

Understanding how decision-makers practice discretion in the context of the Habitual Residence Condition (HRC) in the Republic of Ireland.

Abstract

This paper seeks to gain a greater understanding of how decision-makers practice discretion in the context of the Habitual Residence Condition, an additional criterion for eligibility to social assistance payments in the Republic of Ireland. The paper identifies two approaches to using discretion: nomocratic and telocratic, with both largely emerging as a result of specific structural and cultural conditions that exist within the organisations concerned, and directly impacting the decision-making practices of public servants. Some decision-makers are found to be happy to make discretionary decisions, while others struggle, resist, and protest against the deployment of discretion in the provision of social assistance, instead arguing for rigid rules that can be applied to all welfare applicants.

Keywords: Discretion, Welfare, Decision Making, Habitual Residence Condition.

Introduction

In response to the expansion of the EU on May 1st 2004, Ireland opened its borders and permitted citizens from the new accession states to unconditionally contribute to its labour market. However, citing the need to safeguard against ‘welfare tourism’, Ireland simultaneously introduced the Habitual Residence Condition (HRC) as an additional criterion for eligibility for social assistance payments (Quinn et al. 2014, p.11). This added measure defines whether applicants, regardless of their nationality, are habitually resident in Ireland, which is in turn used to infer an applicants’ centre of interest and thus their relationship to the State (Harmon and Garrett, 2015; Considine and Dukelow, 2009). The term ‘habitually resident’ is not defined in Irish law, however it “conveys a degree of permanence – meaning that the person has been here for some time, from a date in the past, and is intending to stay for a period into the foreseeable future” (Department of Social Protection 2013 cited in Quinn et al. 2014, p.VII). As specified by the Social Welfare and Pensions (No.2) Act 2009, for an applicant to be found habitually resident in Ireland, it must be established that he or she has the ‘right to reside’. Without the right to reside applicants are disqualified from accessing the payment they sought (Quinn et al. 2014).

The requirements for implementation of the HRC differ to the traditional ways in which decisions on access to social assistance in the Irish welfare system are determined. A habitual residence decision is operationalised through a set of ambiguous criteria requiring decision-makers to use their own initiative and to find the ‘balance’ between the HRC guidelines (and/or the legislation) and the facts as provided by the applicants. “The Social Welfare Consolidation Act of 2005 initially required an applicant for social welfare to have been resident within the Common Travel Area (CTA) for two years before making an application for support in order to be declared ‘habitually resident’” (Quinn et al. 2014, pp.21-22). This requirement has been since amended. Instead decision-makers should now focus on the applicant’s ‘centre of interest’, which typically involves consideration of: “location of home; location of close family (automatic disallowance should not apply where a person’s close family reside in another country); nature of employment; evidence of integration into society; location of financial/bank assets; certification of ownership/non-ownership of property in country of origin” (Department of Social Protection November 2013 cited in Quinn et al. 2014, p.24). In determining a person’s centre of interest, decision-makers are also instructed to consider the ‘five factors’ of the HRC, which originated in a European Court of Justice (ECJ) ruling, and are now included under Section 246(4) of the Social Welfare Consolidation Act, 2005 (Crosscare et al. 2012). The five factors are: length and continuity of residence in and outside of the State, length and purpose of any absence from Ireland, nature and pattern of employment, the applicant’s main centre of interest, and future intention of the applicant concerned as they appear from the evidence. Due to this ambiguity, and the necessarily circumstantial nature of the decision-making process, deployment of discretionary judgement is frequently required in operationalising the Habitual Residence Condition.

This article seeks to gain a greater understanding of how decision-makers practice discretion in the context of the HRC. We argue that the process of decision-making should be examined holistically, investigating decision-makers’ understanding of discretion, how they deploy discretion, and how their understandings of and approaches towards discretion arise in the context of their occupational roles, which are distinct to their organisations. This perspective benefits from consideration of the approaches, motivations and values that underpin the actions of all decision-makers including those who may perceive discretionary actions as unfair towards clients and/or the state.

We begin by providing an overview of the literature and contextualise discretion in decision-making practices in the public service through engagement with theories of street-level bureaucracy. We then discuss the methodological approach that was adopted and present four key themes from our findings. We conclude that our decision-maker participants' motivation to use agency is rooted in their organisational and role objectives, which they have internalised through a processes of organisational socialisation.

The Irish Social Welfare System

Statutory social security provisions in Ireland can be traced back to the Poor Law established in Ireland in 1838 through the Poor Relief (Ireland) Act (McCashin 2004), which distinguished those who were 'deserving' of relief and those who were not (see Ryan 2017, pp. 47-50 for a fuller discussion). It is crucial to note that Irish social security was heavily influenced for many decades by two other major factors: the political and social monopoly of the Catholic Church (see Ferriter 2004, p.337 cited in Murphy 2012, p.358), and the influence of the largest economic sector, namely agriculture (Considine and Dukelow 2009). Since the 1990s Irish governments "have been aligned with the needs of the economy, with little attention given to issues of inequality or redistribution, or debate about the nature and direction of the Irish social security system" (Considine and Dukelow 2009, p.218), even during the Celtic Tiger economic boom. Today social security in Ireland is overseen by the Minister for Social Protection and administered by the Department of Social Protection (DSP). Murphy (2012) argues that in this environment the power of civil servants becomes limited as their policy ideas and agendas may be easily rejected. Moreover, Murphy (2012, p.351) argues that higher-ranking officials in spite of representing the same demographic frequently disagree with each other on policy matters and as a result their "departments compete with each other and can be differentiated by cultural and ideological differences". Those differences arise from divergent understanding of the role of the DSP as either a policy agent or an administrator. Those who see the Department in charge of social security are oftentimes so overburdened by pressures to administer this complex system of varied provisions that they lose their capacity to direct the development of policy.

The social welfare system in Ireland provides three types of payment: contributory (insurance-based), non-contributory (means-tested) and universal payments (Turner and Haynes 2004; Barrett et al. 2013; Quinn et al. 2014). The Department oversees over 70 different schemes, which have different eligibility conditions and require different documents and evidence to be supplied by applicants (see Quinn et al. 2014). The main focus of work at the mainstream

section of the Department is on the administration of payments in such a way that it is aligned with the established eligibility criteria, and then on processing claims according to those criteria.

