

Discretion and power

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Introduction

Discretion and Welfare (Adler & Asquith, 1981) is an edited collection, published in 1981, but based on a series of seminars funded by the then Social Science Research Council and which took place in 1978-1979. As such, it straddled the back end of the Callaghan government and the front end of the Thatcher government. References, as the editors caustically commented, may have become out of date, but the general themes remained prominent (p1). Thatcher's 1979 election victory and first government are often taken to be a paradigm shift, but, quite apart from the historical inaccuracy of such a view, discretion and welfare remained prominent and consistent problems.

The editors of this collection were Michael Adler and Stewart Asquith. At the time, both were early career scholars, and it must have been quite an enterprise organizing the workshops. Michael Adler's life history is beautifully presented by Linda Mulcahy in this collection. Stewart Asquith, who passed away in 2009, was a child rights' researcher and activist, as well as a sometime photographer. His career bridged various different disciplines, but, at the time of publication, shortly after he had completed his doctorate at Edinburgh (under the supervision of Neil MacCormick and Alex Robertson), his principal concerns were around justice and welfare in the context of juvenile criminal justice. Mike told us that

I can't remember anything about how we came to collaborate on the proposal that eventually led to the book except that we sought the advice of Raymond Illsley, who was the Director of the Medical Sociology Research Centre in Aberdeen and the Chair of the ESRC's sociology and social policy committee, and that we went up to Aberdeen to see him. Applying for a grant to organise a seminar series was his idea. We applied and the rest is history.

The assembled cast of scholars now reads as an assembly of the founding parents of socio-legal studies. Most were early career lecturers or researchers at the time. A few, such as Jonathan Bradshaw and Gilbert Smith were well-known scholars even then. Participants in the workshops included outstanding social administration scholars, then early career, such as Michael Hill.

For those of us graduating into socio-legal studies in the 1980s and 1990s, it was a pioneering collection, the themes of which have been a constant guide throughout our careers. First, the collection sought to be multi-disciplinary. The participants in the workshops and the essays produced

in the book crossed the social sciences; the very purpose of the workshops appears to have been to counter the predominant positivist versions of the value of law as a control on discretionary power. Secondly, at their heart, the essays raise questions of power, specifically bureaucratic power, and do so - albeit sometimes awkwardly, and certainly not consistently – in a theoretically informed way. Thirdly, the essays themselves speak to each other, and offer productive disagreements (perhaps, the current phrase, disagree agreeably is appropriate) about even the conceptual and theoretical salience of the notion of discretion as a unit of analysis. As Zenon Bankowski and David Nelken (1981: 247) begin their essay,

Practical and theoretical concern over discretion is best seen, not as an invitation to study a particular area of decision-making, but as an index to anxiety over the possibilities of unregulated decision-making.

We are now familiar with interdisciplinary studies of discretion, and there have been a considerable number of such studies, considering discretion generally, as well as in specific case studies. As a result, the pathbreaking nature of *Discretion and Welfare* may be lost on us. Recognised to be a problem requiring solutions, generally legal solutions, discretion had not been the subject of particularly sustained academic analysis in the disciplines. As Hill (1983: 129) wrote in his review of the collection, “That discretion should have come to be given extensive attention in a debate about what the balance between it and rules should be is not something about which those who are interested in social policy should be ashamed”. That such a statement could be written may seem shocking to those of us for whom the relationship between discretion and rules is a taken-for-granted analytical variable across numerous case studies.

In this essay, we want to resuscitate the issues and anxieties of this collection, exemplified in both the introduction to the collection as well as Adler and Asquith’s opening chapter, “Discretion and power”. In the first section, we draw attention to the themes which the authors sought to develop, and which have subsequently been developed by others. In the second section, we discuss illustrations from our own original research which impinges on these themes, and which we develop in that context.

The first illustration concerns the use of the housing health and safety rating system to regulate housing standards in the private rented sector. We know that poor housing conditions have particular impacts on public and private health, but, statistically at least, local authority environmental health departments (the regulatory bureaucracy) have different levels of performance in terms of regulatory action against landlords and letting agents. The second illustration concerns the disqualification of directors of failed companies under the Company Directors Disqualification Act 1986 (CDDA, 1986). The power to disqualify directors rests with the Court on an application from the Insolvency Service

made in the public interest and alleging that a director is unfit to be concerned in the management of a company. The statute lists non-exhaustively practices which render a director unfit (Finch, 1993). This deceptively simple apparently rule-based construct is in practice run through with layers of agency, sites of micro-power and instances of the exercise of discretion.

Discretion and power

In their essay, “Discretion and power”, Adler and Asquith pursue a number of interconnected themes about the use and role of discretion in decision-making. In what follows, we draw attention to their approach and its continuing purchase in studies of discretionary decision-making. We focus on their approach to power, which, at that time, was innovative.

