# Discretion in Translating Law into Action: A Jurisprudential Analysis

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## Introduction

This Article examines specifically the scope for the use of discretion, on which much has been written identifying generally that discretion is closely related to processes of decision making. The essence of discretion lies in that persons, whether by official or unofficial grant of power, have the choice of making decisions in translating the law into action. Galligan describes 'the central sense of discretionary power' as:[1]

> powers delegated within a system of authority to an official or set of officials, where they have some significant scope for settling the reasons and standards according to which that power is to be exercised, and for applying them in the making of specific decisions.

That means discretion is not necessarily limited to the application of the standards set by the higher authority, rather it extends to the setting of standards in processes of decision-making. For example, Article 39 of the Constitution of Bangladesh guarantees press freedom as a fundamental right, but has subjected it to 'reasonable' restrictions. To what extent this term 'reasonable' under Article 39 allows members of different governmental organs to set those standards in imposing restrictions on the press needs to be assessed and analysed. It appears that the legislature as a creative actor in a political environment often provides vague terms, applying discretion and thus facilitating further discretion. Accordingly, the executive and the judiciary are allowed and indeed expected to set standards in decision-making processes, while being influenced by the existing political context. This chapter proposes to interrogate the reliance on this essential common characteristic present in all types of discretionary decision-making. Clearly, while decision-makers use their powers to further what they perceive to be their administrative or institutional purposes, their perception largely rests upon the wider political context in which they operate. Law, we see again, is never really value-neutral.[2]

The Article starts with the general meaning of discretion, which is then followed by a discussion of its relevance in imposing legislative restrictions. The particular issue of discretion has been researched by

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1 Denis Galligan, *Discretionary Powers – A Legal Study of Official Discretion* (Clarendon Press, 1986) 21.

2 See for details, Masaji Chiba (ed), *Asian Indigenous Law: In Interaction with Received Law* (Kegan Paul International, 1986).

many writers, especially by socio-legal scholars, but the wider political context of such decision-making processes has often been neglected. The Article hopes to make a contribution to knowledge in highlighting the critical relevance of political contexts.

**Discretion and its meaning**

Hawkins has regarded discretion as the space, as it were, between legal rules in which legal actors may exercise choice – which may be formally granted or may be assumed.[3] Apart from judges and lawyers, the term 'legal actors' here includes many other officials, whose work involves extensive decision-making in the implementation of a legal mandate.[4] Legal actors include not only the executive, but also the legislature, which is under an obligation to promulgate laws under the respective Constitutional mandate. An act of legislating to comply with the Constitution also involves extensive decision-making, where the legislature may exercise choice, formally granted by the Constitution. But discretion is much more visible in the everyday discretionary behaviour of judges and other public officials, who are acting under relevant legislation. Hawkins observes that legislatures, sometimes, want to remain silent as much as possible on controversial issues and awards of discretion to bureaucracies allow legislatures to duck or to fudge hard issues.[5] Thus discretionary power resides at all level of a legal system, from the legislature to field level executives and allows certain functionaries to exercise their choices in decision-making. It is here that discretionary power not only permits the realisation of the law's broad purposes, but also allows officials sometimes to distort the spirit of law or to assume a legal authority they do not in fact possess.[6] Easily, this can lead to abuse.

Though discretion is an important term in legal literature, those who use it do not agree on its meaning except that discretion has something to do with choice.[7] According to Davis, 'a public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction'.[8] One important element in this definition, as Davis explains, is the proposition that discretion is not limited to what is authorised or what is legal, but includes all that is within 'the effective limits'.[9] Thus, within a defined area of power, the

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3 Keith Hawkins, 'The Use of Legal Discretion: Perspective from Law and Social Science' in Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press, 1992) 11, 11.

4 Ibid.

5 Ibid, 12.

6 Ibid.

7 George Christie 'An Essay on Discretion' (1986) 35 *Duke Law Journal*, 747, 747.

8 Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, 1969), 4.

9 Ibid.

official should reflect upon its purposes, and then settle upon policies and strategies for achieving them.[10] Another important aspect of Davis's definition is that discretion not only includes action, but also inaction. Accordingly, a legislature may exercise its discretion negatively by not promulgating law to invalidate the colonial legislations that impose restrictions on the press. The same applies to the executive and the judiciary, who may be liable not only for imposing restrictions on the press according to law, but also use inactions in upholding press freedom in their everyday decision-making.

