

# *Welcoming Talent: European Migration Law Has a Part to Play*

INAUGURAL LECTURE BY PROF. DR. TESSELTJE DE LANGE

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Radboud Universiteit



INAUGURAL LECTURE  
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In *Welcoming Talent*, Tesselkje de Lange presents nearly thirty years of practical experience and academic work on economic migration law and migrants' socio-economic rights. Through the stories of a highly qualified labour migrant, a trainee in the hospitality sector, and a nurse stuck in the asylum

system, De Lange uncovers the perverse effects of legal categorizations in migration law: ambiguity in admission policies, difficulties in accessing rights, complex institutional frameworks, a lack of procedural fairness, and the dashing of long-term migration prospects.

De Lange develops the Welcoming Talent model as a tool that migration researchers and policy-makers can use to assess the extent to which migration law, policies and practices can be seen as welcoming. And she outlines an agenda for research that looks, from a global perspective, at economic migration that is oriented towards a sustainable society for future generations and the part that European Migration Law in the broadest sense has to play in relation to migrants, markets, and states.

Tesselkje de Lange is Professor of European Migration Law at the Faculty of Law at Radboud University, Nijmegen, where she is also Director of the Centre for Migration Law. She earned her first degree in law at the University of Amsterdam, and her PhD at Radboud.

De Lange has worked as an immigration lawyer, honorary district judge, and has been a member of the Dutch Advisory Committee on Migration Affairs, including as Vice-Chair. She has published widely on national, European, and international issues related to economic migration law, policy, and practice.

WELCOMING TALENT: EUROPEAN MIGRATION LAW HAS A PART TO PLAY



## **Welcoming Talent: European Migration Law Has a Part to Play**

*Lecture by Professor Tesseltje de Lange on the occasion of her appointment as Professor of European Migration Law at the Radboud University's Faculty of Law on Friday, 2 July 2021*

**by prof. dr. Tesseltje de Lange**

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*Dear Rector Magnificus, Dean, colleagues, family, friends, students, and those joining remotely,*

Welcome, and thank you so much for being here.

#### INTRODUCTION

I'd like to begin by telling you about Mike.

Mike is Canadian. He holds a master's in Computer Science, and he heads up a game-development team at a company here in the Netherlands. He holds a Blue Card—a residence permit for highly qualified migrants from outside the EU—talent the EU is keen to welcome.<sup>1</sup>

A couple of years ago, Mike's father was diagnosed with a terminal disease, and Mike went back to his native Canada to care for him, leaving his team in the capable hands of a co-worker. Several months later, when his father passed away, Mike was able to be by his side. Not long after that, he came back to the Netherlands and went back to the same job. "Let's get people playing!", he said to his team.

So far so good.

Now, what fascinates me about Mike's case is what comes next. This story will also give you a sense of why I study law and its impact on people the way I do, and why today I have the honour of giving this inaugural lecture as the newly appointed Professor of European Migration Law. And before I go on, in fact, I'd like to take this opportunity to thank Radboud University and the Faculty of Law, as well as the Research Centre for State and Law and the Centre for Migration Law, for the trust you have all placed in me. I'm both honoured and humbled.

So then: as I walk you through it in what follows, Mike's case might seem a bit trivial to some. Mike is not a refugee, he has not been persecuted. Mike is an economic migrant. He's healthy and quite wealthy. But his case is significant, for three reasons—which, as it happens, are the same reasons why I find studying economic migration and migrants' socio-economic rights so important.

First, Mike's encounter with migration law brings us up against a complex patchwork of European Directives on the conditions governing the rights of non-EU nationals to enter and stay in the EU— a patchwork that has been, and will continue to be, the focus of my research.<sup>2</sup> The number of academics in my specific field of migration law is, so far as I am aware, relatively small compared to, for instance, people studying asylum law, although the societal and economic interests involved in welcoming economic migrants - or not welcoming them - can be immense. According to the International Labour Organisation (ILO), in 2017 migrant workers constituted a bigger share among the global workforce than among the global population of working age, due to the hi-

gher labour force participation rate of migrants (70.0 per cent) compared to non-migrants (61.6 per cent).<sup>3</sup>

And when I study migration for family reunification or humanitarian reasons, my research focuses on their socio-economic rights and the impact that socio-economic factors, such as *money matters* have on their access to rights.<sup>4</sup>

In the first steps I took on this research path, I looked at the income requirements for family migrants.<sup>5</sup> I was a practicing lawyer at Everaert Immigration Lawyers, and I began to ask myself: Why is it that some people have rights while others do not? Or why do people who *do* have rights not always exercise them, or sometime feel *unable* to do so in case they end up putting something else in jeopardy?

Since that time, European migration law has become more and more relevant - hence the title of this lecture, "European Migration Law Has a Part to Play".

