

Chapter 5

Regulation vs. Room for Maneuver



One tension that caseworkers encounter in everyday work is that between normative regulation and the room for maneuver (which goes beyond discretion). This chapter shows how decision-making officials deal with this tension in processing asylum claims. On a superficial level, officials' task consists of applying the law; however, this is anything but a clear task. Deciding upon asylum claims requires the application of general laws to particular individual situations, and this implies more than strictly following rules. Applying a rule also means shifting, changing, supplementing, replacing, or violating a rule; to a certain extent, rule application always implies interpretation, manipulation, circumvention (Ortmann 2003). Moreover, norms, rules and preferences can only be fully constituted in situ; that is, decision criteria are interpreted and modified in view of the situational and contextual circumstances. As with the application of any norm, there are also "peripheral" zones in the application of law. These gray zones with unclear borders play a vital role in officials' work. Dealing with questions of the law can be especially difficult for those decision makers who do not have a legal education.

Because legal rules contained in statutes and regulations may be incomplete, vague, ambiguous, contradictory, or inexplicable, grasping the appropriate course of action from a positivist legal source may be problematic. For an administrator who is not trained in the law and has neither the experience nor the time to navigate through rough seas toward understanding, legal requirements can raise more questions than they solve (Martinez 2009:115ff).

Concerning non-legal officials, the law is thus rather "felt and tamed ... than grasped and comprehended" (Eule 2014:62). Whereas bureaucratic work is structured and defined by administrative and legal norms, caseworkers have various ways of understanding and applying these norms in everyday work. The differing missions and logics of legal and administrative norms, such as human rights versus

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processing targets, create structural contradictions for decision makers. Within this structure, caseworkers develop social practices that facilitate everyday work and make use of (legal) discretionary power and, more broadly, room for maneuver within the asylum procedure. Where officials have room for maneuver, they develop a variety of individual approaches, attitudes and strategies in dealing with everyday tasks. Caseworkers' different approaches are reflected in their ways of dealing with asylum applications and claimants and in their decisions. Considering decision makers' discretionary power, the alleged objectivity of legal procedures can be relativized; it can make a difference who decides upon a specific claim since it is not an abstract authority that makes the decision but a particular individual.

5.1 Norms and Instructions, Discretionary Power and Room for Maneuver

In the bureaucratic setting, everyday work is governed by comprehensive provisions and by the law and its translation into administrative norms. Although decision makers are always individuals and not robots, they often perceive themselves simply as executing organs carrying out orders; active agency is often factored out. "I'm only the executor ... of course, I can stimulate something, but in my everyday work, I work according to the provisions that are given to me," Thomas explains. Veronika also describes her task as a clear application of the rules: "the legal basis in Austria just is like that ... and if politics, let's say, decide that we are to apply ... Article 3 ECHR for dialysis patients too, then I will apply it." Taking and carrying out orders implies that responsibility can be delegated, for example, to the management, to politics, and to the provisions as such. As Gabi notes, "There is a binding work instruction for everything." However, she adds that after an official knows the basics, she will rarely look at the instructions. When the work instructions are internalized by and through everyday practice, they no longer need to be considered explicitly. Routine implies that when "cases" are perceived as repeating themselves, officials also reproduce their practices in processing these cases. Within and in addition to the formal framework, officials not only possess discretionary power but also room for maneuver within their practices of dealing with asylum claims. Using a metaphor, a caseworker highlights his action possibilities as well as the restrictions.

There is a certain basic schedule that's predefined for everyone, sure. And then there is a little room for maneuver on top of this mountain of instructions where one can choose one's way, I'd say ... So there's the big motorway, you can choose the lane, but, let's say, there are no side streets, the breakdown lane that's then the head of the unit ... one can also change lanes (Thomas).

Using a traffic-related metaphor, the official explains that although there are an enormous number of rules and regulations, there are also areas where caseworkers can work autonomously. He mentions the possibility of changing one's approach as well as seeking help from a superior. In addition, the notion of a "motorway" alludes to speed, possibly hinting at the time pressure that dominates work at the FAO.