Galligan observes that discretion in its broadest sense denotes an area of autonomy within which decision-making is to some extent a matter of personal judgment and autonomy.[11] According to Galligan, the discretionary nature of authority may be understood and identified only if two variables are considered: the scope for assessment and judgement left open to the decision-maker by the terms of his/her authority, and the surrounding attitudes of officials as to how the issues arising are to be resolved.[12] With respect to the first, the areas of choice left to decision-makers can be ascertained by considering the terms in which powers are conferred.[13] For example, the Constitution of Bangladesh has explicitly left the legislature with the choice of imposing 'reasonable' restrictions on the press. Thus, there is a discretionary power of the legislature, reflected in the term 'reasonable'. Though related to certain subject matters such as defamation or contempt of court, this does not contain any specific 'guiding standards, accompanied by the inference, whether express or implied, that it is for the authority to establish its own'.[14] With respect to the second variable, Galligan places importance on the attitudes of officials, especially courts, as it is ultimately the courts 'that finally determine from a legal point of view whether an official has discretion, and if so, how much'.[15] This argument is somewhat problematic since in cases of administrative discretion, 80 to 90 per cent of discretionary decisions escape both formal proceedings and judicial review.[16] Even when the highest court decides on the issue of contempt of court, the court itself is deciding how much discretion it has under the law. Besides, in a Dworkinian sense, the attitudes of the officials or the courts are largely influenced by the surrounding political context.[17]

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10 Galligan, above n 1, 22.

11 Ibid, 21.

12 bid, 23.

13 Denis Galligan, *A Reader on Administrative Law* (Oxford University Press, 1996) 23.

14 Ibid.

15 Ibid, 24.

16 Davis, above n 8, vi.

17 Ronald Dworkin *Taking Rights Seriously* (Duckworth, 1977).

Dworkin considers discretion as a relative concept and compares discretion to the hole of a doughnut, existing only 'as an area left open by a surrounding belt of restriction'.[18] Therefore, it always makes sense to ask, 'discretion under which standards?' or 'discretion as to which authority?' and the context will make the answer to this plain.[19] As his concept of discretion takes its meaning from a context of rules or standards, Dworkin goes on to observe that context confers different senses of discretion, drawing a distinction between strong and weak discretion.[20] In cases of strong discretion, the decision-maker is not bound by the standards set by the authority in question. This strong sense of discretion, however, is not tantamount to total license. The official having strong discretion is obviously expected to make decisions with proper recourse to standards of sense and fairness, but the decision is not controlled by a standard furnished by the particular authority.[21] Dworkin uses the example of a sergeant asked by the lieutenant to pick any five men for patrol without any further qualification. Here, the sergeant has strong discretion to choose his men for patrol. In contrast, there may be two types of weak discretion. In one type, the application of the standard demands the use of judgment, while in another, the official has the final authority to make a decision which is not subject to any further review. If the sergeant is asked to pick five of his most experienced men for patrol, his discretion becomes weak because that order purports to govern his decision by the term 'most experienced'. Still, his decision may be subject to review by the lieutenant, but if the statement expressly stipulates that the sergeant has discretion in choosing the five most experienced men, his discretion becomes weak in the second sense. This may be compared to Goodin's 'ultimate discretion', the contrast of which is the 'provisional discretion', reversable by another official.[22] However, Dworkin has been criticised for relying mostly on formal controls to determine the extent of discretion.[23] As Galligan has argued, if the surrounding standards have gaps or are vague and abstract, or are in conflict, then Dworkin's metaphor of the doughnut may be misleading.[24]

This vagueness of the standards has encouraged Goodin to suggest another pair of contrasts, 'formal discretion' and 'informal discretion'.[25]

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18 Ibid, 31.

19 Ibid.

20 Ibid, 31-33.

21 Ibid, 33.

22 Robert Goodin, 'Welfare, Rights and Discretion' (1986) 6(3) *Oxford Journal of Legal Studies* 232, 236.

23 See, Galligan, above n 1, 14-20; See also, Kent Greenawalt, 'Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges' (1975) 75 *Columbia Law Review,* 359, 363-366.

24 Galligan, above n 1, 32.

25 Goodin, above n 22, 235.

If the formulation of the rule statement which lays down the standard is vague, then the discretion becomes informal. Goodin takes the example of an official 'O' told to give treatment 'T' to some individuals 'I' as per the rule 'R'. If the rule R specifically states 'T' or 'I', then the discretion is formal. On the other hand, if the rule R is vague in stating 'T' or 'I', then the discretion is informal. This suggestion gives rise to two more types of discretion, when they cut across Dworkin's classification. Accordingly, discretion may either be 'strong formal' or 'strong informal' or discretion may be 'weak formal' or 'weak informal'.[26]

For example, the term 'reasonable' under Article 39 of the Constitution of Bangladesh has no gap in it as such, it is vague and abstract enough to fit into the theory of Dworkin.[27] But the term 'reasonable' plays a role in making the legislatures bound to apply their judgement, making the discretion 'weak' in nature. There is a need to assess what is 'reasonable'. Hence, as per the classification of Goodin, Article 39 of the Constitution allows the legislature to exercise 'weak informal' discretion.

This section identified discretion in general terms, as Dworkin argues that due to the lifting of the concept of discretion by the positivists from ordinary language, it must be put back in 'habitat' to understand it.[28] With these understandings in hand, the next section now returns to different legal theories and their implications, especially the theories of Austin, Hart and Dworkin.