In the Department, Deciding Officers (who answer directly to the Minister for Social Protection, and whose decisions are self-governed) administer the payments (McCashin 2004, p.63). In the context of the HRC – of which more shortly – Deciding Officers interactions with clients are very limited, and where possible, decisions are made based purely on the documents submitted by applicants. The Supplementary Welfare Allowance, which was first introduced “in 1977 as the scheme of last resort to provide financial and other assistance on the basis of need” (Department of Social and Family Affairs 2004, p.10) was (and still is) paid by the DSP. Community Welfare Officers (or as legislation refers to them – Designated Persons) administering the scheme were originally employees of the Health Boards (now the Health Service Executive) and traditionally operated from Health Centres located throughout the country (MRCI 2005). Since September 2011 the service has been merged with the DSP and Designated Persons are in the process of being transferred from the Health Centres into local Social Welfare offices or Intreo Offices¹ (Crosscare et al. 2012, p.6).

The Social Welfare Appeals Office (SWAO) was formally established in 1991 as a legally independent organisation, though it falls under the authority of the Department of Social Protection (McCashin 2004, p.63). There are currently thirty-seven Appeals Officers in Ireland (Social Welfare Appeals Office 2013-2020) who are overseen by a Director / Chief Appeals Officer and her deputy. The Appeals Office’s responsibility is to review and make decisions on appeals made by applicants to decisions issued by the Departments Deciding Officers and Designated Persons “with regard to entitlement to social welfare payments and to deliver that service in a prompt and courteous manner” (Social Welfare Appeals Office 2013-2020). When an appeal is submitted to the Social Welfare Appeals Office, the office is required to notify the appropriate DSP office and request any documents relevant to the case. At this point the decision-maker who decided on the disallowance in the first place may revise his/her decision. In 2018 3,425 appeals “were finalised as a result of revised decisions in favour of the appellant being made by Deciding Officers or Designated Persons before the appeals were referred to an Appeals Officer”. Where a decision is not revised, the appellants file is forwarded from the

¹ According to DSP, Intreo offices serve as “a single point of contact for all employment and income supports” (http://www.welfare.ie/en/Pages/Intreo_home.aspx).

Department to the Appeals Office, an independent decision is made and then sent back to the Department for implementation. In 2018 the SWAO received 18,854 appeals; 10,889 (58.8%) of those appeals were overturned in favour of the appellant (Social Welfare Appeals Office 2018).

Discretion in decision-making practices in the public service

If we understand discretion as the legally awarded status of decision-making power to make choices among possible courses of action or inaction or, in other words, the authorised ability to choose a certain course of action regarding a particular case (Davis 1969, p.4 cited in Jessen and Tufte 2014, p. 272), and agency as the inherent “ability to make judgement and take action” (Maynard-Moody and Musheno 2012, p.S19), then their relationship should be a simple one. Where decision-makers are authorised with very little or no authority to make choices, the decision outcome will be less dependent on decision-makers individual agency, as it will be confined to strictly prescribed criteria. Where decision-makers are authorised with a lot of freedom to make choices, the decision outcome will be more dependent on decision-makers’ individual judgement. However, drawing on Maynard-Moody and Musheno (2012, p.S19) we argue that the latter hypothesis must include the analysis of social structure: “rules, roles and resources” within which decision-makers operate and which they internalise through the process of organisational socialisation. We argue that a decision-maker’s approach towards deploying individual judgement impacts on the type of action taken or the individual agency enacted.

To further the aim of understanding how decision-makers deploy discretion in the context of an ambiguous piece of legislation, we draw on theoretical constructs explaining decision-makers’ agency, discretionary practice and street-level bureaucracy. Evans (2010, p. 168) underlines that “in evaluating the use of discretion, it would be best to take account of the wide range of perspectives on this issue”. The theories of street-level bureaucracy, which depict and analyse the role of discretion in public services, were identified as a key conceptual tool in gaining an understanding of how HRC decision-makers deploy discretion (see for example Lipsky 2010; Maynard-Moody and Musheno 2009). Street-level workers are decision-makers in varied public service institutions who possess different degrees of freedom to deploy discretion (Lipsky 2010). Decision-makers in street-level bureaucracies act as intermediaries between the institution and the public, and occupy a privileged position because of their exclusive access to both rules and direct interactions with clients (Hjorne et al. 2010).

Lipsky's (1980; 2010) original 'street-level bureaucracy' explains decision-makers' actions as determined mainly by their self-interested motivations. According to the 'state-agent narrative' (Maynard-Moody and Musheno 2009), decision-makers' agency is perceived as being motivated by outcomes that are beneficial for them. From this perspective decision-makers want to retain a substantial degree of discretion and follow only those procedures to which sanctions are attached (Lipsky 2010). They don't act this way because they are inherently selfish human beings, but because the organisational pressures and dilemmas that they experience as part of their role force them to become almost exclusively concerned about the administrative effectiveness of their work (Lipsky 1991 cited in Evans 2010; Lipsky 2010). Moreover, according to this perspective, while limited discretion is seen as being necessary, the role of public servants is perceived as being best fulfilled if workers' actions are regulated, controlled, and closely monitored (Lipsky 2010).

In contrast, the 'citizen-agents' narrative argues that discretionary practices are normative and the client is central to the decision-making process. Based on their research Maynard-Moody and Musheno (2009) argue that decision-makers in public services do not see themselves as state-agents. The complexity of their work creates a pressured environment in which they have to improvise through the deployment of discretion. Discretionary judgements are conceptualised as pragmatic based on experience that allows decision-makers to fulfil the responsibilities of their organisational role and to resolve dilemmas between organisational requirements and clients' needs (Maynard-Moody and Musheno 2009).