Discretion, law and power

Their target, however, was a critique of Kenneth Culp Davis’ now well-known call for legal controls of discretionary decision-making. As Davis put it, “... we have to penetrate the unpleasant areas of discretionary determinations by police and prosecutors and other administrators, where huge concentrations of injustice invite drastic reforms” (1974: 216). In so doing, Davis counterposed rules with discretion, arguing that formal rules would contain and provide boundaries for administrative discretion. It was a nuanced argument, which recognized that discretion remained whenever one had formal rules – as Harlow and Rawlings (2022: 232) note, “Modern managers, with their faith in box-ticking, have tended to lose sight of this important point”. The point of departure, for Davis, was the kind of individual bureaucrat decision-making routines and simplifications which were described by Lipsky and which virtually become the policies which are delivered (Lipsky, 1980: 84).

The essential insight of Adler and Asquith’s analysis, though, was that the relationship between the individual welfare-seeker and the bureaucrat-administrator was structured by relations of power. Lipsky (1980: 180) had already noted that street-level bureaucracy was “embedded in a larger system that creates and fortifies working conditions”. Adler and Asquith’s focus on power, however, enabled them to acknowledge the classic structure-agency problem. As they put it, it followed that “... attempts to modify the nature of these [bureaucratic] relationships must acknowledge the social and political forces sustaining forms of decision-making which have to be overcome for the achievement of meaningful social reform” (Adler & Asquith, 1981: 12).

Further, their analysis of power was multi-faceted. They were early adopters of Foucauldian understandings of the micro-physics of power, and, although they did not put it this way, their analysis of power was linked to the disciplines/discipline and knowledge (here citing Giddens, 1976). In so approaching power, they were pioneers in social policy (Hillyard & Watson, 1996) and their analysis predated by some years the reception of Foucault's ideas around government and the administration of life. These approaches to power now seem *de rigueur* within socio-legal studies, such that they are taken-for-granted understandings and rarely explicitly discussed.

However, Adler and Asquith adopted a more peripatetic approach to power. Rather, the way they framed their analysis was by reference to ideology, and, more particularly, professional and lay ideologies (23-6). This complex analysis gave them the purchase to critique other studies of discretion:

By ignoring the social derivations of differing ideologies, insufficient consideration is given to the fact that the powerful and authoritative position of the professions in the wider social and political arena renders the relationship between the decision-maker and the person who is subject to the decision a hierarchical one and one which is imbued with power. (26).

Accordingly, returning to the critique of the Davis line of reasoning about legal controls of administrative discretion, they were able to argue that such controls do not touch on the inequalities in society upon which they depend and to which they actually contribute. Welfare state capitalism remained immune from, and diverted from, critique by the superimposition of legal control. This relationship between structure and agency was, they argued, the key to the study of discretionary decision-making (29). Drawing on Tay and Kamenka (1975), they argued that the superimposition of legality would lend further weight to the shift to *gesellschaft* law, focusing on the atomization of society and avoiding the societal structure/s. As a result of this analysis, they advocated interpretative and phenomenological sociological methods.

Perhaps the best illustration of most of these methodological points about discretion lies in Jeffers and Hoggett's (1995) classic analysis of the approach taken by Haringey and Lambeth in the 1980s to counter subjective and institutional racism in council housing allocation. Since 1935, councils had powers to allocate their housing as they wished but had to give "reasonable preference" to certain statutorily identified groups. In the 1970s and 1980s, numerous studies found subjective and institutional racism in council housing allocation, which was regarded as the product of discretionary decision-making (Henderson & Karn, 1987; CRE, 1984). Discretion "... was the smokescreen behind which housing departments infused an agreed hierarchy of needs with a range of other, more dubious, allocative principles" (Smith & Mallinson, 1996: 341).

Haringey and Lambeth, with anti-racist commitments, sought to avoid this problem by moving towards a more rule-based approach, but found that, despite that commitment, black households were being allocated poorer quality housing in worse areas in the boroughs, which was causing residential segregation. Part of the reason for this was that black households approaching the authority disproportionately as homeless re-interpreted the question “where would you like to live” as “how soon do you want to be re-housed” – thus, selecting worse areas; “street knowledge” of allocation schemes amongst applicants affected housing chances and was differentially distributed. Officer discretion still impacted on the choice of area, steering households closer to their family connections (for example), and what to do if a household refused an offer of accommodation. However, the key finding was that it was structural racism, for example as a result of the disproportionate number of black people approaching as homeless, which accounted for differential and disadvantaged outcomes (341-2). Reading this study in light of Adler and Asquith’s analysis, one can see how the retreat to rules opened up new areas for discretion; how the microphysics of power worked in tandem with professional power, statistics and population (viz structural inequalities) to produce not dissimilar outcomes to the previous system, in spite of the best intentions of the programme designers.

Towards co-production

One strand of their analysis, which may seem odd to today’s readers lies in their partial focus on the significance of lay decision-makers and a more open-textured decision-making process, influenced by Luhmann’s ideas. One can see this partial focus as a product of its time – the rise of the idea of the consumer as a counter-hegemonic device to challenge professional power (for discussion, see Loveland, 1991). A similar set of understandings about regulation and accountability permeates the tripartite technique of responsive regulation (Ayres & Braithwaite, 1992: ch 3).