**Discretion and legal theory**

Until recently, legal positivism had a very strong position especially in the common law jurisprudence and hence, Austinian concepts of positive law and sovereignty dominated Western jurisprudence in the last 150 years.[29] Austin viewed law as the command of the sovereign and since sanctions are essential to the existence of command, they are also seen as essential to the existence of laws.[30] Thus Austin supposedly divorced the study of law from the task of identifying the social context of law.[31] Austin made a clear distinction between natural society and political society in consideration that law can operate only in political society, where it is the key instrument of political command.[32] Delegation of sovereign power is fundamental to Austin's thinking, but every delegation of legislative and

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26 Ibid, 235-236.

27 As mentioned above, Article 39 of the Constitution of Bangladesh has subjected press freedom to 'reasonable' restrictions.

28 Dworkin, above n 17, 31.

29 Wayne Morrison, *Jurisprudence: From the Greeks to Post-modernism* (Cavendish, 1997) 4.

30 Roger Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (LexisNexis, 2003) 58.

31 For a critique of this view, see Morrison (above n 29).

32 Morrison, above n 29, 236.

administrative functions to various organisations, whether legislature, executive or judiciary is in fact a 'tacit command' of the sovereign, which may be revoked or invalidated by higher authority.[33] That means, the organisations are merely representing the sovereign, which is not subject to any legal limitation. Hence, while a judge is making a decision and thus in effect legislating, he is performing the job of a legislature and his decision is nothing but 'tacit command' of the sovereign. Such a concept, though it does not exclude discretion, marginalises it. Even then, the Austinian concept of delegation is much more progressive than that of Bentham, who sought a rational and codified legal system which altogether negates not only judicial law-making but also any type of judicial interpretation.[34] Thus judges are required only to apply rational, codified and determinable legal rules to factual situations. This means to 'freeze the meaning of the rule' so that its general terms shall have the same meaning in every case where its application is in question.[35] This attitude in legal theory is known as 'formalism or conceptualism',[36] which Austin himself rejected. Thus 'Austin is the model of cautious moderation beside Bentham's radicalism' by painstakingly weighing up the practical considerations.[37] Still, the Austinian concept allows delegation of power leaving very limited scope for discretion, in existence only if the sovereign power has expressly granted discretionary power due to a limitation in the legislation. So, there can be discretion only in Goodin's 'weak formal' form, and such discretion may be eliminated from law by a subsequent command of the sovereign. Thus, discretion stays in the legal system in a really marginalised form. However, the views of Austin should be understood in the context of the intellectual climate of his times; clearly much has changed since he wrote.[38] Many writers have tried to transcend the Austinian philosophy in radically contrasting ways. One of the prominent writers is Hart, asserting the 'need for a fresh start'.[39] In his attempt to revitalise the Austinian philosophy while providing 'the zenith of legal positivism',[40] he had to take into account the role of discretion in any given legal system and hence rejects the apparent simplicity of the command theory of law. Hart observes that discretion arises from the inevitable 'open texture' of legal rules, which means:[41]

> that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case.

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33 Cotterrell, above n 30, 70.

34 Ibid, 71.

35 Herbert Lionel Adolphus Hart, *The Concept of Law* (Clarendon Press, 1994), 129.

36 Ibid.

37 Cotterrell, above n 30, 71-72.

38 Ibid, 72.

39 Hart, above n 35, 80.

40 Morrison, above n 29, 351.

41 Hart, above n 35, 135.

Thus, in every legal system, a large and important field is left open for the exercise of discretion by courts and officials in rendering initially vague standards determinate or in resolving the uncertainties of statutes.[42] Hart considers legislation and precedent as the 'two principal devices',[43] used for the communication of general standards of conduct and goes on observing (italics in the original):[44]

> Whichever device, precedent or legislation, is chosen for the communication of standards of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture.*

In fact, Hart institutes a new kind of empiricism grounded in the 'linguistic philosophy' associated especially with Ludwig Wittgenstein and brought the methods and enthusiasms of that philosophy into jurisprudence.[45] Wittgenstein came to realise that language actually constructed social reality and it was important to look at the meaning-in-use of words.[46] However, Hart did not focus on the meaning of the words in some definitional manner, but on clarifying the way words are used in various linguistic contexts.[47] Hart claims that previous attempts to define the meaning of law had been misplaced, since they ignored the important fact that the real meaning of law-related terms is inherent in our daily use of language.[48] Cotterrell suggests three insights from this kind of philosophy.[49] First of all, language has meaningful forms apart from empirical description or the statement of logical propositions. Therefore, all rules have a 'penumbra of uncertainty' where the judge must choose between alternative meanings to be given to the words of a statute or between rival interpretations of what a precedent 'amounts to'.[50] A second important insight is that of the 'open texture' of language as mentioned above. Cotterrell observes that though linguistic philosophy could not admit general indeterminacy of language, language has a 'porosity' or partial indeterminacy so that the relationship between the core certainty and the penumbra of uncertainty in even the most precisely stated rules requires philosophical examination.[51] However, Hart finds this obvious as we as human beings are handicapped in two ways:[52] the first one is our

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42 Ibid, 136.