The perceived or actual leeway manifests itself in different forms and in various situations of the bureaucratic everyday. "I am my own master. Nobody interferes

here; I can do what I want, now again in quotation marks,” Roland explains, relativizing his statement and thus his power by introducing quotation marks. Aware of the restrictions, he narrows his field of action, emphasizing that his room for maneuver is limited by the normative framework: “Sure, always within the scope of the laws, no question.” The two legal officials particularly emphasize their autonomy. Despite the strong hierarchy at the FAO, Stephan thinks that he is “not under the thumb of a boss.” Gabi feels as though she is her “own boss,” feeling “much freer” than in her former job in a similar context where she had the impression that she had to “function like a machine.” Stephan highlights the fact “that you can decide relatively freely.” While emphasizing his discretionary power in the decision-making process, he simultaneously notes the limitations imposed by the normative framework by using the word “relatively.” This ambivalence between regulation and discretion is present in most interviews with caseworkers. A common practice of public officials seems to be affirming their own discretion while constantly being aware of the normative constraints structuring their actions (Herbert 1997; Mountz 2010).

The law, which is itself subject to interpretation, is at the same time regarded as the limit of their leeway. Roland summarizes his relation to the law: “Well, I can only decide according to the law, right? If there is nothing, then I can’t give asylum, right? ... ‘I feel sorry for you, I’ll give you asylum,’ that I can’t do, right?” A similar point of view is expressed by a colleague who views herself as an executing organ and decision making as a simple process. “Now I think, okay, this is how the law is, these are the regulations, and if it is like this, then he gets that,” Veronika explains. While identifying the limitations of their scope of action, the caseworkers are aware of the opportunities for interpretation that the legal provisions introduce. Thomas explains that “if one enters substantially into the topic, then suddenly very many possible interpretations open up.” At the same time, he finds that “our law is already formulated in great detail, so there are not many possibilities.” As an example of the fact that the room for interpretation is minimal, he mentions the notion of private life in the context of the ECHR: “A typical notion, which one can interpret very broadly, and now, there are already very clear determinations from the Asylum Court and the European Court of Human Rights, what that actually is, which points are listed under that notion.” Although decision makers’ leeway is subject to important limitations, judges, and as I would argue also decision-making officials, are “confronted by a choice whose outcome is not dictated by the law” (Morris 2010:93). As Eule (2014:61) notes in the German immigration context, due to the ambiguous and changing character of the law, “it is inherently impossible to ever fully implement it ‘according to the law.’” However, “the ‘legislator’s will’ is often a practical excuse” (Dubois 2010:57).

Roland mentions a concrete example for his exercise of discretionary power: the possibility of making an expulsion “permanently inadmissible.” The asylum claimant “must be integrated, he must speak German, he must have work, he must have an apartment, and, and, and, right? And if that’s rudimentarily fulfilled, and he was really well behaved, and he worked, well then, I let him remain here, right?” The caseworker emphasizes that especially if children born in Austria are involved, and especially if they already go to school, he does not see a reason to “send them home.” This account demonstrates not only the asylum interview’s checklist charac-

ter (including the applied definition of integration), highlighting the importance of expectations toward asylum claimants, but also the fact that the exercise of discretionary power is linked to officials' individual approaches, as we will see in the upcoming sections. In addition, the quotation points to the moral aspect of judging when the caseworker aims to examine whether a claimant was a "well-behaved" person during her stay in Austria. This classification mainly refers to whether she is actively contributing to her integration and did not commit a crime. It is related to the evaluation of whether a person will be allowed to stay in Austria because of her "connection" to the country in her private or family life (article 8 ECHR). This example thus highlights the importance of ideology – such as notions of what is good or bad – in administrative work.