Adler and Asquith raise concerns about the capture of such lay participation, and note that community participation “may help to impart a spurious legitimacy to the institutions concerned” (31). Their instincts in this regard remain pertinent as the dominant research and regulatory motif has become “co-production”, a new way to describe this old problematic of government (see generally, McDermont et al, 2020).

Current research agendas

The analytical purchase of the ideas and diverse strands in their chapter can be demonstrated by the kind of research agenda and taken-for-granted knowledge which we have today. Hawkins’ influential multidisciplinary collection of essays, published 11 years later, covered the same ground and a number of the essays made not dissimilar points albeit in a lengthier format (see Hawkins, 1992; Daly 2020). The literature has branched out into diverse sub-disciplines around administrative and bureaucratic

justice (see Mashaw, 1983; Adler, 2004). The nuanced co-relationship between rules and discretion have been a focal point for analysis (for example, Sainsbury, 1992). The failures of the legal model have been consistently remarked upon (see, for example, Handler, 1992; Loveland, 1995), and concerns have been raised about the impact of the legal model on decision-making (for example, Cane, 2004; Halliday, 2000). The concerns about the salience of due process are frequently considered in the context of ideas around legitimacy and why people obey the law (Tyler, 1990), provoking the kinds of critique which are redolent of Adler and Asquith's analysis (Galligan, 1996: 90-5).

These kinds of issues, however, remain of considerable ongoing importance, raising questions for scholars considering bureaucratic decision-making in the new public management inflected machine age. The shift to screen-level, system-level and even algorithmic driven bureaucratic decision-making raises similar issues, and can pose much sharper questions about structure and inequalities (Bovens & Zouridis, 2002; Eubanks, 2018). And structures are deeply implicated – indeed, imbricated – within digital decision-making (Daly et al, 2021; Raso, 2022). As Bovens and Zouridis noted (2002: 181), there are new implications of these bureaucracies in constitutional state, with system designers the locus of discretionary power (see also Yeung & Harkens, 2023); and further, the capacity of machines to learn within certain boundaries raises added issues for administrative justice (Harlow & Rawlings, 2022: 251-5).

Perhaps most importantly, studies of discretionary decision-making routinely build in nuanced understandings of structure-agency, drawing on a rich sociological heritage. Consider, for example, Hawkins' and Manning's approach to the influences on regulatory decision-making, which relies on a kind of triptych between surround-field-frame (see, in particular, Hawkins, 2002; Manning, 1992). Changes to one level may prompt changes to another. Using this methodology, Hawkins establishes how and why criminal sanctions for health and safety breaches are regarded as the last resort. Reminiscent of Adler and Asquith's approach, he argues that "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" (2002: 31).

Illustrating discretion and power

In the previous section, we discussed the core themes of Adler and Asquith's essay, and demonstrated their continuing salience to the project of understanding discretionary decision-making. In this section, we draw on two illustrations from our own original work to draw out these themes.

Regulating landlords

In their essay in *Discretion and Welfare*, Bankowski and Nelken refer to Nelken's own data on the way in which discretion was used in relation to the powers of local authorities to prosecute private landlords for harassment. Their argument was that discretion could be used sometimes "... to insulate the relatively powerless from the full force of legal or administrative action at their expense" (1981: 253). Instead of prosecuting poor landlords, local authorities engaged in social work techniques to avoid prosecution.

Subsequent research found that these practices were facilitated and enhanced by a discursive narrative about the affected landlords as "amateurs"; only the most egregious breaches might be prosecuted (Cowan and Marsh, 2001). These social work techniques or simply sending a warning letter to a landlord also reflected a significant shift in housing provision. The large-scale decline in social housing from the mid-1970s meant that there was greater reliance on private landlords. Local authorities had to work with them, under "the halo effect" of partnership (Valverde et al 2020: 48).

As the housing crisis, underpinned by a local authority austerity-induced funding crisis, in England has proceeded apace, one might have expected these trends to continue. In two projects conducted with colleagues at the University of Bristol between 2018-2022 on the related area of housing conditions, we found that authorities were more willing to engage in enforcement action (see Harris et al, 2020). The reasons for this shift have been unpacked elsewhere. Here, we reflect on three issues – the relationship between rules and discretion; co-production; the role of discursive narratives in discretionary decision-making.

Rules and discretion

The particular issue with which we are concerned in this chapter is local authority regulation of housing standards in the private rented sector. The 2004 Housing Act requires authorities to take action when health and safety hazards in a property fall below a certain threshold. These are termed Category 1 hazards, and are assessed on the basis of the risk of harm associated with the occurrence of 29 matters, such as damp and mould growth, excess cold/heat, asbestos, crowding, light and noise (see Housing Health and Safety Rating System (England) Regulations 2005, SI 2005/3208). The assessments of these risk was evidence-based (Burridge & Ormandy, 2007; although the evidence-base itself has not kept pace with the evidence, the guidance last being updated in 2006).