43 Ibid, 124.

44 Ibid, 128.

45 Cotterrell, above n 30, 85.

46 Morrison, above n 29, 361.

47 Cotterrell, above n 30, 86.

48 Morrison, above n 29, 362.

49 Cotterrell, above n 30, 86-87.

50 Hart, above n 35, 12.

51 Cotterrell, above n 30, 86.

52 Hart, above n 35, 128.

relative ignorance of fact; the second is our relative indeterminacy of aim. Hart observes:[53]

> If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provision could be made in advance for every possibility. We could make rules, the application of which to particular cases never called for a further choice. Everything could be known, and for everything, since it could be known, something could be done and specified in advance by rule. This would be a world fit for 'mechanical' jurisprudence.

In other words, the necessity of such choice is thrust upon us because 'we are men, not gods'.[54] The third insight, which is the most important one according to Cotterrell is that social insights may be gained from linguistic analysis.[55] As Hart claims in the preface to his book titled 'The Concept of Law':[56]

[T]he suggestion that inquiries into the meanings of words merely throw light on words is false. Many important distinctions, which are not immediately obvious, between types of social situation or relationships may best be brought to light by an examination of the standard uses of the relevant expressions and of the way in which these depend on a social context, itself often left unstated.

Therefore, Hart claims that the book is not only an essay in analytical jurisprudence, but also an essay in 'descriptive sociology'.[57] Thus Hart's legal philosophy firmly rejects conceptualism and seeks to find its concepts in the social context in which the language is used.[58] In other words, indeterminacy of the social context is in fact conducive to the indeterminate 'open texture'.

Dworkin sees this 'open texture' as the vagueness of legal rule and argues that from a positivist point of view, a judge has discretion only when s/he runs out of rules, in the sense that s/he is not bound by any standards from the authority of law.[59] The positivists say that a judge has no discretion when a clear and established rule is available.[60] That means, a judge only exercises discretion in a vacuum and hence in the 'strong sense', which is legally uncontrolled. In this sense, judges can only in a quasi-legislative way choose the decision which seems to them best on

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53 Ibid.

54 Ibid.

55 Cotterrell, above n 30, 86.

56 Hart, above n 35, vi.

57 Ibid.

58 Cotterrell, above n 30, 87.

59 Dworkin, above n 17, 34.

60 Ibid.

whatever grounds they think appropriate to such choices.[61] Dworkin strongly disagrees with this view. Dworkin criticises Hart on this point and finds Hart's observation that a judge while exercising discretion is not bound by any standard as unrealistic.[62] According to Dworkin, the truth is that the judges have only a weak form of discretion, in that they must exercise their own best judgement as to the proper application of relevant principles and other legal standards (MacCormick, 1978: 230).[63] Thus he seeks to argue that in all cases, a structure of legal principles stands behind and informs the applicable rules.[64] In hard cases, these legal principles are treated in practice by courts as legal authorities, which are essential elements in reaching decisions.[65] To distinguish principles from rules, Dworkin takes the example of a New York case, *Riggs vs Palmer*,[66] where the court had to decide whether an heir named in the will of his grandfather could inherit under that will, even though he had murdered his grandfather to do so.[67] According to the applicable rule, the court was supposed to guarantee the heir's right to the property as per the wish of the testator, but the court did not apply that rule. Instead, the court applied the general principle of common law that no man may profit from his own wrong. This principle is not a discretionary invention of the court of law, but is one that has its own legal history as something developed, applied and interpreted in earlier cases and in relation to different legal rules and circumstances.[68] It overrides, in that sense, the other rule. Therefore, a judge is not creating rules in a vacuum by applying his discretion, his discretion is always confined by pre-existing principles and 'weak' in nature. As he makes a choice between competing rules, that is in itself also a form of discretion, which is of course part of the 'business' of being a judge.

Dworkin finds the distinction between rules and principles a logical one and suggests that rules are applicable in an 'all-or-nothing' fashion.[69] That means, the rule either answers a particular case, if it is applicable, or it contributes nothing to the decision. On the other hand, principles argue in favour of a decision but not necessarily conclusively, so that someone does not abandon a principle in recognising that it is not absolute.[70] Unlike principles, rules determine results and when a contrary result has been

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61 Neil MacCormick, *Legal Reasoning and Legal Theory*, (Clarendon Press, 1978) 230.

62 Dworkin, above n 17, 34.

63 MacCormick, above n 61, 230.

64 Cotterrell, above n 30, 163.

65 Ibid.

66 115 N.Y. 506, 22 N.E. 188 (1889).