While both of these theoretical viewpoints help us to understand the complex realities of public service work, on their own they are insufficient in explaining the micro-dynamics of discretion. Another body of literature (see Dubois 2010; Taylor 2014) suggests decision-makers are not always either state-agents or citizen-agents, and that their approaches towards and practice of discretion may vary (Robinson 2003; Evans 2013). In effect, circumstances often see decision-makers searching for "the correct balance between compassion and flexibility on the one hand, and impartiality and rigid rule-application" (Lipsky 2010, pp.15-16) on the other. Thus, they are required to embody both identities, of a state-agent – obliging and fulfilling the needs of the state and administrative goals, and of the citizen-agent accommodating and helping applicants. In this context, Oakeshott's (1975) concept of 'nomocracy' refers to public servants' perception of rules as important in themselves: "They should be respected and followed because

they are rules” (Oakeshott 1975 cited in Evans 2013, p.745). Following rules is perceived as producing consistent decisions and as fair. In contrast, the concept of ‘telocracy’ posits that the workers’ believe that while rules are needed, they can also act as a barrier to achieving objectives, for instance when they are required to make decisions on cases that do not fit with the prescribed rules. Under this paradigm, discretion in decision-making is valued, and it is treated as a means to achieve the ends, or to reach, as perceived by the decision-maker, a valid decision. “Rules can be approached flexibly and even changed or discarded as this makes them better able to achieve the desired goal” (Oakeshott 1983 cited in Evans 2013, p.745). These concepts enable us to explore workers’ subjective understandings of contexts. At the same time, they enable us to understand tensions experienced by decision-makers in those moments when they are faced with difficulties of understanding law or policy and trying to interpret it within the contexts created by individual clients’ cases.

Finally, Maynard-Moody and Musheno (2012) argue that the public service work environment creates a context within which social norms are challenged and social values are performed and adjusted to serve organisational objectives. Revealing the organisational norms and values that decision-makers adhere to enables us to explore how a multi-dimensional process of organisational socialisation shapes a decision-makers’ position towards the use of discretion (Miller, 2010; Van Maanen and Schein, 1978; Fogarty and Dirthsmith, 2001). Evans (2010) argues that through the process of organisational socialisation decision-makers acquire, and later reproduce, certain values, norms and beliefs, particular to their organisation’s ‘moral economy’ narratives. In that context the concept of moral economy encapsulates the idea of ethics being an ever present component of decision-making practices (Sachweh, 2012; Beuchamp and Childress, 2001 cited in Evans, 2014; Freidson, 2001 cited in Evans, 2014; Maynard-Moody and Musheno, 2009). In line with the concept of professional morality, Maynard-Moody and Musheno (2003) argue that street-level bureaucrats’ decisions are guided by normative systems of what they consider as the right thing to do, their moral systems of judgement. The workers judgement, as part of their occupational agency, refers to public servants’ perception of a citizen as deserving or undeserving, worthy or unworthy, indicating that workers decisions are grounded in their learnt (through organisational socialisation) view of social fairness. In Maynard-Moody and Musheno’s (2003) study, when directly asked about their understanding of ‘justice’, workers referred to obligatory, non-individualised responses, confirming that normative actions are difficult to verbalise, as they are taken for granted, internalized understandings of what is right or wrong. In this view the impact of institutions,

authorities, peers and organisational rules on workers' actions is significant and has consequences in the form of normalised approaches to rules and to citizens equally. Accordingly, decision-making on access to social assistance cannot be investigated separately from the moral systems that exist within social welfare institutions. Those systems of morality define what constitutes a legitimate claim in the provision of public resources, but also provide insights into the motivations behind public policies as well as the actions of decision-makers (Hasenfeld, 2000). Deciding on citizens' access to social assistance can have vast consequences for applicants. Thus, understanding whether decision-makers' actions are embedded in their own beliefs around what constitutes 'right' or 'wrong' behaviour, can further our understanding of how they make their decisions.

Methods

Most qualitative research is guided by purposive sampling (Lindlof, 1995) with the sample chosen to provide conceptual richness. Presentations of the early research ideas at two conferences resulted in a successful snowball sample, "used where there is no adequate list from which to take a sample" (Scott 2002, p.33), of three participants. Other efforts (which involved a search for welfare officers contact details online and sending research information letters to local Social Welfare offices and Community Welfare clinics) did not bring any results². A letter was sent to the then Minister for Social Protection, asking if they would be willing to endorse the research project. Shortly afterwards, our Faculty Ethics Committee received an e-mail from the Minister advising that "the Department will co-operate with the study". The Minister nominated a person in the Decisions Advisory Office³ (DAO) who advertised the project to decision-makers in the DSP who fitted the specific sample profile. When potential participants expressed their interest in taking part in the project, the DAO forwarded their names and e-mail addresses and direct contact was then made with them to explain the nature of their participation and the goal of the research. Sixteen DSP participants

² In retrospect, gaining access to research subjects proved quite difficult for two reasons. First of all, since 2008 (the beginning of the country's most recent economic downturn) the rhetoric surrounding the DSP in Ireland, as well as public perception of public servants who make decisions on citizens access to social protection, has been pretty negative, and both the organisation and its staff have been widely criticised by scholars, the public, and by the media (see for example, Ryan 2014; Dunne 2017). In our view this could have been a potential reason why initial attempts at recruiting participants through e-mails and letters failed. The second issue related to the lack of a publically available database of Deciding Officers and Designated Persons.

³ Decisions Advisory Office is an advisory and information service offered to Deciding Officers and Designated Persons.

were recruited through the DAO. Moreover, interviews with three Social Welfare Appeals Officers were secured.

In total, twelve males and eleven females aged between thirty and sixty ultimately participated in this study. These participants had been working in the public service for between six months to twenty-eight years with ten having worked in the DSP for over twenty years. Twenty-one of the research participants were of Higher Executive Officer⁴ grade or higher. In writing this article we are mindful of ethical guidelines and guarantees that were made to protect the participants’ identities. Accordingly, participants are referred to by their position within their organisation and a pseudonym to reflect their gender only. Four were Deciding Officers working in the mainstream section of the DSP who make decisions on the HRC and mainstream payments, three were Deciding Officers working for a specially designated payment unit of the Department⁵; nine were Designated Persons who make/or made decisions on the HRC as part of Supplementary Welfare Allowance payments; two were HRC Training Officers that provide training courses to both Deciding Officers and Designated Persons; three were Appeals Officers who work at the Social Welfare Appeals Office; one was a Social Welfare Inspector who investigates potentially fraudulent claims; and one was an ex-Clerical Officer.