The ambiguity between strictly following the rules and discretionary power is evident in caseworkers' accounts. While certain decision-making officials emphasize their discretion, they also call attention to existing limitations. Although they claim to be merely following the prescribed rules, decisions still have to be legitimized and justified; although the limits of their scope of action are formally defined by law, they are only formed through actual practices and routines. What caseworkers have to do is predefined, but the realization of those instructions through social practices implies some autonomy. As Alpes and Spire (2014:261) note, street-level bureaucrats "are able to draw on legal frameworks in a flexible and instrumental manner."

Since work at the FAO is not only structured by law, caseworkers also orient their actions toward other normative frameworks that allow for room for maneuver with regard to social practices beyond legal discretionary power. Whereas Lipsky (2010:xvii) defines street-level bureaucrats as actors who "have discretion in exercising their authority," Prottas (1979:112) argues that autonomy, that is, the preservation of an independent sphere of action, represents an end in itself for street-level bureaucrats. This room for maneuver is expressed, for example, by statements such as "normally, I don't do that" (Sabine) or "actually, there would now be no reason anymore" (Sabine). The words "normally" and "actually" imply that while certain standards exist, these norms can be circumvented or expanded. Additionally, with regard to fact-finding, Sabine mentions that "one becomes imaginative with time," indicating that there are multiple options to gain information, often counterevidence, on a specific application. She explains, for example, that a liaison officer was assigned to inspect a particular village and question people on the spot so that she could contrast the officer's findings with the drawings and explanations she had asked the asylum claimant to make during the interview. This example illustrates that there is a certain "inventive" aspect in officials' work. Relating to the circumvention or expansion of norms, Gabi mentions that instructions can be unrealistic or unworkable. She classifies a particular instruction as "ridiculous" because she regards it as unrealistic. "One is to always commission different interpreters ... that's just difficult, right, because if you now work well together with one, are satisfied with him, he knows how you work, I have the feeling he's neutral, why should I then appoint another one?" Based on her experience in the past – good and bad – with various interpreters, she has reached the conclusion that it is more useful to reappoint an interpreter with whom she has good experience instead of appointing

a new interpreter she does not know. The example shows that work instructions, just as any other norm, are subject to interpretation, alterable and may thus produce diverging social practices.

Officials' autonomy is also relevant to their relations to other actors such as assistants, interpreters and experts. As the superiors, decision makers can determine the role and activities of their assistants, deciding which tasks they want to carry out themselves and which they want to delegate. As Gabi notes, "not every assistant is good for everything," referring to the varying skills and competences of the different assistants. In addition, caseworkers have the freedom to decide which interpreter and which expert they want to commission for a particular asylum claim, and they have the power to decide what to do with the information provided by these external actors. These examples demonstrate that caseworkers have both discretionary power in a legal sense and room for maneuver with regard to social practices more generally. This observation is also highlighted by the individual approaches, attitudes and strategies that officials develop in dealing with asylum claimants and their claims.

5.2 Individual Approaches, Attitudes and Strategies

Different caseworkers develop distinctive social practices in dealing with the various norms. These differing practices can be observed in all areas of everyday work, whether officials take something to heart or choose a superficial approach, in their behavior and methods in interviewing asylum claimants, in their preferences for certain experts and the avoidance of others, and whether work is taken home – mentally or physically. Dubois (2010:94) argues that agents not only have personalities but also that "individual paths, relationships to the job and personal competences are combined in the definition of the ... agent's role." In other words, officials each have their own way of dealing with their job, and their individual attitudes influence how they deal with asylum claimants and their claims. These observations highlight the informal aspects of the asylum procedure.