67 Dworkin, above n 17, 23.

68 Cotterrell, above n 30, 163.

69 Dworkin, above n 17, 24.

70 Ronald Dworkin, 'A Reply by Ronald Dworkin' in Cohen, M. (ed), *Ronald Dworkin and Contemporary Jurisprudence* (Duckworth, 1984) 247, 260.

reached, a rule has been abandoned or changed.[71] MacCormick is of the contrary view, that rules in effect compete with principles and are not invalidated by loss in the competition.[72] He takes the example of the decision of the House of Lords in Anisminic,[73] where based on general principle, section 4(4) of the Foreign Compensation Act of 1950 was construed narrowly, but this did not imply that the section was invalid.[74] In fact, the important factor in that decision was the relevant 'context' and 'what the House of Lords did was to determine the ambit of the rule in a given context, not its validity or invalidity'.[75] What is important in this argument is that, even the discretionary decision of applying any principle depends on relevant context. Therefore, principles are also to a large extent influenced by context. As Cotterrell observes:[76]

> While legal rules may be identifiable by using some positivist test expressed in terms of rules of recognition, basic norm or sovereign command, legal principles cannot be so identified. They emerge, flourish and decline gradually by being recognised, elaborated and perhaps eventually discarded over time in the ongoing history of the legal system concerned. As such, they reflect and express the legal system's underlying values or traditions: in a sense, its underlying political philosophy.

Therefore, the principle which a judge applies in the exercise of his Dworkinian 'weak' discretion is very much influenced by the underlying values or traditions and hence, contextualised. This again confirms that law is not really value-neutral.[77] Dworkin himself observed:[78]

[W]e make a case for a principle, and for its weight, by appealing to an amalgam of practice and other principles in which the implications of legislative and judicial history figure along with appeals to community practices and understandings.

Accordingly, why the constitutional mandate of imposing 'reasonable' legislative restrictions on the press in Bangladesh may turn out to be actually 'unreasonable' in practice can be related back to the context of the legislative and judicial history of the country. Dworkin was mainly writing about judicial decision-making in a theoretical sense and the question now becomes whether this type of analysis may be applied, for the purpose of this thesis, to actual legislative and administrative bodies. The following section, therefore, considers discretionary decision-making as a whole and compares the 'rational choice theory' with 'naturalism'. It argues that 'context' may be detected as a basis for the common analytical approach for all types of decision-making, be it legislative, administrative or judicial.

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71 Dworkin, above n 17, 35.

72 MacCormick, above n 61, 232.

73 2 A.C. 197 (1969).

74 MacCormick, above n 61, 232.

75 Ibid.

76 Cotterrell, above n 30, 163-164.

77 See for details, Chiba, above n 2.

78 Dworkin, above n 17, 24.

**Discretionary decision-making**

Almost any definition of discretion starts with the notion of choice, which can be legitimately exercised within a framework to achieve a specific goal or goals.[79] As Goodin, while characterising the term discretion positively, suggests, 'an official may be said to have discretion if and only if he is empowered to pursue some social goal(s)...'.[80] Hence, the basic duty of an official vested with discretion is to realise and advance the objects and purposes for which his powers have been granted.[81] This goal-directed approach of decision-making is centrally embedded in the 'rational choice theory'.[82] This theory is premised on the fundamental assumption that 'decisions are purposive choices made by informed, disinterested and calculating actors working with a clear set of individual or organizational goals'.[83] Decision-making is thus carried out by a rational individual and is a fundamentally rational matter.[84]

Rational choice theory holds that individuals must anticipate the outcomes of alternative courses of action and calculate that which will be best for them.[85] Thus rational choice involves two guesses, a guess about uncertain future consequences and a guess about uncertain future preferences.[86] Accordingly, consequences are assumed to be capable of being fully anticipated, and the decision-maker is then assumed to choose the alternative that promises to attain the objective of the decision most closely.[87] The classical model of rational choice theory, therefore, calls for 'the knowledge of all the alternatives that are open to choice' and also for 'complete knowledge of, or ability to compute, the consequences that will follow on each of the alternatives'.[88] March observes that 'anticipating

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79 John Bell, 'Discretionary Decision-Making: A Jurisprudential View' in Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press, 1992) 89, 93.

80 Goodin, above n 22, 233.

81 Galligan, above n 1, 30.

82 Rational Choice theory, originally derived from work in micro-economics or statistical decision theory, has been extremely influential in areas as diverse as industrial and governmental decision-making, on the one hand and analysis of decision-making in criminal justice , on the other (see for details, Hawkins, above n 3, 20-21). Its application to social interaction takes the form of *exchange theory* (see, below n 85, 126).

83 Hawkins, above n 3, 21.

84 Ibid, 20-21.

85 John Scott, 'Rational Choice Theory' in Gary Browning, Abigail Halcli and Frank Webster (eds), *Understanding Contemporary Society: Theories of the Present* (Sage Publications Ltd: 2000), 126, 128.

86 James March, 'Bounded Rationality, Ambiguity and the Engineering of Choice' (1978) 9(2) *The Bell Journal of Economics* 587, 587.

