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Your income is too high, your income is too low: discretion in labour migration law and policy in the Netherlands and Macau

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ABSTRACT

Labour migration policies create social tensions over the functioning of national labour markets, the interests of the local workforce, employers' needs and migrant workers' rights. This makes legislating on labour migration a balancing act, which often leads to legislation which grants wide discretion to bureaucrats in assessing labour market needs or other public interest indicators. We question whether, and if so how, the use of discretion in labour migration law transforms our concepts of migration and – possibly – membership. Central to our analysis is the fundamental question of how discretion may be properly limited. The existence of acceptable levels of transparency, accountability and representativeness in policy- and law-making processes is the first line of defence against arbitrary exclusion of 'the other' from membership. We show how discretion in labour migration policy is not determined so much by regional context (e.g. the EU). We do this by presenting two case studies on jurisdictions from very different regional contexts: the Netherlands and Macau SAR. These jurisdictions are representative of the persistent pressure exerted by governments to overcome obstacles encountered in the rigid statutory wording and mould the daily application of migration law to their perception of public interest. We use the globally relevant concept of income, understood sometimes as a barrier to migration and sometimes as a means to protect the migrant, and inquire on the recurrent use of discretion in setting the level of income required for migration. We show how discretion is used to label income as either too high or too low. In this respect, the use of discretionary power calls into question the principles of participation, transparency, affectedness, and accountability. Income requirements and their enforcement present themselves not as a means to protect migrant workers but more like another instrument of exclusion from – potential – full membership.

KEYWORDS Labour migration law; income requirements; discretion; arbitrariness; judicial accountability; membership; highly skilled migrants; sponsor; Macau; the Netherlands; EU migration law

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1. Introduction

Globally, countries compete to attract highly skilled migrants in order to position themselves as dynamic knowledge-based economies, in what is referred to as the 'battle for brains' or 'war for talent'.[1] Competition also exists for less skilled migrants, as countries need them in sectors such as construction, hospitality, agriculture, or domestic work, which justifies extensive recruitment policies currently in place in different regions of the world. Labour migration policies embodying such competition create social tensions over the functioning of national labour markets, the interests of the local workforce and employers' needs, as well as over the contentious issue of the welfare state's role and level of protection of migrant workers. This makes legislating labour migration a balancing act, which often leads to designing systems where legislation grants wide discretion to bureaucrats in assessing labour market needs or other public interest indicators. Albeit flexible, such systems create an atmosphere of uncertainty and frustration amongst migrants and their employers alike.

Discretion in labour migration policy is not determined primarily by the regional context to which a given legal system belongs, there it is not a variable of geography. Interestingly in this respect we discern similar patterns in two very different regional contexts. In the law and practice of both the Netherlands, a European Union member state, and Macau, a Special Administrative Region (SAR) of the People's Republic of China, discretionary powers are similarly used to set and test admission requirements for migrant workers. Income requirements are paradigmatic cases of loose regulation that allows the exclusion of migrants on the basis of the argument that the salary offered to aspiring labour immigrants would be either too low or too high, based on vaguely defined local labour market rates. Distinct actors' interests and actions, such as employers' perceived economic need for migrant workers and their willingness (or not) to pay the 'right' income; the local labour unions' political pressure to keep jobs available for local workers and keep salary levels high; the State's choices in shaping migration policy; and even the mindset of bureaucrats while using available discretionary powers find common ground in the discretionary tool of income requirements in labour migration law.

The study of two jurisdictions so far apart – the Netherlands as an example of a European liberal democracy with increasingly reduced national discretionary powers in the field of migration in general, as well as specifically in the field of labour migration, due to EU law, and Macau as a very specific

[1] Jeroen Doomernik, Rey Koslowski and Dietrich Thränhardt, *The Battle for the Brains: Why Immigration Policy Is Not Enough to Attract the Highly Skilled* (Brussels Forum: Paper Series 2009); William S. Harvey, 'Winning the Global Talent War: A Policy Perspective' (2014)5(1) Journal of Chinese Human Resource Management 62–74.

case of a capitalist economy falling under Chinese sovereignty, but with autonomy to design its own migration policy – provides an illustration of law-making practices embracing discretion in the field of labour migration. This topic has received only scant attention in academic literature despite its prominence in the world of law- and policy-making and its potential economic and labour market impact.[2] In this contribution, we begin to close such a gap.

The article starts by presenting a conceptual overview of the principle of discretion contextualising it in a wider debate on legal certainty, arbitrariness, flexibility and legitimacy of law-making and legal discourse (Section 2). It is followed by an explanation of the legislative choice for, and development of, discretion in the Netherlands and Macau's labour migration policies (Section 3). The final section provides a discussion and concludes by exploring whether, and if so how, the use of discretion in labour migration law transforms our concepts of migration and – possibly – membership.