Whereas Roland regards himself as "the most liberal" in comparison to his colleagues, Veronika claims to be "someone who racks her brain" and who "makes an effort," in contrast to others who work differently. Different caseworkers have different "attitudes toward the whole thing," Veronika notes. Stephan believes that, unlike himself, "there are surely soft-hearted [officials] who let themselves be lulled [by claimants]." He thus suggests that an official's attitude and personality impact that official's interaction with claimants in the interview situation. This view is confirmed by an official who was sitting in on an interview with a claimant whose application she had handled before; this follow-up interview was conducted by one of her colleagues. She notes her discontent with the substituting official's behavior: "I still feel sorry for him [the claimant]. He's [the official] bad! ... That hurts me; I'd never do an interview like that" (o.i. 1). As two officials summarize, "everyone has a different approach to the matter... an individual approach" (Veronika), and officials can "work completely differently" (Stephan).

Illustrating that caseworkers' attitudes seem to be reflected in their ways of dealing with asylum claimants and their claims, Thomas explains that "it is possible [to work] with more or with less effort." This is valid for the asylum interview as well as for writing the decision notification; "one can treat it really very quickly ... or one arranges it more nicely." Similarly, Gabi finds that some colleagues "maybe don't place so much value on quality from the start and therefore sling out [notifications] quick, quick." Veronika says that she would "wish for a certain superficiality" and thinks that it would be better for her "to ruminate less." She finds that due to her attitude, she also needs longer for the interviews with claimants than other colleagues of hers. The fact that caseworkers develop individual strategies for dealing with the different situations of everyday work is also illustrated by the "mimesis approach" when officials start working at the FAO. They observe different colleagues when interviewing asylum claimants "in order to pick out something everywhere, to adopt [things] and then to develop their own strategy" (Gabi).¹ Additionally, before asking colleagues for their opinion on a specific "case" Gabi first "get[s] a theory or a strategy ready." Veronika explains that she "simply [has her] rail" in processing asylum applications. That is, once established, routines can be difficult to break.

An official's general approach can thus also be relevant to the concrete decision on an asylum claim. Which decision is made "also depends on the official," Sabine explains, since a colleague "might not have granted subsidiary protection" to a person to whom she did grant this status. A colleague mentions that he always "tries a little bit more," meaning that in his decisions, he tries to be tougher than necessary or than other colleagues would be since "one never knows what the Asylum Court does" (ob. 40,401). The caseworker thus makes extensive use of his discretionary power to the detriment of the claimant because he assumes that the claimants will appeal anyway. Gabi is also convinced that different officials would – hypothetically – decide the same case differently due to their "personal attitudes." She thinks that it depends on "how much you grapple with it [and] how seriously you take it [the work]." The official recalls a situation in which she was not completely sure how to handle a specific application. Already having a tendency regarding the decision, she asked some colleagues for their opinions regarding the case. Although she eventually made a positive decision, the other caseworkers' opinions differed widely, including positive and negative assessments as well as subsidiary protection. As O'Dwyer (2008) notes, it is inevitable that two decision makers who look at the same set of facts can reach different conclusions. "Adjudicators can and consistently do reach opposite conclusions based on near-identical and conclusive evidence" (O'Dwyer 2008:206).

These examples illustrate that "objectivity" – generally claimed in legal procedures – can become relative, especially since discretionary power and room for maneuver are involved. The findings demonstrate that it can make a difference who decides upon a specific claim and that it is not an abstract authority making the deci-

¹ Strategies suggest that actors have a certain autonomy to define the rules of the game, as opposed to tactics that would only allow them to subvert the rules (de Certeau 2011[1980]; Fassin 2015).

sion but a particular individual. Government action and decisions upon asylum claims thus “depend as much on personality as on policy” (Mountz 2010:89). In addition, institutional context plays a key role. Houle’s (2002) description of discretion as a sponge that absorbs the values, assumptions, and preferences to which it is exposed illustrate the importance of the context in which civil servants make decisions. Since caseworkers’ attitudes and approaches can affect decisions, the fact that those attitudes are not necessarily stable but may change over time (for example, through increasing socialization in the organization and internalization of its values) should also be considered. Some officials note that they viewed things differently when they started working at the FAO as opposed to now, with several years of experience. As mentioned above, for example, training can be eye-opening, leading to a reconsideration of established approaches and routines.