In situations where participants are recruited through gatekeepers, there is the possibility that participants may feel coerced into taking part (Boeije 2010). To clarify, in this research the person in the DOA who helped identify potential candidates did not know the vast majority of them personally and crucially they did not have any direct authority over any them. All participants were also informed that they did not have to participate.

Figure 1. Profile of Respondents

No.	Role	Responsibilities	Organisational background
1	Clerical Officer	New claims front office + administration	Mainstream section of DSP
2	Welfare Inspector	Investigating social welfare fraud	DSP

⁴ The Higher Executive Officers answer directly to the Minister for Social Protection. Their organisational role allows them a substantial degree of autonomy.

⁵ In order to protect the identity of the participants we are unable to name this unit.

3	Deciding Officer	Deciding on new claims including the HRC	Mainstream section of DSP
4	Designated Person	Administering of SWA payments	Community Welfare Service
5	Training Officer	Developing and delivering training to all decision-makers at DSP.	Community Welfare Service
6	Training Officer	Developing and delivering training to all decision-makers at DSP.	Community Welfare Service
7	Deciding Officer	Deciding on new claims including the HRC	Mainstream section of DSP
8	Deciding Officer	Deciding on new claims including the HRC	Mainstream section of DSP
9	Deciding Officer / Supervisor	Deciding on new claims including the HRC	Specialised payment section of DSP
10	Deciding Officer	Deciding on new claims including the HRC	Specialised payment section of DSP
11	Deciding Officer	Deciding on new claims including the HRC	Specialised payment section of DSP
12	Appeals Officer	Determining appeals to all social welfare schemes	Social Welfare Appeals Office
13	Designated Person	Administering of SWA payments	Community Welfare Service
14	Designated Person	Administering of SWA payments + other responsibilities such as audit of payments	Community Welfare Service
15	Designated Person	Administering of SWA payments	Community Welfare Service
16	Designated Person	Administering of SWA payments	Community Welfare Service
17	Designated Person	Administering of SWA payments + management of another programme	Community Welfare Service
18	Designated Person	Administering of SWA payments	Community Welfare Service
19	Designated Person	Administering of SWA payments	Community Welfare Service
20	Office Manager	Office management + Deciding on new claims including the HRC	Mainstream section of DSP
21	Appeals Officer	Determining appeals to all social welfare schemes	Social Welfare Appeals Office
22	Appeals Officer	Determining appeals to all social welfare schemes	Social Welfare Appeals Office
23	Assistant Principle	Assisting decision-makers on operationalisation of all social welfare schemes	Community Welfare Service

A series of open-ended in-depth interviews of at least one-hour duration examined the participants' approach to the HRC and its implementation practice. While the interview guide was designed thematically, participants were accommodated in bringing up their own topics and in speaking about the matters that were important to them. Through "progressive focusing" the interview guide was extended if new relevant themes were introduced in conversations with

participants (Parlett and Hamilton 1976 cited in Schutt 2011, p.322) and those additional themes were explored in subsequent interviews. Consequently, the interviews explored individuals' perception, operationalization, and implementation of discretion in their decision-making practices, their perceptions of the benefits and limitations of same, their role in the public service and the organisational culture that they were exposed to in their day to day working environment.

The process of data analysis was iterative, with a rhetorical approach to narrative analyses being chosen (Chase, 2011). Feldman et al. (2004, p.151) state that "analysis is based in the presumption that we live in a social world characterised by multiple interpretations, and that as people tell stories, these numerous interpretations are manifest in multiple and sometimes conflicting logic". A rhetorical approach to narrative analysis is especially useful in revealing the implicit arguments hidden in those stories (Feldman et al. 2004, p.149). In narrative analysis the researcher is not particularly focused on whether the statements made by our participants reflect an objective reality but rather they wish to understand "the meaning people attach" to those statements (Chase 2011, p.424). The focus of the analysis was thus on the meaning of the discretionary or non-discretionary act for those who deploy / refuse to deploy discretion. "When narrative researchers interpret narratives heard during interviews, they begin with narrators' voices and stories, thereby extending the narrator – listener relationship and the active work of listening into the interpretive process" (Chase 2005 cited in Chase 2011, p.424). The systematic and structured analysis of participants' narratives (see Feldman et al., 2004), through the identification of story lines, oppositions, and enthymemes in each story, allowed for exploration of norms, values and beliefs that the workers adhere to and that are embedded in decision-makers' understandings of their occupational role. Through inductive and iterative coding, the theoretical constructs emerged. As a consequence of this process of data analysis, a range of key themes were identified (see Ryan 2017, pp.152-166). For the purposes of this paper, four key themes, will be discussed next.

The impact of external-organisational forces

Public servants' work is significantly influenced by agencies and public discourses outside of their work place. In this 'external space' their decisions are scrutinised and their status may be questioned. At work they may be respected for their experience and skills, however, outside of the workplace they may need to prove that this knowledge is valid. Thus, we now explore what effect external-organisational forces have on the decision-making practices of public servants in the context of the HRC.

The external-organisational forces which may have an effect on the decision-making practices of Department of Social Protection staff are clients and public discourse, advocacy agencies, Appeals Officers, and the Judiciary. With regards to Appeals Officers, their decision-making may be scrutinised by the Ombudsmen or the courts. The extensive support provided to welfare applicants from various advocacy agencies and the additional safety-net of the Social Welfare Appeals Office has fundamentally altered the relationship between the applicant and the Department. Our participants reported an awareness among applicants regarding the possibility that decisions issued by the Department can be incorrect and can be challenged. Our participants indicated that a majority of disallowed cases are appealed. While such scrutiny increases accountability and motivates decision-makers to thoroughly examine potential disallowances; it may also have a negative impact on them. Decision makers are required to present their decisions at oral hearings or judicial reviews and many fear that they are not qualified to do this:

“We have one case at the moment that will be taken to the high court and I had to sign an affidavit if I’m brought into court, I don’t think I’m qualified to fight it. I don’t think I’m qualified to fight a legal team of the client (...). I’ve never been in the court before I don’t really know how it works so I’m just scared.”
(Ruth, Deciding Officer)

The lack of confidence and the resulting uncertainty has a direct impact on decision-makers performance at work. It leads to over-analysis of cases (mostly those that are potentially thought of as disallowances) which takes a long time and results in a backlog of cases. The lack of direct supervision of the decisions made by public servants is often viewed as flawed because of the freedom that it allows to workers (Lipsky, 2010). However, here we can see that this freedom is not something that all workers enjoy. Furthermore, defending a decision at an appeal or in front of a judge may constitute a significant personal and professional challenge. Finally, making negative decisions on HRC cases affects decision-makers as professionals. The power dynamic between them and their clients is changing in these particular circumstances.