2. The principle of certainty and discretion in labour migration law-making

Nearly a century ago, American legal scholar Ernest Freund pointed out the differences between the legal and political discourses in terms of language accuracy. For him,

> [t]he language of the law always aims at precision, while the language of politics favours vagueness and ambiguity, for the former is chosen with a view to the ultimate arbitrament of a court of justice, the latter with a view to immediate effect upon sentiment or opinion.[3]

Freund also identified different grades of certainty in the language of statutes, the lower of which provides the law with a substantial degree of flexibility, or indefiniteness if one sees it in a less favourable way. Flexibility can be perceived as a characteristic that guarantees the longevity of legal norms, helping them stand the test of time. As such, it can contribute to the predictability[4] and stability of the law and reinforce an overall idea of justice,

[2]On EU member states' discretion in relation to free movement rights, see Elspeth Guild, 'Competence, Discretion and Third Country Nationals: The European Union's Legal Struggle with Migration' (1998) 24(4) Journal of Ethnic and Migration Studies 613; on bureaucrats and discretion, see Norbert Cyrus and Dita Vogel, 'Work-permit Decisions in the German Labour Administration: An Exploration of the Implementation Process' (2003) 29(2) Journal of Ethnic and Migration Studies 225; Franck Düvell and Bill Jordan, 'Immigration Control and the Management of Economic Migration in the United Kingdom: Organisational Culture, Implementation, Enforcement and Identity Processes in Public Services' (2003) 29(2) Journal of Ethnic and Migration Studies 299.

[3]Ernest Freund, 'The Use of Indefinite Terms in Statutes' (1921) 30 Yale Law Journal 437.

[4]Ofer Raban argues that 'as the predictability of application [of legal rules to given cases] is concerned, vague legal standards are often better in allowing people to predict the consequences of their actions', at 'The Fallacy of Legal Certainty: Why Vague Legal Standards May be Better for Capitalism and Liberalism' (2010), 19 Public Interest Law Journal 190.

paradoxes already exposed in literature.[5] Nevertheless, even when it represents a deliberate option, flexibility ought to pass the test of legal certainty as a principle of proper law-making. One might say 'a legal rule is "certain" to the extent that it proceeds to a definite legal conclusion without reliance on contextual judgment'.[6] Such a statement, however, does not shed light on the multitude of factors on which such legal conclusion depends. Intelligibility of drafting, terminological consistency, internal coherence and harmony within the legal system[7] are just but a few principles and good practices of legal drafting that enhance the predictability of the law.

However, even if quality in law-making is guaranteed, legal certainty might be hindered by legislators' sovereign power to elect flexibility as 'a deliberate object of legislative policy'.[8] Then, decision-makers gain a wide margin of discretionary powers to decide according to their own judgment,[9] inasmuch as 'statutes deliberately do not bind decision-makers to one correct decision, but leave [them] discretion to reach their own decisions based on their own responsibility and independent choice'.[10] Such legislative policy often uses discretionary powers together with indefinite normative[11] legal concepts. These are legal terms requiring a judgment *or* prognosis that intermediates their application to a specific factuality. Such is the case of concepts like 'public order', 'general wellbeing of the labour market', 'humanitarian reasons' or, in our case study of the Netherlands, 'economic interest'. Here, bureaucrats' freedom of action exists within the limits of discretion envisaged in the law and as long as the legality of the decision and its procedural propriety are guaranteed. Della Torre explains that 'the broader the normative standards and the more retained the judicial scrutiny, the larger the official's margin of manoeuvre will be'.[12]

In turn, James Maxeiner highlights the difference between indefinite legal concepts and discretion: 'The former leaves room for judgment [by the decision-makers] in the prerequisites of action, while the latter provides for freedom of action.'[13] So, even if the prerequisites are fulfilled, the

[5]Patricia Popelier, 'Five Paradoxes on Legal Certainty and the Lawmaker' (2008) 2 Legisprudence 47; James R. Maxeiner, 'Legal Certainty: A European Alternative to American Legal Indeterminacy?' (2007) 15 Tulane Journal of International and Comparative Law 559; Tom Bingham, *The Rule of Law* (Penguin Books 2011) 50.

[6]Shawn J. Bayern, 'Against certainty' (2012) 41 Hofstra Law Review 55.

[7]Winfried Brugger, 'Concretization of Law and Statutory Interpretation' (1996) 11 Tulane European and Civil Law Forum 211.

[8]Freund (n 3) 438.

[9]Wayne Joseph Palmer, 'Discretion and the Building of Institutions; A Critical Examination of the Administration of Indonesia's Overseas Labour Migration Programme' (PhD thesis, University of Sydney 2014) 47, <https://ses.library.usyd.edu.au/handle/2123/11989> accessed 18 April 2018.

[10]Maxeiner (n 5) 561.

[11]As opposed to empirical indefinite legal concepts. Mahendra Pal Singh, *German Administrative Law in Common Law Perspective* (Springer-Verlag 1985) 96; Maxeiner (n 5) 560–61.

[12]Lucia Della Torre, 'State's Discretion and the Challenge of Irregular Migration – The Examples of Permanent Regularization Practices in Spain and Switzerland' (2017), nccr-on the move, Working Paper #12, 11.

[13]Maxeiner (n 5) 561–62.

administration has a choice not to act. Both discretion and indefinite normative legal concepts are legislative tools concurring towards reaching a balance between flexibility and stability of the law,[14] in a process that intertwines political intent, legal drafting, administrative practice and judicial control. Yet, if those tools are abused, they might also jeopardise the principle of legal certainty in its role of safeguard against government arbitrariness.[15]

Discretion in migration law is a consequence of state sovereignty and the prerogative it implies of deciding admission policies: States exercise an almost 'absolute' discretion, an unfettered authority, in shaping their own admission policies, i.e. in deciding who can qualify as a migrant and, hence, who benefits from constitutional and international norms and standards on the treatment of migrants.[16] Therefore, from the standpoint of state discretion,

> a receiving state rightly has broad discretion to choose which, if any, prospective immigrants to admit, constrained only by the imperative to avoid selecting immigrants according to certain objectionable selection criteria. Within a broad range, a receiving state has an unqualified right to admit or exclude prospective immigrants.[17]

In labour migration, the prerogative to choose is exercised, for instance, through the implementation of skill-selective immigration policies, the prioritisation of certain countries of origin, or the election of economic sectors that can receive migrant labour.[18] According to David Miller,

> [t]he criteria used to select among economic migrants must connect plausibly to the general goals of the political community. It is legitimate to favour those who are predictably going to be more valuable members of the community, for example, those who will bring in skills for which there is a high demand, or those who can contribute actively to its cultural or political life.[19]

[14]Elina Paunio, 'Beyond Predictability – Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order' (2009) 10(11) German Law Journal 1469.