The sociology of legal judgment provides some insight into the issue of decision makers’ individual approaches. Following Habermas (1996), legal legitimacy is found in the process of law rather than in its content; judicial decisions can thus be understood as “part of a co-operative search for truth which establishes legitimacy through deliberation rather than legal certainty.” (Morris 2010:93) Whereas Dworkin (1986) argues that the principles must be applied in view of the coherence in the law, the critical perspective conceives of law as inherently contradictory and conflictual. Habermas chooses a path between these two positions. Acknowledging Dworkin’s argument that principles are often engaged in the application of law, Habermas “emphasizes the plurality of judicial opinion and the role of deliberation in forming a judgment” (Morris 2010:93). According to Habermas (1996:223–24), “a proceduralist understanding of law ... reckons from a start with discursively regulated competition among different paradigms.” The “procedural paradigm” views the court as providing a deliberative forum for determining the prevailing interpretation of a rule, which can involve a dialog between judges both within and across cases (Morris 2010:98). Similar to the majority of authors of the relevant sociological literature on judgment, Ortmann and Morris also concentrate on judges’ power of decision as a special case. Deliberations on the (binding) decisions of administrative authorities are rather rare. Nevertheless, the findings of this research suggest that many of the observations concerning the practices of judges can be regarded as equally valid for decision making at the administrative level, even if somewhat attenuated.

As discussed above in the context of socialization within the organization, Morris (2010) differentiates between the “cosmopolitan” and the “national” paradigms, which represent ideological predispositions in judicial asylum decision-making. While there are certain prevailing paradigms within the organization, officials also have their own viewpoints. Considering caseworkers’ attitudes and approaches, organizations have the opportunity to fill posts strategically; “ethically qualified” persons can be positioned at sensitive places, and more hardened persons or those more loyal to the regime are deployed where they are needed (Ortmann 2010).

The findings also suggest that individuals’ approaches and strategies are closely related to power relations. According to Crozier and Friedberg (2014[1977]), the analysis of actors’ strategies reveals the characteristics of the underlying “game” by

which all (organized) social action is framed. Since this “game” is based on the existence of zones of uncertainty, controlling sources of uncertainty means having the power to affect others’ room for maneuver. From this perspective, the asylum procedure can be regarded as a strategy game in which the involved actors have different “stakes” and take certain risks. However, a risk usually refers to a predictable event for which the chances of occurrence and costs of damage can be estimated. This does not hold true for the asylum procedure since the outcome is (almost) always open and chances are difficult to calculate. The sources of uncertainty, and with them others’ room for maneuver, are thus largely controlled by the decision makers.

5.2.1 The Claimant’s Performance and the Subjective Dimension in Processing an Asylum Application

Formally, decision making can be understood as an interplay of facts and norms. However, when considering caseworkers’ informal practices, it seems important to take into account the subjective dimension of deciding upon asylum claims. Both officials’ discretion in interpreting the law and applying it to a particular case and the face-to-face interaction with the claimant may influence the decision. What role do impressions (for example, regarding a claimant’s behavior in the interview) play in this context? How can the relation between facts, norms and this subjective dimension be characterized and how are these three factors weighted in the decision-making process?

As Wagenaar notes (2004), dialog constitutes the act of judging. “Practical judgment” can be regarded as an integral part of administrative practice, involving observations, beliefs, convictions, and feelings in the context of the organizational environment. At the same time, any act of judging is constitutive of the environment or community from which it arises. “By entering into a dialogue with other members of that community, be they colleagues or clients, the administrator discovers what unites her and separates her from the other members” (Wagenaar 2004:652). The excerpt of an interview with a relatively new caseworker illustrates the impact of this verbal and non-verbal dialog between official and claimant in the scope of an asylum interview and highlights the subjective dimension of decision-making.