87 Hawkins, above n 3, 21.

88 Herbert Simon, 'Rational Decision Making in Business Organizations' (1979) 69(4) *The American Economic Review* 493, 500.

future consequences of present decisions is often subject to substantial error' and also 'anticipating future preferences is often confusing'.[89] Therefore, Simon has modified the idea of rational choice with the introduction of 'bounded rationality',[90] which recognises 'the limits of man's abilities to comprehend and compute in the face of complexity and uncertainty'.[91] Due to these limitations, people do not act in a purely rational way in making decisions.[92] They rather look for 'satisfactory choices instead of optimal ones'.[93] That means, decision-makers would typically search among alternative decisions only until a satisfactory alternative, likely to be influenced by past decisions and practices, presented itself.[94] This bounded rationality, still, is firmly rooted in the tradition of classical rationality.[95]

Naturalism,[96] however, questions the goal-oriented conception of classical rationality and stresses the natural process by which decisions are made, criticising rationalist work which places more emphasis on outcome rather than process.[97] Discretion is rather seen as the result of social situations that shape the exercise of discretion.[98] Thus, naturalism is rooted in sociological analysis and is essentially a communicative theory, focusing on descriptions, categorisations and their impact.[99] Naturalism suggests that actions are not necessarily the product of intention, or of conscious choice or planning, even though decision outcomes may to some extent be predictable.[100] Therefore, it tends to deprivilege intention or conscious

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89 March, above n 86, 589.

90 The term 'bounded rationality' was first introduced by Simon in the first edition of his famous book, 'Administrative Behaviour', in 1947.

91 Simon, above n 88, 501.

92 Hawkins, above n 3, 21.

93 Simon, above n 88, 501.

94 Hawkins, above n 3, 21.

95 Ibid.

96 Naturalism is a theoretical framework on decision-making, which Hawkins and Manning have been developing recently, for example, in Hawkins (above n 3, below n 103 and n 124) and Manning (below n 107). See for a critique of the theory, Black (below n 99). Hawkins (below n 103) expects that a much more detailed analysis would ultimately appear in Hawkins and Manning (forthcoming).

97 Hawkins, above n 3, 23-25.

98 Richard Lempert, 'Discretion in a Behavioral Perspective: The Case of a Public Housing Eviction Board' in Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press, 1992), 185, 187.

99 Julia Black, 'New Institutionalism and Naturalism in Socio-Legal Analysis: Institutionalist Approaches to Regulatory Decision Making' (1997) 19(1) *Law and Policy* 51, 52.

100 Hawkins, above n 3, 25.

choice as an explanator for decisions.[101] Rather, the notions of context and meaning are central to naturalist views of decision-making.[102]

This 'context' is a very important ground on which 'naturalism' challenges the 'rational choice theory'. To see legal decisions as guided and constrained solely by existing legal rules is 'to ignore the social, political, and economic contexts' in which those decisions are made and 'the richness, subtlety, and complexity' of all the processes involved.[103] Thus naturalism differs substantially from the positivistic analysis of decision-making which Hawkins has termed as 'mechanistic view of legal decision-making' and also a 'narrow field of vision'.[104] Hawkins further observes:[105]

> Legal decisions, like other kinds of decision, are made not in a vacuum, but in a broader context of demands and expectations arising from the environment in which the decision-maker lives and works. An explanation of decision-making behaviour therefore requires attention to the social, political, and economic setting, including the general climate of opinion, as well as the organizational context in which decisions are taken.

In fact, on the basis of such understanding, Hawkins and Manning (forthcoming) are developing the theory of naturalism on decision-making, an integral part of which has been discussed in chapter 2 of Hawkins (2002). The theory stresses that decisions can only be understood by reference to their broad environment and particular context: their surround, fields, and frames.[106] The surround is the broad setting in which decision-making activity takes place. It serves as an environment not only for individual decision-making, but also for legal bureaucracies in which such decision-making takes place, as like other organisations, they are also actors in a social, political and economic space. Within the social surround is the decision field, which describes a defined setting in which decisions are made. Field contains sets of ideas about how its ends are to be pursued. These may exist at both formal and informal levels and organisation hierarchy is important here. Manning defines the social field as 'the social basis for labeling a situation of deciding: the seen-as-relevant-at-the-moment assemblage of facts and meanings within which a decision is located'.[107] Within such a field, the decision frame exists. If a decision field describes the legally and organisationally defined setting in which decision-makers work, the frame speaks to the interpretive behaviour involved in the decision-making about a specific matter. This frame is central to a naturalistic perspective since framing is the means by which the everyday world is linked with the legal world.

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101 Black, above n 99, 52.

102 Hawkins, above n 3, 25.

103 Keith Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (Oxford University Press, 2002), 29-30.

104 Ibid, 29.

105 Ibid, 31.

106 Ibid, 47.

107 Peter Manning, 'Big-Bang Decisions: Notes on a Naturalistic Approach' in Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press, 1992) 249, 261.