What we have, then, is a clear rule – enforcement action must be taken – underpinned by a scientific assessment process. However, as was pinpointed by the Upper Tribunal, that scientific assessment process was, in fact, undercut by discretion:

The complicated set of provisions is designed to produce a numerical score for each hazard that is under consideration so that it can be seen to fall within a particular band and in either category 1 or category 2. The great danger of a numerical score produced in this way is that it creates the impression of methodological accuracy, whereas the truth may be that it is the product of no more than a series of value judgments based on little understood statistics of questionable validity. (*Bolton MBC v Patel* [2010] UKUT 334 (LC), at [38])

Further, although there was a clear rule about enforcement, aspects of discretionary judgment seeped in to frontline action, even in authorities which had moved towards a more hardline enforcement process. The statutory enforcement guidance itself appeared to mandate this move by being less than clear about enforcement. It recognized the importance of “informal working” and suggested the need for “judgment as to the necessity for intervention, given the authority’s priorities and wider renewal policies and, where appropriate, their knowledge of a landlord and his or her compliance history” (ODPM, 2006). That firm statutory rule on enforcement had been rolled back, giving a green light to more informal working practices, including the types of practice found by Nelken.

A particular example demonstrates how, even in enforcement oriented authorities, discretion might play out. There was discretion at the margins as to how long an officer might give a landlord before sending out the enforcement notice. If the landlord was able to conduct the repairs or have the repairs in train before the notice was served, then there would be no need for the notice itself. Some authorities institutionalized this practice by using the threat that, if they did have to serve the notice, the landlord would have to pay a fee. During Covid, such periods were extended because of the difficulty in finding building contractors.

Some authorities, recognizing differences in practice between officers and landlords’ common complaint of differential treatment, had sought to develop IT systems and co-ordinated practices to avoid such issues. Some, also, had institutionalized the “breathing space” between inspection and enforcement on the basis that it was appropriate to give landlords the opportunity before more heavy-handed action. However, the heart of the difference lay in the subjective opinions that officers might have about the willingness of the landlord to comply with their requirements. This might be constructed in part as a risk judgment based on past history of engagement with the particular landlord. The officer’s self-orientation about the purposes of enforcement were also significant. For example, an officer may disagree with the authority’s enforcement standpoint and work at its margins in a particular case.

Different versions of the rationale for enforcement were also employed. It may have been about housing standards, but there were differences about whether this concerned the particular occupiers.

The assessment process assumed in rational scientific style a particular occupier, but the role of the actual occupier affected by the housing conditions was less clear. A more vulnerable occupier might give rise to stronger enforcement. Equally, the occupier's reasons for making a complaint in the first place might affect enforcement – they might be regarded simply as seeking to obtain more priority for social housing, for example, as a result of their living conditions.

Adler and Asquith noted that one of the problematic aspects of law and discretion was that individuals may be unaware of their rights. Socio-legal scholars around the same time as Adler and Asquith's collection were seeking to understand how disputes emerged, developing their ideas under the rubric of naming, blaming and claiming (Felsteiner et al, 1980-1). They also argued for the significance of "agents of transformation". In our study, an agent of transformation was a set of processes which had been developed to filter complaints which were uniformly labelled "triage". That is a label which has been used in welfare bureaucracies, but, in contradistinction to its medical etymology, it means that systems are put in place to identify the worst cases on which there will be primary focus. In some areas, triaging systems were electronic and required tenants to upload veracious information on to a web site before a complaint would be registered. Photographs of areas of concern, details of interactions with landlords (including landlord refusals to comply with their repairing obligations) may be required before being able to pursue the complaint. The concern about such systems is perhaps obvious – they do not necessarily identify the most serious issues, but allow the most technically able to pursue complaints, leaving potentially vulnerable households at the mercy of poor housing conditions. These kinds of systems bake in various assumptions about workload management, and, perhaps, a management view that, if your complaint is serious enough, you will persevere with it.

Co-regulation

In two study areas, it emerged that the local authorities had sought to engage with the local landlord associations in what was described to us as "co-production". The broad understanding of co-production involved was that the landlord association would take primary responsibilities for policing the housing management standards of their members. Reductions in licensing costs were given to members of those organisations. We can see here the operation of the proto-co-production model which Adler and Asquith discussed. Whether or not this relationship between the authority-quasiregulator and the landlord association created the spurious legitimacy to the latter or not, these relationships both were failed experiments. Co-production is hard to do, but even harder when the expectations of both organisations are different. The authority expected effectively to contract out their roles to the associations but the associations had only limited ability to remove members from their roll. Accordingly, the outcome was that, for the duration of the relationship, it provided a spurious legitimacy to the authority exercising its enforcement role through the landlord association.

Narratives at work

Ewick (2008: 87) argues that narratives are powerful techniques of legitimation and sustain power relations. Adler and Asquith's focus on power in the context of welfare bureaucracies emphasise the need for us to see how narratives predetermine particular types of action through the production of a particular type of power/knowledge. In earlier studies, landlords had been constructed by local authorities and their officers as partners in meeting housing need (Cowan & Marsh, 2001). This partnership meant that authorities had to balance their enforcement roles with a recognition that they relied on landlords to fulfil the role of meeting households housing needs, the authorities themselves having insufficient stock so to do.