[15]Popelier (n 5) 52–53.

[16]Fundamental rights regimes represent a constraint to states' prerogative in determining selection criteria and gauge their legitimacy. Aoife McMahon, *The Role of the State in Migration Control: The Legitimacy Gap and Moves Towards a Regional Model* (Brill Nijhoff 2016) 68–78.

[17]Caleb Yong, 'Justice in Labour Immigration Policy' (2016) 42(4) Social Theory and Practice 818. According to Young, 'immigration restrictions in general are not objectionable for the reason they violate requirements of justice', as long as they correspond to legitimate societal needs (825).

[18]This prerogative does not represent an absolute power. Decision-makers have to comply with procedural and substantive standards and are requested to justify the appropriateness of their decisions. Moreover, they have to comply with international obligations bounding the state and, ultimately, with fundamental rights of every person – including prospective migrants – of being treated according to the principles of equality and nondiscrimination. The judgment of the European Court of Human Rights in *Abdulaziz, Cabales and Balkandali v United Kingdom* [1985 ECHR 7] is a classic example of the limits to discretion in legislating admission criteria. In *Ben Alaya v Bundesrepublik Deutschland* [ECLI:EU:C: 2014:2187], the EU Court of Justice held that, given the exhaustive list of grounds for rejection, Member States are obliged to admit to their territory a TCN who meets the conditions for admission.

[19]David Miller, 'Justice in Immigration' (2013) Nuffield College Working Paper Series in Politics 29. A commonly used criterion is 'the perceived economic contribution of would-be migrants'. See Andrew Geddes and Oleg Korneev, 'The State and the Regulation of Migration', in Leila Simona Talani and

Discretion in labour migration is not necessarily undesirable. It confers the authority to reach 'individualized justice'[20] since 'inflexibility built into the system would make no allowance for the exceptional case calling for special treatment, which would itself be a source of injustice'.[21] As tautological as it might sound, the assessment of the role of discretion in labour migration law is contingent on the way discretion is exercised. Besides being inevitable, it can be positive or negative according to the ultimate aim of state action and the values underlying it.[22] The fundamental question, then, 'is not *whether* discretion ought [to] be altogether eliminated but *how* discretion may be properly limited'.[23]

The existence of acceptable levels of transparency, accountability and representativeness in policy- and law-making processes is the first line of defence against arbitrariness.

Transparency of the legislative process is paramount to identifying the scope of discretion intended by the law, which requires full disclosure of policy aims and the underlying (public) interests involved. In this respect, transparency relies heavily on the accessibility of proper information, which shall include in the case of labour migration a clear identification of employers' and migrant workers' rights and obligations. The EU Intra-Corporate Transfer Directive, for instance, obliges the EU member states to make 'easily accessible to applicants the information on all the documentary evidence needed for an application and information on entry and residence, including the rights, obligations and procedural safeguards'.[24]

With regard to *accountability*, we follow Bovens' narrow definition of the concept: 'The obligation to explain and justify conduct.'[25] In its legal

Simon McMahon (eds), *Handbook of the International Political Economy of Migration* (Edward Elgar Publishing 2015) 59; and, on the economic criteria for admitting migrant entrepreneurs, see Tesseltje de Lange, 'Welcoming Talent? A Comparative Study of Immigrant Entrepreneurs' Entry Policies in France, Germany and the Netherlands' (2018) 6 Comparative Migration Studies 27.

[20]The concept of 'individualized justice' is tributary of the Aristotelian idea of equity, an early recognition that 'rules could, by reason of their generality and rigidity, fail to provide an appropriate result in some cases', James Allsop, 'Rules and Values in Law: Greek Philosophy; the Limits of Text; Restitution; and Neuroscience-Anything in Common?' (2017) Hellenic Australian Lawyers Association – Queensland Chapter at Brisbane 7.

[21]Bingham (n 5) 50.

[22]For example, a 'compassionate' admission policy might use discretionary powers to answer humanitarian considerations underlying an individual entry request, whereas restrictive policies would use such powers to deny the exceptional nature of individual cases in the context of tight control on immigration. Allison Brownell Tirres, 'Mercy in Immigration Law' (2014) 2013 Brigham Young Law Review 1563.

[23]Giacinto della Cananea, 'Reasonableness in Administrative Law', in Giorgio Bongiovanni, Giovanni Sartor and Chiara Valenti (eds), *Reasonableness and Law* (Springer 2009) 296.

[24]Directive 2014/66/EU of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer. On the topic, Paul Minderhoud and Tesseltje de Lange (eds), *The Intra Corporate Transferee Directive: Central Themes, Problem Issues and Implementation in Selected Member States* (Wolf Legal Publishers 2018).

