**Book review: Discretion in the Welfare State: Social Rights and Professional Judgment**

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**Molander, A (2016) *Discretion in the Welfare State: Social Rights and Professional Judgment,* Oxon: Routledge, 90 pages, ISBN: 978-1138212428**

This self-described ‘little book’ (pg.79) – at 90 pages, manageable easily in one sitting – has an ambition that far outstretches its modest length. At its core, it advances an argument on how to best conceptualise discretion, proposing a distinction between discretionary space (*structural discretion*) and discretionary reasoning (*epistemic discretion*). Before unpacking this, it is important to contextualise the book in two strands of work.

The first is the longstanding socio-legal literature which tries to make sense of discretionary decision-making. The enduring status of these debates is perhaps best illustrated by HLA Hart’s ‘long lost’ essay, ‘Discretion’, missing for decades among his infamously disorganised files before being unearthed and published in 2013 (Hart, 2013). That the questions he posed in the 1950s are still as relevant published today demonstrates that this is a field which has been wrestling with basic problems of conceptualisation for some time. Molander’s book is not rooted in Hart’s questions over the values discretion promotes or its role in a legal system, but rather the fundamental questions of (i) what the exercise of discretion actually is, and (ii) why we should or should not tolerate its excise in different contexts.

The second is the previous work of Molander and the late Harald Grimen, who was heavily involved in this book’s conception and to whom it is dedicated. Both have published widely together on professional discretion and limits of accountability, in particular with reference to tensions between discretionary decision-making and the rule of law in the social security context. Their efforts to better conceptualise mechanisms for securing accountability led them to draw the distinction between *structural* and *epistemic* discretion – the book retraces many of these same arguments, providing additional room to unpack them more fully.

The book starts by situating discretionary judgment in the context of the professionalization of welfare state services, arguing that there has been a trend towards the increasing delegation of welfare state functions to a professional class of street-level bureaucrats. This is characterised as move away from the ‘rule of law’ ideal (pg.2) and pulls the appraisal of discretionary powers into an interrogation of the fiduciary role of professionals.

The reader would be forgiven for thinking that what follows is a treatise on the professionalisation of the provision of social entitlement or what ‘expert knowledge’ really is in the field of social security, but thankfully – for the reader with a more general interest in discretionary decision-making, at least – the focus broadens considerably in the first two substantive chapters. The first – ‘discretion and its critics’ – does an admirably concise job of outlining the justifications for conferring discretion to professionals in the context of the welfare state (as opposed, for instance, with the delineation of clear rules for administering entitlement) and concerns which have traditionally been targeted at discretionary decision-making. The second – ‘the anatomy of discretion’ – begins the heavy-lifting of the book’s key argument: drawing a distinction between *structural* and *epistemic* discretion. There is an extended appraisal of Dworkin’s infamous ‘donut analogy’ (pg. 20-24), where discretion is the ‘hole in the donut’ surrounded by a belt of rules, to outline the *structural* dimension, before turning to ‘discretion as reasoning’ – namely, discretionary decision-making being more than a ‘mere whimsy’, but instead a designated cognitive activity – to outline the *epistemic* dimension.

The rest of the book is tasked with outlining two problems with decision-making. The third chapter argues that there are two intrinsic and irresolvable normative tensions in the conferral of discretion to professionals: one between discretion and demands of the rule of law (i.e. predictability, legality, and equal treatment), and another between discretion and the principles of democratic rule (i.e. a relinquishing of democratic control over decision-making). The final substantive chapter deals with the problem of accountability, offering a series of practical steps – divided into *structural* and *epistemic* mechanisms – for mitigating what is argued to be the inevitable deficit of accountability in discretionary decision-making.

What emerges from this ‘little book’, therefore, is a concise but convincing account of the analytical distinction between *structural* and *epistemic* discretion which is far more accessible than the work of Alexy it is inspired by. Molander demonstrates the practical application of his arguments when addressing concerns over accountability, providing an insight into how the distinction offers more than simply a theoretical tool for examining tensions in the granting of discretion (i.e. with the ‘rule of law’ or ‘democratic control’), but can also bear fruit when applied to the real-world management of discretion decision-making in a welfare bureaucracy.

Such a short book with such a big ambition will always carry limitations. Partly as a result of the focus of Molander’s previous research on which it is built, the book is focused on mitigating what are seen as the inevitable problems generated by conferring discretion to welfare professionals. Indeed, this is perhaps most evident where a key ‘aim’ of the book is stated as to ‘explain why the extensive delegation of discretionary powers to different professional groups in the welfare state is problematic’ (pg. 78). This approach draws these valuable arguments away from those who do not argue about mitigating *problems* with discretion, but rather argue that discretion is a legitimate *end in itself*. The latter has informed a flourishing literature on localism – particularly in the context of welfare austerity – which remains uninterrogated by Molander’s position that discretion is *de facto* problematic, or as HLA Hart put it in his unearthed essay, something to be tolerated.

**References:**

Hart, H.L.A. (2013) ‘Discretion’ *Harvard Law Review,* 127, 652.