However, it was notable across both of the studies being discussed here that the narratives had changed. Landlords were commonly regarded as running a profit-making business. Accordingly, the idea of the partner meeting housing need, or accidental landlord requiring training, was shifting towards a commercial crime keying in which the authority's role was to "break the business model". This tied in with changing government narratives which have emphasized the rise of the "rogue landlord" – while the participants in both studies deprecated this label, it gave rise to the recognition that some landlords were "crooks", and some authorities had either received short-term grants from central government to deal with them, and/or had set up units to deal with the worst offenders. This re-keying also brought the authorities closer to other organizations, like the police, which had different, more pro-prosecution orientations, and which "rubbed off" on the authorities' approach.

Disqualifying Directors

The process

The current regime around the disqualification of directors emerged from the deliberations of the Cork Committee on the reform of insolvency law (Cork, 1982). Disqualification had been possible before (since 1929) but was available only in very limited circumstances. The 1986 legislative intervention introduced a much broader regime requiring the Court to disqualify a director for a period of 2 to 15 years upon a finding of unfitness on foot of an application by the Secretary of State made in the public interest. Carruthers and Halliday characterized it as offering an underpinning of prevention, retribution, punitiveness and restitution, in deep contrast to the US. The US-inspired approach was normatively much more neutral using insolvency as a mechanism for removing 'less fit' organisations from the ranks of business institutions, or placing poorly managed assets under the stewardship of more able managers (Carruthers and Halliday, 1998: 266, 274-277). The UK legislation imposed a brake on the otherwise prevailing rhetoric of 'free enterprise', 'entrepreneurship', and the small business as

a route to prosperity (specifically a grocery store in Grantham) so valourised by Thatcherism (CPC, 1984; Wheeler, 1993).

This brake has its roots in two other components of Thatcherism. One was the Premier's own moral stance, founded in the tenets of Methodism, that personal responsibility and hard work as opposed to acquisitiveness and incompetence were the key to a good life (Heelas & Morris, 1992; Cooper et al, 2022). The second was the need to support and protect key policies such as the privatisation and marketisation of utilities and other large industries with demonstrable governance of market morality and policing of market failure (Halliday & Carruthers, 1996). The absence of an automatic disqualification for directors of failed companies hints at a distinction being drawn between legitimate attempts at self-advancement that end unfortunately in failure, on the one hand; and, on the other, activities or decisions which are considered to be irresponsible and commercially immoral. In this framing, we can see how the insight of Adler and Asquith, about the significance of structures, remains true in the way in which deviance is framed.

In the first empirical survey of the disqualification legislation, it was clear that those disqualified from being directors were primarily owner-managers of small companies (Hicks, 1998; cf Bankowski & Nelken, 1981). A perusal of the Insolvency Service database of disqualified directors indicates that this remains the case (Insolvency Service, 2023a). The immorality and irresponsibility that is being punished is the use of the shelter of limited liability by shareholders (owners) for the companies' debts generated by their own activities in the guise of managers (directors). As Bankowski and Nelken (1981: 254) put it, "... it is to be expected that, on the whole, officials will use their discretion to ease their tasks by directing their unpleasing attentions at those who cannot fight back". However, the point here is that the legislation itself was devised to produce such low-hanging fruit.

Corporate insolvency and within that directors' disqualification is less conceptually centred than landlord and tenant law, and housing conditions. Within insolvency law there are different types of proceedings and overlapping interest groups – for example, directors are often employees, shareholders and creditors of the failed company simultaneously in addition to their role as directors. Most disqualification orders occur as a result of Creditors' Voluntary Liquidation (CVL) proceedings. That process is by far and away the most numerically significant insolvency proceeding used in England and Wales each year. In 2022, there were 18,825 CVLs but only 1,959 compulsory liquidations with even fewer company voluntary arrangements and administrations. In 2019, there were 12,058 CVLs and 2,945 compulsory liquidations respectively (Statista 2023). The organisation of CVLs is such that they are essentially a private process between the company and its creditors. Once the state administered system of disqualification is grafted on to this process, we are then confronted with a

quite unique mix of state regulation, public interest, private actors and private funding. In one sense, then, this is the kind of democratized understanding of how discretion might be used to operate in society through co-opting society into its operation; but, this ideological model was far from that conceived by the authors in *Discretion and Welfare*, as this model represented the atomization of individual private actors with the state only as back-up of last resort.

A CVL begins with a resolution by a company's shareholders to wind it up. At the same time an Insolvency Practitioner (IP), an individual in private practice (often accountancy) licensed to act, is invited by the directors of the company to prepare a statement of the company's assets and debts for its creditors; a summary of the company's trading and financial history; and, an account of its transactions since its last audited accounts. To prepare these documents the IP works closely with the directors of the company. These documents are sent to the creditors of the company who vote formally at a meeting on whether to approve the appointment of the IP as liquidator of the company. As voting rights are determined by the value of the creditor's debt and most directors of failed companies are, on paper at least, large creditors of their company the appointment is invariably approved.