[25]Mark Bovens, 'Analysing and Assessing Public Accountability. A Conceptual Framework' (2006) European Governance Papers (EUROGOV) No. C-06-01 9; Madalina Busuioc, *The Accountability of European Agencies: Legal Provisions and Ongoing Practices* (Eburon Academic Publishers 2010) 31–34.

dimension (as opposed to its political, administrative or social forms[26]) accountability provides the opportunity for decisions to be judicially syndicated through the reconstruction of the decision-making mental process, as well as the assessment of the respect of the legal mandate given to officials.[27]

Lastly, in respect of *representativeness*, migration law faces a dilemma in terms of its democratic legitimacy: Those who are most directly affected by admission policies are distant from the law-making processes affecting them.[28] The principle of affectedness, considered a fundamental principle of democratic government,[29] is inoperative in respect of those not yet present within national borders or not belonging to the national community. Prospective migrants' representation mostly relies on national trade unions, which have to deal with conflicting interests over the impact of labour migration on the local workforce. It is also dependent on the employers' capacity to participate and influence policy- and law-making processes. Employers, as co-beneficiaries of admission regimes, can 'mediate between the national interests in migration control and the immigrants' interest in access'.[30] Despite how feeble this participation by proxy is, the indirect representation of prospective migrants can indeed enhance the legitimacy of labour migration regimes and contribute to create better opportunities in terms of membership for those admitted within national borders.

3. Income requirements as a discretion fuelled selection tool

Income requirements play an important role in the 'management' of international migration and mobility. First, they represent important barriers for family reunification,[31] permanent residence or – key to our study at hand –

[26]Bovens (n 25), 15–18. Bovens distinguishes accountability from concepts like transparency, responsiveness, participation, and controllability.

[27]The existence and scope of judicial oversight is a relevant additional indicator of the legitimate use of the wide discretion granted to decision-makers in migration law. According to Bingham, 'the rule of law does not require that official or judicial decision-makers should be deprived of all discretion, but it does require that no discretion should be unconstrained so as to be potentially arbitrary. No discretion may be legally unfettered', Bingham (n 5) 54. The thorny issue of judicial review of discretionary powers legally conferred to decision-makers is out of the limited scope of this text but suffice it to say that case law and legal doctrine have evolved towards the scrutiny of such powers through general principles of law like those of reasonableness and proportionality. Alec Stone Sweet and Jud Mathews, 'Proportionality, Judicial Review, and Global Constitutionalism', in Giorgio Bongiovanni et al. (eds), *Reasonableness and Law* (n 23) 173; Wojciech Sadurski, 'Reasonableness and Value Pluralism in Law and Politics', in Giorgio Bongiovanni and others (eds), ibid 129.

[28]Tesseltje de Lange, *Staat, markt en migrant. De regulering van arbeidsmigratie naar Nederland 1945–2006* (BJU 2007).

[29]Patricia Mindus, 'Citizenship and Arbitrary Law-making: On the Quaintness of Non-national disenfranchisement' (2016) 7(13) Società Mutamento Politica 105.

[30]Bill Jordan, Bo Stråth and Anna Triandafyllidou, 'Comparing Cultures of Discretion' (2003) 29(2) Journal of Ethnic and Migration Studies 375.

[31]On the extremely high-income requirements set for family migration in the UK, see Helena Wray, Eleonore Kofman, Saira Grant and Charlotte Peel, *Family Friendly? The Impact on Children of the Family Migration Rules: A Review of the Financial Requirements. Project Report* (2015), Children's Commissioner. See also, ECJ case law such as *Chakroun* and *Kachab* on how income requirements should not become

access to the labour market. Although income requirements can be exclusionary, they can also intentionally be important safeguards for migrant workers. They can act as preventive instruments against abuse in labour relations, guaranteeing that migrants do not receive salaries below national standards, which could also negatively influence the price for labour negotiated through industrial relations. Building on this globally relevant concept of income as a barrier to migration, or protector of the migrant, and the often use of discretion in setting the level of income required, we now turn to our case studies: The Netherlands's implementation of a skilled-based admission scheme and the discretion granted to the administration to define the role of income requirements within it; and Macau's drafting of labour migration legislation and how intentionally income requirements were placed among a set of vague criteria.

3.1 The Netherlands

The Treaty on the Functioning of the EU bestows the regulatory power on the Union to regulate labour migration into its borders. By now, several EU Directives deal with labour migration and, as time progresses, they leave less discretion to the Member States to design national schemes. The, albeit slow, renegotiation of the Directive for the admission of highly skilled migrants – the Blue Card Directive[32] – is illustrative of this trend. While the original Directive allows for the Member States to keep their national admission schemes, it is expected that under the new Directive Member States will no longer have the freedom to do so. Additionally, EU law already sets the stage of many of these national schemes, as they come under the aegis of the Single Permit Directive.[33] According to this Directive, employers and their migrant workers are entitled to a single application procedure for work and residence permits, transparent and fair procedures and legal certainty through reasoned decisions.[34] It is against this 'constitutional' backdrop that the Dutch example of the use of discretionary powers should be understood. The framework for discretion in the admission of migrant workers is established by applicable rule of law principles, such as legal certainty, proportionality, and the prohibition of arbitrariness as mentioned before. More than legal principles, such framework encompasses a rights-based culture that is commonly viewed as intrinsic to Dutch society as a liberal democracy.

barriers hindering family life indefinitely [Cases C-578/08 (*Rhimou Chakroun v Minister van Buitenlandse Zaken*) and C-558/14 (*Mimoun Khachab v Subdelegación del Gobierno en Álava*)].

[32]Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment.