Social surround, decision field and decision frame are in mutual interaction. Political and economic forces may shift, and hence, the social surround of the organisation changes. Changes that occur in the surround prompt changes in the particular setting for a decision, the field. Equally, a change in the surround may cause a change in the way events are interpreted and classified, that is, the frame.

Thus, in naturalism, decisions are analysed as far as possible in their natural settings, and unencumbered by the assumptions of positivism, in particular, of rational choice decision-making.[108] As Emerson and Paley remark, '...dichotomous rules-discretion models strip decisions of their relevant contexts'.[109] A naturalist approach to decision processes allows decision-making to be described and analysed in its natural state, while respecting the complexities of ordinary behaviour.[110] Therefore, while rationalists are mainly concerned with the substance of the decisions, naturalists put emphasis on the processes of decision-making and their context: organisational, social, political or economic.[111] This particular approach indicates that there may be some scope in exploring further how political contexts relate to decision-making processes. Hawkins observes:[112]

> People both anticipate and adapt. They follow rules, but they also create rules, norms, patterns of behaving. They make decisions in ways that are situatedly rational, that is, rational in a particular context. On this view, there are not necessarily any broad, clear, taken-for-granted organizational or other goals whose attainment is sought through choice. Instead, decisions are seen very much as embedded in their own particular contexts, as the response of a decision-maker to a particular set of circumstances.

Thus, behaviour within the organisation may be highly influenced by the surrounding circumstances and as Manning suggests, 'organizations are creative actors in a political environment'.[113] In fact, this political influence on decision-making has not been properly dealt with even by the socio-legal scholars while explaining decision-making from a socio-legal approach. As Hawkins admits:[114]

> The politics of discretion have not for the most part been closely studied by socio-legal scholars...though, given the amount of legal decision-making which involves organizational activity and the extent to which attempts may be made to influence how decisions are made where uncertainty or

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108 Hawkins, above n 103, 30.

109 Robert Emerson and Blair Palay, 'Organizational Horizons and Complaint-Filing'in Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press, 1992) 231, 231-132.

110 Hawkins, above n 103, 30.

111 Hawkins, above n 3, 26.

112 Ibid.

113 Manning, above n 107, 278.

114 Hawkins, above n 3, 20.

> conflicts of value exist, it is clear that this is an important area for more work involving the study of power in the exercise of discretion. A perspective from politics on the use of power to advance, protect, or preserve some conception of the interests of groups or individuals contrasts with rational or bureaucratic conceptions of the use of discretion, where there is no place for political activity...

This article emphasises particularly this important area of the involvement of political power in the exercise of discretion. Since the discretionary power in decision-making exists as a part of the overall power structure of the legislature, executive or judiciary as an organ of the government, legislations imposing restrictions on any fundamental right need to be examined considering the context of their promulgation and the relevant purpose of the government as well. Therefore, taking seriously into account the history of legislations in the context of their respective development during periods of colonial administration, one may aim to create a comprehensive and verifiable explanation as to why arbitrary decision-making has remained so difficult to control in independent post-colonial Bangladesh.

**Concluding Remarks**

The sections above seeks to explain the legislative restrictions on the press as a result of discretion exercised by the legislative, the executive and the judiciary under the Constitution and hence, highly influenced by the political context. As stated above, Article 39 of the Constitution of Bangladesh, which allows the government to impose restrictions on the press, has created a significant scope for the exercise of such discretion by using the term 'reasonable'. In fact, all legal systems, in different ways, compromise between two social needs: the need for certain rules for smooth applicability and the need to leave open for later settlement by an informed, official choice, when any issue arises.[115] Accordingly, to regulate such a sphere the legislature sets up very general standards and then delegates to a further rule-making body the task of fashioning rules adapted to the special needs of various types of cases. One of the technique to do so, as Hart expressly observes, is to use the word 'reasonable' in law and thus to allow, subject to correction by a court, weighing up and striking a reasonable balance between the social claims which arise in various unanticipated forms and at certain times and in certain situations.[116] This is indeed, a very good technique to successfully tackle the indeterminacy of legal rules, with only a fringe of 'open texture' as explained above. However, MacCormick reminds us:[117]

> A value-expression or value-predicate such as "reasonable" always involves a multifactorial judgement in any sound application of it to a case. Even if reasonableness is, as lawyers claim, both a "question of fact"

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115 Hart, above n 35, 130.

116 Ibid, 132.

117 Neil MacCormick, 'Discretion and Rights' (1989) 8(1) *Law and Philosophy*. 23, 30.

> and a matter of "objective" tests, its application is judgemental in the sense that rational people of good will can, in the last resort, differ over a considerable range of cases as to what actually is reasonable in the given context.