Directors of failed companies are rarely 'repeat players' in the sense of being involved in successive corporate failures, despite sensationalist media stories which might suggest otherwise (Williams 2007). This means that often they fail to understand the pivotal significance for them of the appointment of the IP as liquidator by the creditors. The Adler and Asquith insight about the nuance of disciplinary power is evident here: from this moment onwards there is a power shift in the IP-director relationship. The IP's key constituencies now do not include the directors from whom they originally sourced this work and appointed them. The IP becomes the central actor in the disqualification process for company directors as the disqualification system (CDDA 1986, section 7A, and the Insolvency Rules 2001) requires that the liquidator in a CVL complete a form for the Insolvency Service commenting on the conduct of the directors. These forms are known as Director Conduct Reports and are submitted at the level of the company.

Rules and discretion

Prior to April 2016, the IP was expressly asked to make a yes/no determination on whether a director was 'unfit' to be concerned in the management of a company, and to give details of what they thought the unfit conduct was. After April 2016, the IP has not been required to exercise discretion as to whether the conduct amounts to unfitness or not. That determination is performed by an algorithm within the Insolvency Service which sorts out which matters require further investigation. Accordingly, the critical moment of discretion has slipped back to the IP Report and its framing. The discretion of

the IP now sits at the level of the thoroughness of the investigation that they carry out around the director's conduct and the quality of evidence that they include in the Director Conduct Report.

The Creditors' Meeting is also a critical juncture for IP and the creditors themselves. The interplay between private interests and the requirements of the regulatory state make this meeting a micro-power site where expectations are voiced and promises are made (Wheeler, 1994). It is here that the IP provides and gets agreement on their fees for winding up the company. These fees might be based on a time cost basis (the hours that will be spent on the liquidation) or expressed as a percentage of the assets recovered. As the company is in liquidation because it can't pay its debts, whatever the IP charges is money taken from the limited funds recovered and so is money not available to creditors to satisfy their debt.

If the creditors want the directors' conduct to be investigated with a view to civil recovery personally against them - a recommendation for disqualification or a compensation order - they have to recognize the financial cost of the IP doing this and trust that they will do it. For the IP, fees can't be excessive partly because of the rather remote risk of losing reputational capital with local trade associations and the like, and partly because of the much bigger risk of individual creditor complaints to their licensing body. Conversely, if fees are set too low, then the investigation of the directors' conduct that creditors might request and that the Insolvency Service requires for the disqualification regime will need to be subsidized by the IP. At the point of setting fees at the Creditors' Meeting, the IP will have had time for only the briefest of consideration of director conduct, so gauging the amount of work required is difficult. Whilst conduct reports are required to be made about directors 'in the public interest', the cost of protecting the public interest here is borne not by the state but by the creditors or the IP.

The IP controls the asset recovery process and the compilation of the disqualification reports for the Insolvency Service. A Schedule to the CDDA 1986 provides an indicative list in very broad terms of the type of activities that might render a director unfit if an application to disqualify them is made by the Insolvency Service to the Court - misfeasance, breach of fiduciary duty, and breach of legislation or other obligations to be set alongside the frequency of conduct and responsibility for the failure of the company. There is no legislative guidance on how these factors are to be weighed or assessed. The Director Conduct Report form translates these criteria into a requirement for details of how the company has been conducted over the previous three years of its existence. The IP decides how they present the company and what evidence they provide to support their narrative.

There is clearly a discretion filter residing in IPs in the compilation of the report. The vast majority of companies that are placed in CVL have both poor quality records and accounting compliance history. They are likely to have been in a state of disarray for some time. The IP will have to decide how much

time they spend on reconstructing the company's history and the decisions of the directors, and who will be interviewed (Wheeler, 1995). Evidence will need to be gathered and analysed to be presented in the Director Conduct Report.

The 'Rules Engine', as the Insolvency Service describes its algorithm that makes the first sift of Director Conduct Reports, depends on language recognition to allocate the case for human review. If a case is not sifted for review at this stage, then there is no possibility of proceedings being launched by the Insolvency Service. In 2020, changes were made to the algorithm to lower the number of cases being captured for human review. In the financial year 2021-2022, the Insolvency Service received 9,826 Director Conduct Reports of which 4,165 were sifted by the rules engine for human review. From that sub-sample, 802 directors were subsequently disqualified. What we do not know is how many individual directors were caught in the 9,826 submitted conduct reports or in the 4,165 sifted reports as they are at the level of the company (Insolvency Service, 2022).

Decision-maker professionalism

Insolvency Practitioners are one of the UK's youngest professions, yet the professional knowledge analysis of Adler and Asquith can be applied to them. IPs professional status and licensing regime came into being in 1986 coterminously with the legislative framework for disqualifying directors. Whilst their reports on directors go to the Insolvency Service and their primary client relationship is with the directors of insolvent companies, individuals facing bankruptcy and their respective creditors, licensing occurs through one of four Recognised Professional Bodies (RPBs). The two largest such bodies are the Insolvency Practitioners Association (IPA) and the Institute of Chartered Accountants in England and Wales (ICAEW). with around 600 and 800 members respectively.