[33]Council Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

[34]Tesseltje de Lange, 'The Single Permit Directive: A Limited Scope, a Simple Procedure and Limited Good Administration Requirements', in Paul Minderhoud and Tineke Strik (eds), *The Single Permit Directive: Central Themes and Problem Issues* (BJU 2015) 5.

The Dutch highly skilled migrants scheme (*Kennismigrantenregeling,* hereafter referred to as the HSM-scheme) is a popular scheme under which, in 2017, 13.920 single permits for work and residence were granted.[35] It was implemented in 2005, designed to make the Netherlands the most attractive knowledge economy in the EU, for which non-EU knowledge workers were seen as essential.[36] The legislator chose the prospective salary as the *only* selection criterion.[37] The scheme applies to migrant workers in an employment relation only and does not cover self-employed or freelance workers (translators, lawyers, etc.) whose income may vary hugely from month to month and year to year.[38] The salary offered had to meet an annual threshold (€ 45.000 for over 30 and € 32.600 for younger than 30), in which case the 'national labour market' test was waived and the worker was deemed to be of value to the employer *and* therefore also to the Dutch economy just on the basis of income.[39] Skill levels had explicitly not been added to the entry conditions because

> skill levels as such are not representative for the labour productivity of and innovations brought forward by the migrant worker. Medium skilled migrant workers can be as innovative for the small and medium enterprises and thus for the Dutch economy.[40]

If the annual threshold was met, the permit *may* be granted, the regulation said. The debate leading to the HSM-scheme made clear that the 'may clause' was not meant for any discretion regarding the income requirement but could be needed for rejections based on other pertinent reasons, such as public order or public health.

[35]Press release, 'Immigration and Naturalisation Service', 24 October 2018, <https://ind.nl/nieuws/Paginas/Werkgevers-bestraft-om-gesjoemel-met-kennismigranten.aspx>.

[36]Parliamentary Documents 2003/04, 29 200 VI, nr. 164 on 'Admission of knowledge workers'. Dutch Official Journal (*Staatsblad)* 2004, 481. Soccer players, prostitutes and religious leaders are excluded from the scheme.

[37]However, these rules only apply to employers that had been deemed trustworthy by being awarded a status of 'trusted sponsor'. To become a trusted sponsor, the solvability of the sponsor, hence its capability of fulfilling the salary requirements, is considered in detail. In 2018, 4730 employers were eligible for the use of the scheme.

[38]Self-employed and freelance migrant workers qualify as 'entrepreneurs' under Dutch migration law, for which a points-based system applies. See de Lange, 'Welcoming Talent? A Comparative Study' (n 19) 27.

[39]The scheme is an example of a public-private partnership in the management of labour migration. See Tesseltje de Lange, 'Public-Private Regulation of Labour Migration: A Challenge to Administrative Law Accountability Mechanisms', in Marion Panizzon, Gottfried Zürcher and Elisa Fornalé (eds), *The Palgrave Handbook of International Labour Migration* (Palgrave Macmillan 2015) 118; Tesseltje de Lange, 'The Privatization of Control Over Labour Migration in the Netherlands: In Whose Interest?' (2011) 2011(2) European Journal of Migration and Law 185; de Lange, *Staat, markt* (n 28).

[40]Dutch Official Journal (*Staatsblad)* 2004, 481. The lack of motivation and justification on the income threshold and age differentiation could in itself be deemed arbitrary. The motivation was that because Dutch employers were prepared to pay such salaries, the workers must be needed, irrespective of their educational attainments. Also, an 'unambiguous and objective income criterion' would facilitate fast track procedures, so efficiency was another reason. But why the norm was set as it was, including the age barrier at 30, was not explicated. The Blue Card e.g. sets income criteria at 1.5% of the average gross annual salary in the Member State concerned (article 5(3)) in addition to skills. It does not differentiate according to age as that was seen as age discrimination.

Two cases were brought before the courts right after the start of the programme, challenging the *application* of the income requirement by immigration authorities.[41] One case concerned a Pakistani sushi-chef and the other a Turkish manager. Although the migrants did meet the salary threshold, the immigration authorities deemed them 'false' HSM-scheme applicants because their high salary was not in conformity with market prices given the migrant workers' relatively low educational attainments, experience and the specifics of the jobs they were to perform. Their income was simply too high. To some surprise, the Council of State agreed with the authorities, going against the legislators' choice to set a simple criterion with little discretion.

In 2011, the HSM-scheme was amended and vague terminology was added, stating that the salary level should not 'deviate strongly from the usual wage'. The statutory vagueness again led to litigation over interpretation and application of such legal clauses. The use of such wording was tested over the question of when is a wage deviating *strongly* from the usual wage, as well as over administrative practices of measuring not the scope of deviation, but rather if the salary offered was an average salary or not. If it fell outside the average rate, either above or below, the salary was not accepted as fulfilling the income requirement for admission. The legislators' next step was to rephrase the requirement: Currently, the legislation reads that the permit *may* be granted when the salary is 'in conformity with the average salary level paid in the market for the job to be performed', hence not too high but also not too low.[42] 'Average salary' could be a very vague term, again leaving the authorities some leeway, this time over how to *measure* average salaries. A first instance court found that the way the authorities measure the average salary is unfit, as it was done through an arbitrary selection of online data.[43] Moreover, conformity is mainly checked in case of small- and medium enterprises.[44] This 'results in the presumption [that the authorities find] that large firms, who wield more market power, also employ the "real" talented migrants'.[45] Also, Chinese migrants are at the top of those whose salary is checked for market conformity,[46] which may raise the question of an eventual national bias.