Therefore, the use of the term 'reasonable' subjects decision-making to the exercise of a considerable amount of discretion in the end. Dworkin observes that words like 'reasonable' often make the application of the rule which contains it depend to some extent upon principles or policies lying beyond the rule.[118] Dworkin takes the example of the Sherman Act, which states that every contract in restraint of trade shall be void.[119] The Supreme Court had to make a decision taking this provision as a rule, whether all the contracts which restrain trade shall be struck down, or the Court should take it as a principle, providing a reason for striking down a contract in the absence of effective contrary policies. The Court construed the provision as a rule, but treated that rule as containing the word 'unreasonable' and as prohibiting only 'unreasonable' restraint of trade ( e.g. in the case of *Standard Oil vs United States*).[120] This allowed the provision to function logically as a rule and substantially as a principle, by taking into account the economic context of a particular restraint. In a similar way, Article 39 of the Constitution of Bangladesh allows the imposition of 'reasonable' restrictions on the press. As per the Dworkinian view, by adding the term 'reasonable', the rule has been made dependable upon principles lying beyond the rule, which takes into account the respective political context of the country at a particular time.

It is noticeable that freedom of the press, as taken for example in this article, is a fundamental right under the Constitution of Bangladesh and hence, judicially enforceable. Therefore, the term 'restriction' in case of 'freedom' is surely a conflicting one. However, journalists in Bangladesh are generally of the opinion that the authoritarian political context has repeatedly deprived the nation of the fruitfulness of a free press.[121] Scheingold rightly observes:[122]

> The political approach thus prompts us to approach rights as sceptics. Instead of thinking of judicially asserted rights as accomplished social facts or as moral imperatives, they must be thought of, on the one hand, as authoritatively articulated goals of public policy and, on the other, as political resources of unknown value in the hands of those who want to alter the course of public policy.

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118 Dworkin, above n 17, 28.

119 Ibid, 27-28.

120 221 U.S. 1, 60 (1911).

121 See for example, Nurul Kabir, 'Media Regime in Bangladesh: Rule of Repressive Law'in Odhikar, *Proceedings of the National Workshop on the Media, Democracy and Human Rights* (Odhikar, 2003) 7.

122 Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy and Political Change* (University of Michigan Press, 2004) 6-7.

This raises fundamental concerns about the concept that discretion is advantageous due to its inherent flexibility. This concept may be viewed merely as the rejection of the positivistic approach, in which decisions are treated as 'simple, discrete and unproblematic' as opposed to 'complex, subtle, and part of, or the culmination of, a process'.[123] More recently, Handler,[124] who is broadly concerned with social justice, adopts a more positive position about discretion than Davis, 'since its pliability can be turned to advantage'.[125] Freund also observes that 'the main advantage of discretion is the flexibility of its operation, and its main province would be the regulation of interests in which public policy demands, both maintenance of minimum standards and the possibility of variation'.[126]

Hawkins suggests that the broad conception of discretion as 'subjective justice' has spawned a series of by now familiar criticisms: first of all, while the flexibility of discretion can be valuable in individualising the application of the law, its subjectivism can also be the cause of inconsistency in decision outcomes: apparently similar cases may not be treated in the same way by decision-makers.[127] An obvious corollary, but a criticism much less marked, is that discretion can impose similar outcomes upon apparently different cases. Secondly, apparent inconsistency is often cited as an example of arbitrary decision-making. Thirdly, discretion grants to officials power and the scope for its abuse. Control may be exerted in undesirable ways. Fourthly, the procedures by which discretion is exercised prompt concern. Decision-makers are free to take into account a wide array of information, which may be of questionable accuracy, reliability or relevance. Moreover, as we saw, the political and social environment dramatically affects decision-making.[128]

Davis therefore suggests limiting and even elimination of the discretionary power, so that it can be put within a boundary to control its exercise.[129] He advocates a substantial check to protect discretion against arbitrariness. Hawkins discusses those suggestions and observes:[130]

> Davis at once increased academic interest in discretion and redirected conceptions of it away from the somewhat benevolent view then prevailing. In doing so he created a new vocabulary of reform by arguing for the

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123 Keith Hawkins, 'On Legal Decision-Making' (1986) 43(4) *Washington and Lee Law Review* 1161, 1187.

124 Joel Handler, *The Conditions of Discretion: Autonomy, Community, Bureaucracy* (Russell Sage Foundation, 1986) 301.

125 Hawkins, above n 3, 17.

126 Ernst Freund, *Administrative Powers over Persons and Property: A Comparative Study* (Ayer Publishing, 1971) 97.

127 Hawkins, above n 3, 15-16.

128 Paul Dow, *Discretionary Justice: A Critical Inquiry* (Ballinger Publishing Company, 1981) 5.

129 Davis, above n 8, 55.

130 Hawkins, above n 3, 17.

'confining, structuring and checking' of discretionary power. His advocacy of these legal modes of control, however, is telling.

This indicates inherent problems in checking processes of arbitrary decision-making. However, to what extent legislative provisions may be structured to check such arbitrary decision-making is beyond the scope of this article and therefore, is left for future research.