Furthermore, in the context of the ambiguous HRC, it is crucial for the decision-maker to know the law very well. Despite their practical experience and knowledge, many public servants’ decisions in recent years have come under scrutiny and some were heavily criticised by the public, non-governmental organisations, the Social Welfare Appeals Office, and even by the

courts. We argue that this scrutiny has an impact on how discretionary decisions are being constructed by Irish social welfare staff today.

Moral economies of decision-making

Our study found that there are differences in the approaches of the participants towards discretionary policy that cannot be explained by simply looking at the data through the lenses of Lipsky's (2010) 'state-agent' or Maynard-Moody and Musheno's (2003) 'citizen-agent' narratives. First of all, our analysis of concerns expressed by participants in relation to discretion as an attribute of their decision-making practices showed that all participants are motivated by a sense of social obligation (i.e. protecting the public purse), being fair to each individual applicant, or by both of these positions. The differences in their approaches are explained through analysis of the stories related to participants' understanding of what constitutes the right course of action as part of their occupational role. We argue that organisational culture and workers socialisation into their organisational role shapes their notions of what constitutes the appropriate and legitimate action to a substantial degree. Those moral economies, the systems of norms and values embedded in organisational arrangements (Sachweh 2012, p.422), are influenced by the concerns that lie behind them. In essence, decision-makers' actions are guided by what they understand to be ethical.

Drawing on Oakeshott's (1975) theory, our findings suggest that decision-makers implement the HRC through either nomocratic or telocratic lenses. Some public servants see adherence to rules as the most significant component of their daily decision-making. This group of 'nomocratic decision-makers' placed the most value on consistency and fair treatment of all their clients. Accordingly, their aim is to evaluate similar cases in a similar manner. Consequently, exceptionalism is perceived as being unfair (for both the clients and the state) as it breaks the rules, which the state has created. In line with Evans's (2013) findings, it doesn't mean that nomocratic decision-makers do not recognise that certain rules don't work in practice; they do; however, they don't perceive that their role allows them to bend those rules.

"I would say [discretion] complicates it [decision-making process], because it creates such a grey area. I can make a submission to pay someone on discretion, or I could also do a submission to disallow them. So the discretion, I think that's where the problem is. It should be black or white" (Tom, Designated Person).

On the other hand, we argue that, some workers see exceptionalism as the only way of making policy work for citizens. Those 'telocratic decision-makers' place a high value on their ability

to deploy discretion, and adjust the rules on a case by case basis. They see their primary objective being to ensure the well-being of their clients'. Accordingly, exceptionalism is perceived by these decision makers as being a positive attribute of their work, because it is deployed for the benefit of their clients.

It is important to underline that the nomocratic and telocratic narratives are not intended to make a distinction between good or bad decision-makers. The aim is to understand what social forces / ideologies / structures impact on these workers and in what ways, so as to understand why their approach to discretion varies in situations where they are essentially required to make the same type of decision, under the same legislation. We now turn to the discussion of both approaches.

The Nomocratic approach to discretion

Our study found that the approach of some decision-makers (four Deciding Officers and one Designated Person), can be defined as nomocratic; i.e. they perceive the core objective of their organisational role to be assisting clients, while also being fair to taxpayers. A majority in this group perceive discretion as being unfair towards clients, confusing for decision-makers, and a factor adding to inconsistency in decisions being made across the country. They also clearly distinguish between deserving and undeserving applicants.

Protecting the public purse: deserving vs. undeserving clients

A sizeable proportion of participants⁶ were role oriented towards protecting the public purse. They believe that some applicants are fraudulent and that it is their job to distinguish them from deserving applicants. Thus, in general they approach applicants with mistrust. The nomocratic group of decision-makers perceived the ambiguity of the HRC and the requirement for deployment of discretion to be unfair. In particular, they believed that positive decisions favouring clients may be invalid and 'undeserving' applicants may wrongly have their claim upheld.

"Maybe it's the legislation, it can be abused in some ways (...) They know how to work it. And then there are genuine people who are coming over here (...) to find work and because of the recession and everything else they can't find enough work, they don't have the right to reside and they are sent home, well not sent home but they're not entitled." (Amy, Deciding Officer)

⁶ A majority of Deciding Officers in the mainstream section of the Department and one Designated Person.

Deserving clients are distinguished here from the undeserving ones. The Deciding Officer quoted indicated also that some clients bring their children to Ireland to strengthen their position on habitual residency. The categories of who is deserving and who is not are perceived by them to be legitimate (Watkins-Hayes & Kovalsky, 2016). The concept of deservingness, pertinent to the provision of social services, operates globally. It has been used as a means of protecting public funds, to rationalise cut backs to public services, and deny access for migrant groups by a variety of countries across the globe. Migrants are typically constructed and perceived by public organisations as the least deserving, and suspected of intentionally migrating to live on their state's welfare (Watkins-Hayes & Kovalsky, 2016).

As Watkins-Hayes & Kovalsky (2016: 193) argue “individual perceived worthiness for assistance has long served as both a rhetorical device and a determinant of who should receive resources and under what conditions”. Deserving clients are those who are perceived to have earned, through their actions (such as work) or special circumstances (such as illness) the right to access public funds. Those who are undeserving on the other hand are those whose life choices are poor “due to their own lack of virtue” (Watkins-Hayes & Kovalsky 2016, p.193).