A final aspect to consider is that the salary threshold shifted from being measured in terms of annual salary to a monthly salary. The salary threshold

[41]de Lange, *Staat, markt* (n 28) 331.
[42]Article 3.30a (1) Dutch Immigration Decree.
[43]District Court 26 April 2018, AWB 17/10941. The courts' decision was not appealed by the authorities, making it a potential 'landmark' case on this issue, although the case has remained unpublished by the court, which does not contribute to judicial review as a defensive tool against arbitrariness.
[44]Marije Rijsenbrij, 'Market Conformity in the Highly Skilled Migration Scheme: Gatekeeping or Headhunting' (2018), unpublished PPLE Thesis based on desk research of case-files at the administrative authority responsible for verifying the market conformity of income.
[45]ibid 32.
[46]ibid 36.

was at first set at an annual salary of € 45.000 for knowledge workers older than 30 years; in 2005[47] it became a monthly threshold to prevent monthly imbalances.[48] In 2018, the threshold was set at € 3.229 for those not yet 30 years old and € 4.404 for those over 30. Under the amended rules, the migrant must earn a steady income throughout the year (instead of earning enough money in four or five months and not earn anything the rest of the year) to qualify for the HSM-scheme. Here the argument was enforcement: In order to be able to enforce the scheme, the labour inspection had to be able to continuously control for compliance, which is difficult with annual earnings.

Indeed, regular inspections are performed on the actual salary paid by employers. Employers are selected for inspections on the basis of (unpublished) indicators.[49] Employers or migrant workers who fail to report a minor change of income may face administrative sanctions. If the income goes below the threshold (or other administrative glitches by the employer occur), it may result in the withdrawal of a residence permit even if the lost income is later covered by repair payments. Again, to some surprise, the Council of State agreed with the authorities that it was not disproportionate to withdraw the residence permits of the migrants although it was the employer who made the mistake of not fulfilling the requirements of the scheme and paying an income too low.[50]

While the market conformity check prior to admission prevents any 'membership' of migrants whose employers do not stand the market conformity test of the offered salaries, the administrative sanctions *after* admission have a significant impact on the continuation of the migrant's membership. They prevent the migrant from becoming eligible for permanent residence or citizenship or at least prolong the migrants' access to such full membership.

To conclude, the legislator drafted a simple HSM-scheme to provide the Dutch economy with the highly 'talented' migrants employers are in need of. Yet, administrative authorities have made use of their discretion and the vague terminology embedded in the scheme over time to enforce the scheme in what appears to be an arbitrary manner. In need to control and prevent 'abuses', small and medium enterprises and possibly certain countries of origin are targeted. Albeit legitimate, such controls lack of transparency[51]

[47]Article 1d Decree on Foreign Labour, Dutch Official Journal (*Staatsblad*) 2005, 187 of 12 April 2005.
[48]Article 1d Decree on Foreign Labour, 2018.
[49]Press release (n 35). In 2018, 24 employers (of a total of 4730 eligible for the use of the scheme) were sanctioned for wrongfully using the scheme.
[50]See Council of State decisions in appeal, 30 November 2017, ECLI:NL:RVS:2017:3294, 28 December 2019 ECLI:NL:RVS:2017:3608 and 18 January 2018, ECLI:NL:RVS:2018:173. First instance courts *had* judged the sanction of withdrawal disproportionate.
[51]Namely, in terms of *when* (either prior to admission or after admission) and *how* (according to which criteria) the salary's market conformity is assessed and *what* is required of the migrant worker to prevent withdrawal of the residence permit.

and with hardly any representation of the migrant workers involved, not even through *legal* accountability, which would have been the final resort to properly limit discretion.

3.2 Macau SAR

The economic significance of temporary migrant workers and their percentage in the overall population[52] would suggest that Macau has a carefully crafted labour migration policy. Instead, it is characterised by its vagueness and the institutionalisation of a high degree of bureaucratic discretionary powers.

The existing labour migration policy is heir to that established by the Portuguese administration in the 1980s in response to Macau's industrial development based on intensive labour re-exporting industries. In 1988, two parallel sponsorship schemes were launched according to the level of skills.[53] These schemes were considered

> unique in that the state keeps relatively tight control at the points of entry and exit in terms of the number of migrant workers, their legal status and their repatriation after the expiry of contracts. Once inside Macau, the conditions of employment, including the level of pay, are largely left to private arrangements between the workers, recruitment agents and employers.[54]

From a formal viewpoint, Macau's temporary labour migration policy was characterised by the dispersion of its norms and its 'weak' binding force. From a material perspective, the regime was centred on a casuistic assessment of market conditions based on vague criteria, such as the availability of local workers, the existing wage level, the ratio between local and non-local workers and the impact on local workers' rights. The rules prescribed 'a set of procedures requiring the bureaucracy to fully consider the potential impacts of the application. However, since procedures have not been operationalized as clearly defined goals, benchmarks, quota and restrictions, officials have considerable discretionary powers'.[55] Besides having a wide level of discretion combined with the use of vague terminology,[56] Macau's labour migration policy was deemed to lack transparency and acceptance