Creating a new profession to administer the frontline of a new disciplinary regime was key to avoiding direct regulation by the state of this process, which would not have suited the prevailing ideology at the time of smaller government and less regulation. It might be said that the ethic of the legislation through which they owe their powerful social and political existence is replicated in their approach and understandings.

Professional status was something for which elite professionals involved in insolvency work had been asking since the 1960s (Cork, 1982) - for recognition within their own professional groups as much as for professional status in and of itself. This creates a micro-power site between the individual IP and the RPB that provides their licence. RPBs are required to undertake compliance checks on their members and respond to complaints about their service with any complaints to the Insolvency Service about IPs being referred to them.

The complaint handling and compliance visit system by the RPBs is, like nearly all self-regulation systems, financed by membership fees. The number of complaints concluded across the full spectrum of IP work for IPA regulated IPs was 162 in 2022. Five of these were referred to the Regulation & Conduct or Disciplinary & Appeals Committees (IPA 2022). The Insolvency Service holds the key to RPBs maintaining their status as regulators. The number of RPBs has reduced from eight to four since the IP profession was created. All of this is perhaps indicative of the insight of Adler and Asquith (1981: 22) that such organisations are “carriers of a welfare ideology and are a very important means by which certain conceptions of social reality are sustained and by which particular forms of social order are maintained”.

In September 2023 a Government Consultation Response to The Future of Insolvency Regulation challenged the RPBs to deliver measurable improved outcomes to their regulatory activities around the timeliness of complaint handling and disciplinary decision-making, and to deal with the potential for internal actual or perceived conflicts that arise from self-regulation (Insolvency Service, 2023b). Perhaps the sun is slowly setting on a regulatory style of a particular time; a discretion based system of private action, privately funded, supporting a rarely applied but inflexible state sanction.

Conclusions

In this chapter, we have demonstrated how the analytical insights of the pioneering work of Michael Adler and Stewart Asquith in their collection remains both perspicacious and so significant to our understandings of the role of discretion that they are automatically implicated in our studies. *Discretion and Welfare* has become a key reference point without being referenced. We have sought to resuscitate it here by giving credit where it is due. We corresponded with Mike about this chapter and, like us, he “... was surprised at how many of the ideas that have informed my research over the years were flagged up in this early piece”. The same is true for us. Our illustration reflect the ongoing significance of the key themes of that chapter – the micro-physics of power; how discretion apparently written into legislation comes to be used against the interests of the poor; and how professional and lay knowledges combine with unequal outcomes. Although our illustrations are different, and the actors differently constituted, both demonstrate how that relationship between structure and agency becomes implicated in the practice of discretion.

References

- Adler, M. (2004), "A socio-legal approach to administrative justice", *Law and Policy*, 25(4): 323-52.
- Adler, M. and Asquith, S. (eds) (1981), *Discretion and Welfare*, London: Heinemann.
- Ayres, I. and Braithwaite, J. (1992), *Responsive Regulation: Transcending the Deregulation Debate*, Oxford: OUP.
- Bankowski, Z. and Nelken, D. (1981), 'Discretion as a social problem', in Adler, M. and Asquith, S. (eds) (1981), *Discretion and Welfare*, London: Heinemann.
- Bovens, M. and Zouridis, S. (2002), "From street-level to system-level bureaucracies: How information and communication technology is transforming administrative discretion and constitutional control", *Public Administration Review*, 62(2): 174-84.
- Cane, P. (2004), "Understanding judicial review and its impact", in M. Hertogh & S. Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives*, Cambridge: CUP.
- Carruthers, B. and Halliday, T. (1998), *Rescuing Business*, Oxford: OUP.
- Conservative Political Centre (CPC) (1984), *Small Today, Bigger Tomorrow*, London: Conservative Party.
- Cooper, C., Tweedie, J., Andrew, J. and Baker, M. (2022), "From 'business-like' to businesses: Agencification, corporatization, and civil service reform under the Thatcher administration", *Public Administration*, 100(2): 193-215.
- Cork (1982), *Insolvency Law and Practice: Report of the Review Committee*, Cmnd 8558, London: HMSO.
- Cowan, D. and Marsh, A. (2001), "There's regulatory crime and then there's landlord crime: from 'Rachmanites' to 'partners'", *Modern Law Review*, 64(6): 831-53.
- Daly, P. (2020), "The inevitability of discretion and judgment in front-line decision-making in the administrative state", *Journal of Commonwealth Law*, 2: 99-134.
- Daly, P. Raso, J. and Tomlinson, J. (2021), "Administrative law in the digital world", in C. Harlow (ed), *Research Handbook on Administrative Law*, Aldershot: Edward Elgar.
- Davis, K. C. (1971), *Discretionary Justice: A Preliminary Inquiry*, Urbana: University of Illinois.
- Eubanks, V. (2018), *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor*, New York: St Martin's Press.
- Finch, V. (1993), "Disqualifying Directors: Issues of Rights, Privileges and Employment", *Industrial Law Journal* 22(1): 35-43.
- Galligan, D. (1996), *Due Process and Fair Procedures: A Study of Administrative Procedures*, Oxford OUP.
- Halliday, T. and Carruthers, B. (1996), "The Moral Regulation of Markets: Professions, Privatization and the English Insolvency Act 1986", *Accounting, Organizations and Society* 21(4): 371-413.