Public servants' motivations to exercise discretion or not should thus be understood as “a mixture of concerns including principled commitments that are situated within day to day practices” (Evans 2014, p.388). Asked about the role of social welfare in Ireland, one Designated Person (the only Community Welfare Officer in the study whose approach to discretion was found to be nomocratic and who explicitly underlined the need to protect the social welfare system from abuse⁷) stated that:

“Social welfare is there to protect the weakest in society. But you have to protect the public purse as well. For a person who works for social welfare their role is to protect the public purse as well.” (Tom, Designated Person)

⁷ This Designated Person's approach to rules was evidently nomocratic despite extensive work experience in a client-centred organisation and service oriented occupational role. We argue that this exception can be nonetheless explained by the growing influence and effect of the organisational culture traditional to the Department of Social Protection over Designated Persons. Designated Persons and Deciding Officers have worked together since 2011. This particular Designated Person revealed a close collegial relationship with Deciding Officers, and admitted to oftentimes making decisions on HRC cases collaboratively with them. Despite the outlier case not fitting the theory here proposed, we argue that it enhances the degree of importance of organisational culture on decision-makers' approaches towards discretion. Thus revealing this outlier adds to the theoretical model proposed here by revealing how the decision-makers' approach to rules and discretion can change profoundly as they are socialised into a new organisational culture (see Ryan 2017, pp.291-292) for a fuller discussion.

An understanding of the welfare system as being significantly impacted by fraud, increased some decision-makers' level of personal involvement in decisions. For these individuals, distinguishing deserving from undeserving clients became a very important component of their decision-making process. As the following quote from a Deciding Officer makes clear, the belief that undeserving clients have access to social assistance frustrates them.

“A lot of people abuse the system there is no doubt about that. But the purpose of it [social welfare] is to assist people who are genuine, in that a) they have an entitlement, b) they are satisfying all the conditions. They are looking for work or they are entitled to stamps or they are genuinely lone parents, they are genuine. But unfortunately, there’s an awful lot of people who do make claims, they’re not genuine claims. And that is the frustrating part of it. That’s not my role proving this... there are inspectors there. But I think there should be a lot more resources put into, out on the road, house call, check in, people are working in the black economy, they are doing x y and z. You can see what they are driving around, there is no way they can have this type of vehicle that’s 5 years fresher than your own car, and be on social welfare. There is something else going on. They’re not the genuine people.” (Jenny, Deciding Officer)

The following excerpt from an interview with an Appeals Officer reveals one possible explanation for why some decision-makers may hold such strong beliefs about ‘the system’ needing to be protected:

“The issue in the Department for the last number of years, and even at the highest level [is] that when the Department was asked to make significant savings on its budget and the Minister herself said we are going to bring down controlled savings so we don’t have to make it by you know losing services or reducing services somewhere else. And if it’s going to come from control we’ve got to save money. And suddenly that’s a goal. And if that’s a goal it can affect the decision. And that can affect the culture.” (Jack, Appeals Officer)

This Appeals Officer’s perception is that Ministerial directives to staff to control spending, have had an effect on the Department of Social Protections’ organisational culture, which has subsequently effected decision-makers’ daily practices and approach to clients. Approaches informed by a dichotomy of deservingness can be damaging and have extremely negative consequences for applicants (Altreiter and Leibetseder, 2015), especially when a high degree of discretion is authorised (Hasenfeld, 2000). It diminishes the decision maker’s appreciation of the structural conditions in which poverty is embedded and creates conditions under which their decisions may be biased against certain social groups. As Jensen (2015) argues, where the objective of a decision-makers’ role is to regulate clients, as opposed to providing a service, clients are treated with mistrust and decision-makers feel accountable to the public rather than to individual clients. This is consistent with the regulatory role and approach adopted by some of the research participants in this study.

Resisting discretion

Some HRC decision-makers use their individual agency to resist the discretionary element of the HRC. According to E.P. Thomson (1971) resistance originates in situations where socially maintained values are being broken. Through, for example, seeking support from peers, organising discussion meetings and requesting organisational support in decision-making, this group of decision-makers seek uniformity in their decisions and are opposed to individualised decision-making. These actions, mainly by Deciding Officers in the mainstream section of the Department of Social Protection, seek to increase those workers' confidence in their decision-making. Resistance to deploying discretion was also identified in decision-makers' efforts to ensure consistency in the decisions being made on the HRC, which was associated by these workers with the validity of those decisions. Evans (2014) highlights that moral economies may be deployed as a means of resistance. The HRC requires changes to the routines that Deciding Officers are used to. Changes are thus resisted because workers' status quo values (the norms that workers understand as legitimate and that they adhere to) are being broken (Randall and Charlesworth, 2000 cited in Evans, 2014).

In the interviews, decision-makers discussed the current organisational support for their decision-making, perceiving that they do not meet with their expectations in terms of translating the legislation into operational instructions, which in turn leads to subjective decisions being made. For that reason, those decision-makers rigidly follow the HRC guidelines, discussing the complex cases amongst themselves and trying to agree on a method for implementing the HRC in those difficult cases. These decision-makers resist discretion then through seeking advice from colleagues and avoiding having to make individual decisions.

“I mean you apply the guidelines, you try and make sure consistency (...). That if I was going to go this way with this customer, that the next customer that presents with a similar scenario, that other people would also go the same route. I know I go the same route but are other HRC decision-makers going to go the same route? But we're coming together, we were starting to agree a procedure and agree an interpretation of the guidelines.” (Jenny, Deciding Officer)

Aiming for consistency

For nomocratic decision-makers, consistency of decisions was found to be important because it indicates to them that decisions are made according to (and closely following) the established rules. This section reveals that for these people consistent decisions are understood as valid decisions. Thus, their aim in resisting the use of discretion was to increase confidence in the

validity of decisions through efforts to create more prescribed criteria for the evaluation of habitual residency.

According to all of the participants in this study decisions on the HRC are inconsistent. The majority of Designated Persons and Appeals Officers underlined that this is the nature of the HRC and there is little that can be done to change this. However, the Deciding Officers and one Designated Person were adamant this should not be the case, expressly arguing that the rules on access to social assistance should be equally applied to all. In their view, the approach to making decisions is so different that it is possible that a client would receive a different decision from two decision-makers working in the same office:

“People come to the same office and meet someone and one person will approve the HRC and another wouldn’t. That’s what seems to be going on.”
(Tom, Designated Person)

Others argued that increasing the consistency of decisions is possible to achieve within offices through conversations with peers but it is not possible across the entire Department.