[52]By the end of 2017, there were around 179.500 migrant workers in Macau, which represent 27.48% of the total population and around 47.2% of the employed population. As a comparison, in 2000, there were 28,100 migrant workers, representing 16% of the total active population (Source: Monthly Bulletin of Statistics, January 2018, <www.dsec.gov.mo/Statistic.aspx?lang=en-US&NodeGuid=8ef1e6ac-47a3-4a56-b9e1-9925ca493549> accessed 23 April 2018).
[53]Despacho 12/GM/88 (un-skilled workers) and Despacho 49/GM/88 (skilled workers).
[54]Alex H. Choi, 'Migrant workers in Macao: Labour and globalization', in Kevin Hewison and Ken Young (eds), *Transnational Migration and Work in Asia* (Routledge 2006) 153.
[55]ibid 157.
[56]See, for example, Court of Second Instance ruling of July 3, 2003 (Proc. 40/2001).

by local people,[57] as well as prone to illegitimate pressure from economic interests.[58]

The promulgation of the Framework Law on Employment Policy and Labour Rights[59] in 1998 enshrined the principle of complementarity as a key feature of Macau's labour migration policy. According to this principle, the hiring of non-resident workers[60] 'shall only be permitted if it is intended to overcome the lack or insufficiency of resident workers who are capable of rendering service of similar cost and efficiency, and it shall have a time limit'.[61] The law further restricts admission as it determines that despite the fulfilment of the requirements mentioned above, migrants' hiring 'is not permitted if it contributes significantly for the reduction of labour rights, or directly or indirectly causes the termination of employment contracts without just cause'.[62] These clauses were intended to appease public opinion by binding the government to a general principle enshrined in the law. Despite the political intention, legal drafting made substantial use of indefinite legal concepts that, in practical terms, keeps broad discretion in deciding admission applications. The law does not establish any mechanism to assess the 'lack or insufficiency of resident workers', nor does it explain what is meant by 'capable of rendering service of similar cost and efficiency'. Similarly, the use of expressions like 'contributes significantly' or 'directly or indirectly causes the termination of employment contracts' gives freedom of action in implementing the principle of complementary. Those opposing the admission of migrant workers, namely trade unions representing local workers,[63] are still crying foul over the government's decisions on admission, which they consider do not comply with the vague terms of law.

More than a decade after the enactment of the Framework Law, Macau's Legislature passed the first comprehensive legal instrument on the employment of migrant workers.[64] The aim was to adapt the labour migration regime to the new socio-demographic features of Macau's society and the exponential growth of the gaming industry, without changing the main characteristics of the previous labour migration policy. The thorny issue of

[57]There was a general public perception that the admission of migrant workers was impacting the work opportunities and revenue of the local population negatively.
[58]Choi (n 54) 154.
[59]Law no. 4/98/M.
[60]In Macau, temporary migrant workers are referred to as 'non-resident workers', i.e. persons without the right of residence in the Macau SAR who are authorized to temporarily provide a professional activity under an employment contract entered into with a specific set of employers listed by law [article 1 (2) of Law no. 21/2009).
[61]Article 9(1) of Law no. 4/98/M.
[62]Article 9(2) of Law no. 4/98/M.
[63]'[T]he largest labour union, the pro-Beijing Associação Geral dos Operários de Macau (AGOM), (…) is one of the most vocal groups demanding a more restrictive migrant policy and is considered hostile to [migrant workers'] presence', Choi (n 54) 155.
[64]Law no. 21/2009.

the criteria, or the lack thereof, for the admission of temporary migrant workers, was dealt with extreme caution during the drafting of the new law. Legislators considered the original bill too vague in order to offer tangible guidelines for bureaucrats' decisions on admission. To overcome such vagueness, the bill's final draft incorporated eight general principles[65] applicable to the hiring of non-resident workers: the principles of complementarity, temporariness, non-discrimination, remuneration equality, priority, sustainability, prior authorisation, and specificity.[66] These guidelines were implemented with the aim of reducing the level of administrative arbitrariness while keeping a wide margin of discretionary power, in order to safeguard justice and other relevant values and interests.

Macau's temporary labour migration scheme also uses income requirements as admission criteria, although in a covert way. One of the factors to be taken into consideration in deciding admission is the work conditions offered to the migrant, which includes their salary. When applying for a permit to hire a migrant worker, the employer has to declare the salary he/she intends to pay. The government may reject the application if the salary deviates from the average wage for that sector, i.e. if it is too low or too high. However, there are no written rules or procedures to determine the wage limits, nor a method to determine the average wage other than general statistic data. As Macau has yet to adopt a general minimum wage law which could work as a reference for the lower admissible salary, the administration is granted wide discretion in setting income thresholds administratively, a prerogative recognised by local courts.[67] Correlated with the income requirement, the assessment of the employer's capacity to pay the salary declared is a further mechanism that curbs high salaries: The administration might decide that the employer cannot afford to pay what it is willing to pay.[68]

The attempt to curb discretion in admission policy through the proclamation of general principles might seem futile as they resemble mere political statements. However, those principles are useful in providing interpretative guidance, and their inclusion was vital in gathering political support for the new law. Nevertheless, it failed to limit decision-makers' discretion on the prerequisites for admission. Not only because the use of vague terminology does not provide predictability to the legal regime, but also because local courts

[65]Some of those principles had been shaping labour migration policy since the enactment of the Framework Law on Employment Policy and Labour Rights in 1998, some others derived from international law instruments, namely ILO conventions.

[66]Macau's government forbids migrant workers to be employed, for example, as croupiers in casinos and professional drivers of taxis, buses or trucks, considering the *specificity* of those economic sectors.

[67]Indeed, the executive is legitimized to fix minimum income limits in deciding if a non-resident worker can remain in the SAR. See Court of Second Instance ruling of July 7, 2011 (Proc. n. ° 170/2007).