- O: Mostly, before I actually write the decision, I already know how I will decide. And then, I actually try to rather incorporate the impressions from the interview. And which facts and circumstances emerge ... That’s actually rather unspectacular. [chuckling]
- I: Not for me. [chuckling] ... So, you mean the atmosphere in the interview or the interhuman dimension?
- O: I also perceive that very strongly, yes. I also already realized that in the beginning that that influences one very strongly. So how a person acts and their appearance also does have an effect, yes. Of course, in the first place, what has to be judged is what the person says, so the content, but at the same time, yes, at times it can

also be derived from the behavior if someone now takes it seriously or not, for example.

I: What are these indicators, for example, where you think that's strange somehow?

O: Well, that's not so easily stated. So, that's really a purely subjective impression, yes. It's difficult, there are very many different things; I couldn't specify it at all now.

I: Depending on the situation?

O: Right, exactly, also one couldn't say, one can't generalize and say, if now someone just keeps saying that he doesn't know anything or can't provide any information that immediately or that the behavior would allow any conclusions, let's say it like that.

...

O: I have to add that in both cases [discussed before], I started out from what they had said and let that just slip in in addition, let's say. I also think when one is aware oneself that something like that can influence one, then one is much better prepared

I: Yes, sure, when that's somehow reflected.

O: Yes, in a way. Especially, one realizes quite quickly if one has sympathy or not. Or antipathy.

(Interview with Thomas; O ... official, I ... interviewer)

The analysis of this interview passage provides insight into the complexity of the decision-making process, particularly regarding the officials' impressions and conclusions. Whereas Thomas distinguishes between the actual decision on the claim and the process of writing the decision down for the caseworker notification, the excerpt focuses on what influences the caseworker in this writing process (and potentially in the decision-making process). In developing the decision notification, he distinguishes two elements: the facts and circumstances of the case and his impressions from the asylum interview, particularly regarding the claimant's appearance and behavior. Although he insists that, above all, the facts and circumstances of the case – that is, the content – must be judged, he also thinks that his impressions have a certain weight. Using the phrase “at the same time,” he first implies that the two dimensions are equally important. Later, however, the official emphasizes that the facts are his starting point and that his impressions are used as a complement. While alluding to the idea that it would be illegitimate to base a decision equally on impressions and on “facts,” he does not claim that his impressions of a claimant's behavior and appearance are irrelevant in dealing with an application, as might be expected in the allegedly impersonal bureaucracy context.

Thomas finds that a person's appearance and behavior in the interview influence him “very strongly.” Emphasizing that the impression he gains in an interview is purely subjective, the caseworker thinks it is advantageous that he is conscious of the fact that he can be influenced by a claimant's performance. This consciousness may make him feel that he is in control of these processes and able to handle them. Nonetheless, the official draws conclusions from his impressions, noting, for

instance, whether the person “takes it seriously or not.” While he does not explain what is meant by “taking it seriously” in this context, he is presumably referring to whether the claimant makes an effort in the interview to be taken seriously by the official, thereby giving importance to the procedure.

Although Thomas is certain that it is sometimes possible to derive conclusions from a person’s behavior, he notes that conclusions cannot be generalized. He is not able to specify a particular behavior that would lead him to a certain conclusion. He knows that there are different elements of a person’s behavior that can have an impact on him, but he notes that there is not a fixed scheme regarding the direction of that impact. According to the official, it is not possible to automatically reach a particular conclusion, for example, when a claimant does not provide any information or keeps saying that she does not know what he wants to know.

Highlighting the performative aspects of the asylum interview, Veronika stresses the problem associated with determining credibility or incredibility on the basis of a claimant’s linguistic capabilities.

