Administrative Law in the Shadow of Discretion

Eyal Peleg

At the heart of the discourse on administrative law is a years-long debate surrounding the discretion granted to administrative authorities, its advantages and disadvantages. The debate focuses primarily on the discretion granted by enabling legislation for authorities to operate, each in its own area – legislation on education, welfare and the like. This discretion permits the authority to determine the substance of its administrative decisions. In contrast, the discourse surrounding another type of discretion is still underdeveloped, namely, the discretion embodied in the rules of procedural fairness of general administrative law, which manifests, for example, in the duties to hold a hearing, to act with appropriate speed, and to establish an evidentiary basis. This discretion is inherent in the question "How?" For example, how should a hearing be conducted? The article seeks to contribute to the underdeveloped discourse on such discretion.

The argument underpinning this article is that granting administrative authorities the discretion to determine the substance of procedural duties is inconsistent with the dominant concept at the basis of administrative law as a whole – the rivalry concept – which focuses on concerns about abuse of administrative power and infringement of individual liberties. Accordingly, the following questions are posed: If there is so much concern about the administrative state and its bureaucracy, why are officials granted discretion to infuse circumstantial substance into rules that are meant to restrain them and restrict their power? What motivates courts to compromise, overlook rivalry-related concerns, and grant such discretion to administrative authorities?

The first explanation offered, based on positive law, holds that discretion is granted to authorities for the sake of achieving an optimal balance between the duty of fairness and other considerations, such as administrative efficiency. I argue, however, that this balance is inadequate from the perspective of the rivalry concept, and that it is necessary to establish a different legal arrangement, with better adaptation of the rules of procedural fairness to this dominant concept. Adopting a critical contextual perspective, therefore, I argue that the discretion embodied in the rules of procedural fairness is also a problematic outcome of administrative law as general law that applies in public administration as a whole. I then explain how the development of contextual, area-related administrative law is expected to reduce the scope of such discretion, thus promoting better adaptation of the rules of procedural fairness to the rivalry concept.

The article presents two contextual models for reducing this discretion: first, a strict model establishing non-discretionary 'emphases' (i.e., adaptations) as an integral part of the procedural duties in a given area; second, a softer model that permits officials to deviate from established emphases and exercise discretion under truly special circumstances. In such cases officials will have to overcome a number of hurdles to ensure they are not deviating unjustifiably from the contextual law.