[68]In fact, this shows similarities with the Dutch assessment of an employer as a trusted sponsor (see n 37).

refuse judicial review of both discretionary powers[69] (freedom of action or inaction) and indefinite legal terms.[70] The latter fall within a 'free margin of assessment' which is not subjected to judicial control as long as the decision-maker can reach more than one possible – and legal – interpretation of such concept.[71] The courts can interpret indefinite legal concepts but do not have the power to assess the factuality underlying their application *in casu*.[72] Therefore, the judiciary does not have the power to assess if there are 'insufficient resident workers', what are 'the needs of the labour market', 'the growth tendencies in a specific sector', the 'financial capacity of the employer', or if the income threshold is justified.

Macau's case study shows that discretion is a key characteristic of local labour migration policy. However, instead of being an instrument to reach justice in adjudicating individual cases, the use of discretion in setting income requirements increased the risk of arbitrariness.[73] Moreover, the use of income requirements, coupled with strong restrictions to migrants' labour mobility and denied membership, also has an intrinsic economic value and is a relevant policy determinant factor: It shields the local labour force from competition and protects the employers' interest in keeping salary costs as low as possible.[74]

4. Conclusion

The analysis of the Dutch and Macau cases reveals a common tendency to embrace discretion in labour migration law. This does not have to be problematic. Irrespective of the geographic and constitutional context of both jurisdictions, discretion is a tool to provide flexibility to migration regimes that need to pass the test of time and, in their generality, be able to answer individual needs of workers and employers alike. The two jurisdictions are

[69]Except when the discretionary decision does not comply with the purpose for which it was granted by the law. See Court of Second Instance ruling of October 6, 2016 (Proc. n. ° 15/2015).

[70]Court of Final Instance ruling of July 30, 2008 (Proc. n. ° 34/2007); Court of Second Instance rulings of July 7, 2011 (Proc. n. ° 170/2007), October 18, 2012 (Proc. n.° 127/2012), November 29, 2012 (Proc. n.° 755/2011), February 27, 2014 (Proc. n.° 355/2008), July 24, 2014 (Proc. n.° 558/2013) and October 27, 2016 (Proc. n.° 645/2015).

[71]See, in particular, Court of Second Instance ruling of October 18, 2012 (Proc. n. ° 127/2012).

[72]These are terms that bind the government in decision-making but cannot be scrutinized by the judiciary, except in cases of 'evident error' in applying the law. See Court of Second Instance ruling of November 29, 2012 (Proc. n. ° 755/2011).

[73]As evidenced, in a 2018 corruption case related to a lack of clear criteria for investment migration. See *Investigation Report on IPIM's Vetting and Approval of 'Major Investment Immigration' and 'Technical Immigration'* (June 22, 2018), <www.ccac.org.mo/en/news/rpt20180702_en.pdf> accessed 7 November 2018.

[74]The negative feelings towards migrant workers are based on the unproven premise that they jeopardize the employment opportunities of the local workforce. However, Macau's labour force is recognizably insufficient to comply with labour market needs, both in terms of quantity and quality. Employers constantly remind the government that they need more and better workers to keep up with the pace of development.

representative of the persistent pressure exerted by governments to overcome obstacles encountered in the rigid statutory wording and mould the daily application of migration law to their perception of public interest. Even if such application and interpretation diverge from the original legislative intent and goes beyond what was envisaged by legislators. The presence of discretion in migration law is, thus, not intrinsically negative or positive. The assessment of its role is dependent on how the freedom it provides is used. This is, in turn, ultimately conditioned by the legal culture underlying its application, i.e. by societal and individual values embodied in statutes, administrative actions or judicial decisions. In this respect, we conclude that discretion is necessary in labour migration regulation. However, when discretionary power holders are not held accountable, this power may become arbitrary, and this arbitrariness is unacceptable in both the legal systems scrutinised. Indeed, the way discretion is employed in practice shows that it is essential for the quality of legislation, as well as for assuring that labour migration law meets the accountability requirement and is not 'just' an instrument of labour market policies facilitating fast track recruitment of (cheap or not) migrant labour.

The recent changes in US immigration policy and the different attitudes of EU Member States in handling the arrival of refugees are paradigmatic of how values are relevant in addressing pungent migration issues and how they shape policy- and law-making processes. Values are revealed in migration regimes that adopt an inclusive rights-based culture and welcome migrants into the community opening pathways for membership, regimes that provide the possibility of 'them' becoming part of 'us'; values are also revealed in migration regimes perceiving migrants as 'others' that do not belong and preventing them from becoming members 'like us'. Thus, we do conclude that the way discretion is designed and, more importantly, the way it is used, transforms our concepts of membership, even when it concerns highly skilled migrant workers. Also, income requirements, and their enforcement, do hardly appear as means of *protection* of a new member, but rather appear to us as yet another instrument of *exclusion* from – potential – full membership.

Legislating discretion in migration law raises serious questions in terms of democratic legitimacy. There is a thin line separating the legitimate choice of elected representatives of granting freedom of action to bureaucrats – discretion as a 'deliberate object of legislative policy' – and their conquest of such freedom against the equally legitimate choice of not granting it. In the latter case, the principles of participation, transparency, affectedness, and accountability are in peril. In sum, discretion in migration law ought to comply with requirements of legal certainty and close judicial scrutiny, i.e. legal accountability, to avoid being mistaken with undesired arbitrariness.

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