“Within this office (...) we generally between ourselves try to be very consistent. Few years ago I remember when I was on a course and straight away the differences of opinion or of interpretation between offices was just, it’s definitely out there. We even know offices in the country I would have a claim that I’m making a decision on and say: oh no she is a jobseeker allowance in [name of city] oh God that’s going to be an argument (...). Different schemes they seem to be much harder on it.” (Audrey, Deciding Officer)

Thus, they argued that decisions across the country are inconsistent due to the variety of approaches that are being taken in implementing the HRC. Further, they argued that such inconsistency means that a large proportion of decisions are ultimately invalid. Interestingly, it impacts on decision-makers approach to discretion because of how they think others perceive them as a result of people making decisions which are later over-turned on appeal:

“There is inconsistency everywhere and everyone is saying “what’s the point of doing it?”. You see, it makes us look very unprofessional because I can stand up in an appeals office, I can stand up in courts, I’ll be like I can stand over this, and all of a sudden at the end of this someone wins it. They will think you don’t know what you’re doing.” (Tom, Designated Person)

As this Designated Person indicates, some decision-makers feel helpless in these situations; they are trying to do their jobs effectively only to learn at a later stage that their decisions are wrong, and for reasons they don’t clearly understand. Advocacy agencies in Ireland also underlined “that the assessment of the HRC is too subjective and too complex for consistency

in decision-making to be achieved” (Quinn et al., 2014: 39). We argue that in such a context negative perceptions of discretion are effectively reinforced and the adoption of a nomocratic approach is further legitimized.

Subjective decisions

Our data revealed that discretion creates difficulties for decision-makers when implementing the HRC, with the outcomes of those decision making processes being embedded in the decision-makers’ own subjective understandings of the case. This in turn can create bias in decision-making:

“We just have to guess, we just have to look through everything and OK take all the factors into consideration but it’s really our opinion at the end of the day.”
(Jenny, Deciding Officer)

Subjective discretionary decisions can be, on the one side, a positive attribute of decision-making, allowing decision-makers to include exceptional cases; as opposed to rejecting them because they do not ‘tick boxes’. Conversely, the ability to exercise discretion may also lead to negative outcomes for applicants, for example, it may facilitate the inclusion (even on a subconscious level) of any preconceived notions that public servants have of certain groups, nationalities or ethnicities, in the process of arriving at their final decision. A small proportion of the participants in all samples, for example, observed a certain amount of prejudice against applicants from EU and non-EU countries.

“I don’t like to say this, but I don’t know if its racism that’s in the Department, or lack of empathy. You know racism could be a very strong word to use, but it might be a lack of empathy. We try here to examine every case on its merits and on its facts, and having said that you do notice trends with nationalities, and you try not to let that sway your opinion..... I hate to be saying it but sometimes you find that you’d ring an office, and you know by the person talking that ... the way they describe somebody like: what did she come here for? I had a case where a social welfare officer, he was livid because we’ve paid somebody, we overlooked the fact that it was disallowed on another scheme. And I asked him to send me on the report and I thought the report was a disgrace. The wording in it: she alleges this, she alleges that, she alleges. And it was like he was catching her on lies (...). I think that there is a mixture right across the Department. People might have different ideas about people coming into the country.” (Jim, Deciding Officer)

In conclusion, participants who took a nomocratic approach to discretion and rules, see discretion as creating a space where decisions are unfair, inconsistent and subjective. This mirrors Taylor’s (2014: 421) findings where caseworkers argued that “going by the book and having a book to go by are better for them as they are not burdened by negative consequences

of their decision-making”. For that reason, decision-makers strategize to resist discretion by aiming for uniformity in the implementation of this ambiguous piece of legislation. Yet, such strategies may well lead to implementation practices which were not intended by legislators or policy-makers.

A telocratic approach to discretion

The differences in the focus of the organisational role of Designated Persons, Appeals Officers and Deciding Officers was underlined and connected to the different roles of the organisations concerned. The vast majority of Designated Persons (10 out of 11), all the Appeals Officers and all of the Deciding Officers in the specially designed payment unit of the Department, taking part in this study saw discretion as being helpful in enabling the effective implementation of the HRC. According to those participants, discretion allows them to adjust rules to cases that do not fit squarely into prescribed criteria.

“I think it’s more helpful [having discretion]. Like that’s my opinion because you can always bring other factors into it (...). I think it benefits the client more – the discretionary part, because you can bring their family factors and other enabling factors that they couldn’t bring” (Kate, Designated Person).

The telocratic decision-making in this research was found to be centred on the client’s situation. The stories classified under this narrative constructed the role of the decision-maker as not only an administrator of a payment but also as an advisor and even an advocate. Designated Persons were adamant that they possess vast experience in dealing with individuals in extremely difficult circumstances, with the nature of their work being closer to that of a social worker or counsellor. Moreover, in their view, Deciding Officers don’t have the same sense of responsibility towards their clients. For that reason, Designated Persons argued that it is easier for Deciding Officers to make decisions and not become personally invested in their clients’ cases.

“When I went into Community Welfare I wasn’t going to save the world, save the whales. I wasn’t planning to do any of that. I was trying to help, and do something that I thought was a bit worthy which is why I went into Community Welfare in the first place. And I found in Community Welfare a bunch of people who kind of felt the same. None of us were social workers, none of us were psychologists, but you turn into a social worker, psychologist, and a counsellor over 10-15 years doing this kind of work. I think probably people who sat in their office and have never met the public, have never worked face-to-face with the public in difficult areas where there’s addiction, where their children face addiction. If you have never worked in those kind of situations I think it’s much easier to make decisions but much harder to understand customers.” (Eoin, Designated Person)

This quote is an important reflection of the organisational role differences between Community Welfare and the DSP, a point underscored by another story told by a Deciding Officer who stated:

“Unfortunately people cried ... I can’t change the rules. I can’t bend the rules. I’m an officer putting my name on something. You know I would advise them [disallowed applicants] to go to Community Welfare Officer. I would advise them on all other avenues. We would help them on looking for work. You know we would advise them to go here, there and everywhere. But in the end of the day ... even one day, nothing to do with the HRC, but again threatening suicide. You know: I’m going down to the river. Yes that impacts on me, but can I change the decision just so that he or she doesn’t? No I cannot. Am I responsible if he does? No I am not. And like that would be part of our training. People will throw that at you. And I’m not saying that they don’t genuinely feel like that, but they can’t throw it at you and expect you to change your decision. If it’s a decision that’s a right decision, you can’t change it.” (Anne, Deciding Officer)

A telocratic approach was also found to be evident among Deciding Officers who work for a specially designated payment unit of the Department and the Social Welfare Appeals Officers:

“We generally in [name of the specialized payment section of the Department] do our best to pay. I’d always have empathy with the customer. So we are looking for reasons to pay as opposed to reasons not to pay, even though customers mightn’t realise that. We have to base it on the facts but you also use a fair bit of, it’s not just your gut feeling but your experience.” (Sarah, Deciding Officer)

“... I think the focus of the Appeals Office is how can I allow this case (...), because we are very much on the appellant’s side so our whole focus is - can we allow this case.” (Caroline, Appeals Officers)

The telocratic approach would therefore appear to involve discretionary judgement, which is grounded in pragmatic understandings of the case; essentially it is what Maynard-Moody and Musheno (2012) define as pragmatic improvisation. These are moments when the situation is negotiated via the decision maker’s occupational ethical standards, which are acquired through organisational socialisation. Interestingly, those adopting a telocratic approach to decision-making perceived that the negative consequences of discretion, such as those mentioned earlier by nomocratic decision-makers, needed to be addressed. In their view, if the HRC was prescriptive and non-discretionary, it would have a far more damaging impact on access to welfare services in Ireland than it does under the current arrangement.

Conclusions

In conclusion, this article explored how decision-makers deploy discretion in the context of the Habitual Residence Condition in Ireland. In this study, we identified two approaches to discretion: nomocratic and telocratic, with both largely emerging as a result of specific structural and cultural conditions that exist within organisations, and directly impacting decision-making practices in the public service. The study findings confirm Evans and Harris's (2004) understanding of discretion as being neither always a positive or a negative attribute of decision-making. We offered evidence that some decision-makers, despite difficulties in understanding the vague terminology of the legislation, are happy to make discretionary decisions, while others struggle, resist, and protest against the deployment of individual judgement in the provision of social assistance, instead arguing for rigid rules that would be equally applicable to all applicants.

Du Gay (2000) and Evans and Harris (2004) argue that discretion manifests only in the contexts in which it is deployed. We support their argument by revealing that certain contexts (in the case of this study – an ambiguous piece of legislation), produce an environment where a higher degree of freedom in decision-making is available. Dworkin (1978 cited in Evans and Harris, 2004: 881) “argued that discretion is not the absence of principles or rules; rather, it is the space between them”. His idea of “three senses of discretion [include] judgement that has to be employed to apply a standard (in circumstances where judgement cannot be applied mechanically); a final responsibility for making a decision (within the rules); and discretion in a strong sense, which gives the decisions and the criteria of decision-making to professionals” (Dworkin, 1978 cited in Evans and Harris, 2004: p.881).

This article shows that even when the work environment allows for a high degree of discretion, not all decision-makers will perceive of themselves as a person who should be responsible for, or whose organisational roles should involve, creating, or individually interpreting, the criteria for decision-making. The study revealed that one group, comprised mainly of Deciding Officers in the mainstream sections of the Department of Social Protection demonstrated a nomocratic approach to discretion. They perceived that discretion is creating problems in decision-making, leading to unfair, inconsistent, implementation processes, which result in an unequal opportunity for citizens to access social assistance. Our participants reported confusion in the implementation of the HRC, a lack of sufficient training, a lack of adequate organisational support, varied perceptions of what valid decisions are, and ultimately confusion over how they

should make decisions. The telocratic group asserted the importance of having the ability to take into account their clients exceptional circumstances which do not fit into the prescribed criteria before arriving at their decision.

Varied understandings of the objective of HRC decision-makers' role as providers of social assistance were identified in this study. We argued that many of those issues are associated with how those individual officers have been socialised with respect to their organisational role. All decisions are made in the context of morals (Evans, 2014), however, how public servants respond to clients differs according to which organisational objectives have been internalised. Hence, the use of discretion, whether for one's own benefit or for the benefit of the client, is largely determined by one's understanding of the objective of the organisation for which you work (organisational culture) (see Hasenfeld 2000). If decision-makers' understanding is that the objective of their organisation is to serve the good of the public, to maintain social order and to regulate deviance, then the staff will more likely perceive discretion as problematic and resist discretionary practices and discretionary legislation. The clients will also be more likely to be treated with mistrust. If the objective of the organisation is to serve individual clients, then staff will be more likely to perceive discretion as being helpful to achieving the organisational goal and to practice discretion without hesitance. The clients will also be less likely to be seen as potentially fraudulent cases.

The study confirmed Maynard-Moody and Musheno's (2012) and Taylor's (2014) argument that in exploring discretionary practice we should extend our analysis to decision-makers agency, as opposed to focusing exclusively on discretionary judgement. We support the argument made by Maynard-Moody and Musheno (2012) that through such broad analysis we begin to uncover the multiple versions of social equity / fairness that are (re)produced according to organisational and situational contexts. Conceptualising discretion as part of a wider context of individual agency (Maynard-Moody and Musheno, 2012: S19), allows us to uncover the nuanced mechanisms of deciding on ambiguous pieces of legislation. We argue that understanding discretion in this way enables us to account for decision-making practices where discretion is resisted by public servants.

Finally, Lincoln and Guba (2000: 8) argue that in case-study research the aim is not generalisability but rather "transferability of conclusions". The key transferable aspect of our paper lies in the nomocratic and telocratic approaches to discretion and in understanding both

approaches as emergent in particular types of organisations and particular occupational roles that decision-makers fulfil. Clauses similar to the HRC exist across several European countries and beyond. However, nationally and internationally there is a lack of empirical data and conceptual understanding of the impact of those type of conditions on decision-making practices. We argue that the results of this study are transferable to other contexts, not only in the public service settings but also in the private sector. Understanding norms, values and beliefs that workers adhere to, allows us to better understand their actions in using discretion or not.

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