It’s always difficult. Let’s say you want to assess all that neutrally. Now someone is here who can’t really express himself well because he never learned it, because he didn’t need it; he talks haltingly and because of that, the whole assertion maybe doesn’t come across so well. Now you have another case, he is articulate, is well prepared ... and trots out a false story really skillfully ... then you almost don’t have a chance. And that’s also difficult, so, someone, let’s say, does he now lack credibility simply because he stutters, because he doesn’t formulate an answer, or is he just so simpleminded that he really can’t express what the situation actually is? (Veronika)

This quotation illustrates that an asylum claimant’s performance in the interview can be seen as a key factor in the procedure: decision making may be impacted not only by her appearance and behavior but also by her linguistic capabilities. The important aspect in this regard is how caseworkers evaluate the performance; the quotation shows that both *what* the claimant discloses and *how* she does so are relevant. Referring to the naturalization procedure, McKinnon (2010: 218) finds “that key audiences focus on dimensions of credibility that are performed through the conventions of speaking well, rationally, and evenly.” Access to a legal status thus increasingly depends on individuals’ “ability to appear coherently credible, grounded on the performance conventions of good speech, narrative rationality, and embodied affect” (ibid:205). Claimants’ performance and how they “orchestrate” their claims (Noura 2006) in the asylum interview was also highlighted in the above findings.

The officials do not discuss the consequences of their impressions and conclusions. If the official determines that a claimant does or does not take the procedure seriously based on her behavior or if he realizes that he has or lacks sympathy for a person, what does that imply? The caseworkers do not mention the consequences of the fact that claimants’ behavior has an impact on them. The questions thus remain open: do these behaviors have an impact on the decision or on the argumentation of the decision, or are the impressions and conclusions just a byproduct that does not require any further attention? The relation among impressions, conclusions and what the caseworker eventually incorporates into the decision notification remains

unclear. Nonetheless, the findings highlight “the prevalence of subjectivity involved in state practices” (Mountz 2010:89). As Kagan (2003:375) notes, refugee status determination is a “human process.” Therefore, credibility assessment is, to a certain extent, inevitably prone to subjectivity in a system where “emotional impressions of a person and ‘gut feelings’” (ibid), intuition (Jubany 2017) or instinct (Dubois 2010) can have a considerable impact.

According to Habermas (1996:178), judicial decision making involves a combination of two types of procedures: the institutionalized legal procedure and an argumentation process that evades the internal structure of legal institutionalization and follows its own logic. Codes of procedure enable and institutionalize legal discourses without being able to standardize the argumentation as such. “Legal procedures define, protect and structure only the spaces in which argumentations are supposed to take place” (ibid). While the embedding of discourses in legal procedures does not affect their internal logic, the procedural institutionalization subjects discourses to certain temporal, social and technical restrictions. Procedural norms regulate, for example, participation and role allocation as well as the range of topics and the course of argumentatively controlled processes of the formation of opinion and will (ibid). In the asylum procedure, caseworkers must justify their decisions in the written notification. They are required to adhere to a formal structure, but they are free to develop and substantiate their individual argumentation. This freedom makes it possible to draw on impressions and other subjective elements, although these elements will have to be expressed in an institutionally authorized way, which involves a process of transforming informality into formality.

5.3 Theorizing Officials' Practices: Rule Application and Decision Making

The findings discussed in this section illustrate the structural contradiction of the omnipresent legal framework, on the one hand, and the importance of caseworkers' individual approaches and strategies, on the other hand. This is the dilemma of autonomy versus control, identified by Hjørne et al. (2010:303) on the basis of the works of Prottas (1979) and Lipsky (2010[1980]). Speaking in Parsons' (1951) terms, this dilemma can be expressed as a necessary decision between ascription and achievement. This orientation alternative concerns the evaluation of whether the situation requires action according to the relevant rules or whether an individual achievement is possible or even necessary. An orientation toward ascription could imply work to rule – a practice often attributed to the administrative field. By contrast, an orientation toward achievement focuses on the possibilities off the beaten path, highlighting the individual and “creative” aspect of officials' work.