- Harris, J., Cowan, D. and Marsh A. (2020), *Improving Compliance with Private Rented Sector Legislation: Local Authority Regulation and Enforcement*, Glasgow: CaCHE, https://housingevidence.ac.uk/wp-content/uploads/2020/08/200803_ComplianceReport_Final.pdf.
- Halliday, S. (2000), "The influence of judicial review on bureaucratic decision-making", *Public Law*: 110-124.
- Harlow, C. and Rawlings, R. (2022), *Law and Administration*, Cambridge: CUP.
- Hawkins, K. (1992), "The use of legal discretion: Perspectives from law and social science", in K. Hawkins (ed), *The Uses of Discretion*, Oxford: OUP.
- Hawkins, K. (2002), *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency*, Oxford: OUP.
- Heelas, P. and Morris, P. (1992), "Enterprise Culture: Its Values and Value", in P. Heelas and P. Morris (eds) *The Values of the Enterprise Culture*, London: Routledge.
- Hicks, A. (1998), *Disqualification of Directors: No Hiding Place for the Unfit?*, London: ACCA Educational Trust.
- Hill, M. (1983), Review of Michael Adler and Stewart Asquith, *Discretion and Welfare*, Heinemann, London, 1981, *Journal of Social Policy*, 12(1): 128-9.
- Hillyard, P. and Watson, S. (1996), "Postmodern social policy: A contradiction in terms?", *Journal of Social Policy*, 25(3): 321-46.
- Insolvency Rules (2001), *The Insolvent Companies (Reports on Conduct of Directors) (Amendment) Rules 2001*, SI 2001/764.
- Insolvency Service (2022), *The Insolvency Service 'Annual Reports and Accounts 2021-2022'* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1113783/221012_Annual_Report_and_Accounts_2021-22_FINAL.pdf (accessed September 13th 2023)
- Insolvency Service (2023a), <https://find-and-update.company-information.service.gov.uk/> (accessed September 9, 2023)
- Insolvency Service (2023b) ,*The Future of Insolvency Regulation* <https://www.gov.uk/government/consultations/the-future-of-insolvency-regulation> (accessed September 16, 2023)
- IPA (2022), <https://insolvency-practitioners.org.uk/about/annual-reports-and-accounts/> (accessed September 16, 2023)
- Jeffers, S. and Hoggett, P. (1995), "Like counting deckchairs on the Titanic: A study of institutional racism and housing allocations in Haringey and Lambeth", *Housing Studies*, 10(3): 325-44.
- Lipsky, M. (1980), *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services*, New Ork: Russell Sage Foundation.
- Loveland, I. (1991), "Square pegs, round holes: The 'right' to council housing in the post-war era", *Journal of Law and Society*, 19(3): 339-64.

- Loveland, I. (1995), *Housing Homeless Persons*, Oxford: OUP.
- Manning, P. (1992), "'Big bang' decisions: Notes on a naturalistic approach", in K. Hawkins (ed), *The Uses of Discretion*, Oxford: OUP.
- Mashaw, J. (1983), *Bureaucratic Justice: Managing Social Security Disability Claims*, New Haven: Yale UP.
- McDermont, M., Cole, T., Newman, J., Piccini, A. (2020), *Imagining Regulation Differently: Co-creating Regulation for Engagement*, Bristol: Policy Press.
- ODPM (2006), *Housing Health and Safety Rating System: Enforcement Guidance*, London: DLUHC.
- Raso, J. (2022), "Implementing digitalization in an administrative justice context", in M. Hertogh, R. Kirkham, R. Thomas and J. Tomlinson (eds), *The Oxford Handbook of Administrative Justice*, Oxford: OUP.
- Statista (2023) <https://www.statista.com/statistics/310422/uk-insolvencies-total-number-of-company-liquidations/> (accessed Aug 21, 2023)
- Tyler, T. (1990), *Why People Obey the Law*, New York: Princeton.
- Valverde, M., Briggs, J. Tran, G. & Montevirgen, M. (2020), "Public universities as real estate developers in the age of 'the art of the deal'", *Studies in Political Economy*, 101(1): 35-58.
- Wheeler, S. (1993), "Disqualification of Directors: A Broader View", in H. Rajak (ed), *Insolvency Law and Practice*, London: Sweet and Maxwell.
- Wheeler, S. (1994), "Empty Rhetoric and Empty Promises: The Creditors Meeting", *Journal of Law and Society* 21(3): 350-73.
- Wheeler, S. "Directors' Disqualification: insolvency practitioners and the decision-making process", *Legal Studies* 15(2): 283-305
- Williams, R. (2007), "Disqualifying Directors: A Remedy Worse than the Disease?", *Journal of Corporate Law Studies* 7(2): 213-42.
- Yeung, K. and Harkens, A. (2023), "How do 'technical' design choices made when building algorithmic decision-making tools for criminal justice authorities create constitutional dangers?", *Public Law*: 265-86 & 448-72.