Structuration theory provides further insight by taking a broader perspective on applying rules and making decisions. Applying general rules to concrete cases is one of public administrators' main tasks. Rules can be understood as “generalizable

procedures applied in the enactment/reproduction of social practices” (Giddens 2011:21). Verbally formulated rules such as law books, organizational instructions or job announcements – the “blueprints” of formal organization (Ortmann et al. 2000:329) – are not understood as rules but as “codified interpretations of rules” (Giddens 2011:21). Rules, including the formal, explicitly formulated (codifications of) rules, are only completed in their situational enactment. The seemingly secondary application derived from the formal rule is actually constitutive to the meaning of this rule. Giddens conceptualizes this enactment of rules and resources in a specific situation with the particular background and competency of the actor realizing the action as a “modality” mediating between action and structure (Ortmann et al. 2000:331).

Following Ortmann (2003), deciding and applying a rule are closely connected concepts. Deciding upon a specific asylum claim involves more than simple deduction from a general rule. For the rule to maintain its generality, it has to be void to a certain extent, and this void can only be filled in and through the application of the rule. However, the way to fill this void cannot be deduced from the rule. The necessary void of a rule can only be complemented and filled in situ – a complementation that takes on the character of replacement (Ortmann 2003:135). Decision criteria are thus interpreted and modified in view of the situational and contextual circumstances. As the author notes, “[A]ims and orders of preference do not exist *before* and *independently from* the decision but are only established *through* the decision” (ibid:40, emphasis in orig.).

The interviewed caseworkers defined the laws as the limits of their leeway; at the same time, they are subject to interpretation. It becomes clear that although the limits of their discretion and room for maneuver – the “zones of tolerated difference” (Ortmann 2003) – are formally defined (“by law”), they are only formed through the actual action, by routines. Referring to the administrative field, Prior (2004) argues that independently of the degree to which a categorization system is rule based, administrators always have to interpret the rules anew. Nevertheless, if those who categorize are asked to explain their reasoning, they most often invoke rule-based systems.

Decision criteria are generalizable procedures of practice and thus are subject to continuous self-deconstruction. In view of the situational and contextual circumstances, decision criteria are interpreted, reinterpreted, modified, complemented or even replaced. New conditions, obstacles, opportunities, and technologies evoke ever-new changes of aims, shifts of aspiration levels, and modifications of decision criteria. Since every decision is based on a particular case, the decision maker has to realize a constructive interpretation of her decision rule anew each time. She applies the rule and replaces it in order to create a “new” one – but the deviation from the old rule is usually regarded as insignificant. The maintenance of this insignificance of deviation from the old is one of the main aims of organization (Ortmann 2003). Similarly, Friedberg (1995) argues that actors in organizations necessarily act counter to official norms and precisely thereby guarantee the continuation of organizational procedures when these norms are characterized by conflicting goals, rigidity or generality that is too great or little.

The praxeological perspective also highlights how socialization in the organization rather than official rules inform officials' practices. Practical judgment refers to the relationship between the general rule and the particular case as well as the given circumstances of having to act on the situation. Here, knowledge, as a condition for and consequence of acting, helps the official to orient herself in the particular situation. "Knowing" then refers to the embodiment and enactment of this knowledge (Wagenaar 2004:651). Being able to "understand" a situation does not imply that the official follows static organizational goals but rather that she draws on background knowledge and experience based on a sense of what the situation requires. It is not necessarily an analytic understanding that settles the case once and for all but a more holistic and unarticulated understanding that is developed in the course of working in a particular organization on a specific topic such as immigration or asylum. This understanding, which suggests meaningful action, is flexible and open-ended, allowing for situation-specific adaptation. In addition, finding a feasible (practicable), acceptable (in case of a complaint) and rational (in accordance with the law) solution to a problem or a case is a highly interactive process (ibid:646). As Wagenaar (ibid:652) notes, it is an organization's "specific social-cultural-moral community that provides the categories, situations, norms, standards, and exemplars that guide her [an administrator's] assessment of situations."

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