Second, Mike's story - and we will look at other examples in what follows - exemplifies the functioning of law in society more generally: laws are made to give structure to our reality, to set common standards, and achieve common goals. My research often takes me to fields outside EU migration law proper, such as laws, policies and practices related to labour, industrial relations, banking, planning, entrepreneurship, and so on. This broader approach shows us how migration law and policy are part of industrial politics: today's industries and jobs might not be the industries and jobs of the future. Some industries that once relied heavily on migrant labour have since been offshored or robotized. But not all work can be offshored, or fully robotized such as caregiving. So we have to provide housing for the migrants who will be doing that work if 'we' do not want to, or are with too few people, to do it ourselves. You can't just "beam them up" like in *Star Trek*, where the "up" means from planet x to the *Enterprise* - that is, from wherever migrants happen to be straight into some distribution centre. With a lot of white-collar jobs, though, that's exactly what's happening more and more these days.

Third, I study migration because it is in my family history and my own personal experience. I was an 'expat' child in the US, Suriname, and Indonesia. Since the age of fifteen I have been living in a transnational family setting: my parents lived in Indonesia, while I was in the Netherlands. Because in Indonesia it is the local tradition to bury someone within 24 hours, I could not attend my mother's funeral. I wish I had known she was dying and could have cared for her in her final moments, like Mike cared for his father.

Back, then, to Mike. European migration law played an important part in facilitating his transnational working life *and* it allowed him to care for his family. Very welcoming altogether. At least that's how it seemed.

## THE LAYMAN AND THE LAW

Mike did something tricky as a layman: he went and read the law. He took the text of the European Blue Card Directive. He found it offered him the opportunity to return to his home country for a maximum of 12 months without losing his future entitlement to long-term residence status, a European permanent residence permit. Without consulting a lawyer, he did what the law said he could do: he left his job, set out to care for his father, and returned within the 12 months. Here's what the relevant provision in the Directive says:

3. For the purpose of calculating the period of legal and continuous residence in the Community and by way of derogation from the first subparagraph of Article 4(3) of Directive 2003/109/EC, periods of absence from the territory of the Community shall not interrupt the period referred to in paragraph 2(a) of this Article if they are shorter than 12 consecutive months and do not exceed in total 18 months within the period referred to in paragraph 2(a) of this Article. This paragraph shall apply also in cases where the EU Blue Card holder has not made use of the possibility provided for in Article 18.<sup>6</sup>

So far, no court has ruled on this yet, the Directive notwithstanding, what Mike tried didn't fly. Oh, he came back all right, and regained his Blue Card residence permit. But when he asked for the EU Long-Term Residence permit, it was refused. Why? Because he had been away for more than six months.<sup>7</sup> With the help of an expert immigration lawyer, he challenged this decision. Although he had specifically referred to the Blue Card Directive in his application, the street-level bureaucrat deciding on his application denied it, without a word on the Blue Card Directive.<sup>8</sup> There was no reference to the bit in the Directive that Mike had read and that he'd felt sure would facilitate his transnational career and accommodate his time abroad to care for his father.<sup>9</sup> It's like the song says, *The things you are liable to read...It ain't necessarily so*. Unless, of course, a national court or the EU Court of Justice rules in his favour.

What interests are at stake when these laws are made? Why make laws that street-level bureaucrats won't apply? How can a lawyer, a judge, a member of parliament, a journalist, an academic, or a determined citizen set the bureaucrat - or the lawmaker for that matter - straight on this score? Was whoever drafted the law not thinking about Mike, or about how the law would be implemented as a practical matter in the future? Or was it that other interests prevailed? This was actually the research question I set out to answer in my PhD, a legal-historical study of the regulation of labour migration in the Netherlands, which I defended here in Nijmegen in 2007, under the supervision of Kees Groenendijk and Anita Böcker. (It's so great to be working with you both again!) Migrants, I concluded at the time, did not have much to say about the laws that

shape their lives in the Netherlands. Today, in the EU, things might just be slightly different with the European Migrant Advisory Board, a group of advisors with refugee and immigrant backgrounds. Their goal is to increase the participation of refugees and immigrants in different policy-making processes that affect their access to rights.<sup>10</sup>

#### INTERDISCIPLINARY RESEARCH METHODS

Did I talk with Mike? No, I did not. I spoke with his lawyer. In this story, apart from the legal details, Mike is fictional. Talking to Mike and possibly to other migrants on their experience with migration law, on their rights, and the obstacles to claiming these, requires interdisciplinary research methods, which I have not used for this lecture.

I enjoy working with people from other disciplines, and have more often than not engaged in interdisciplinary research.<sup>11</sup> I take a multidisciplinary and, if possible, interdisciplinary research approach, working within a range of disciplines, each entailing different theoretical perspectives and research methods. In these research projects, I also strive to involve people with a “migration background” as colleagues and peers. I see this is as engaged scholarship - a kind of participatory action research applied to migration law, if you will.<sup>12</sup> The sum of such perspectives and methods is, in my experience, often stronger than the parts. We need doctrinal, empirical, *and* theoretical work to advance debates on who is actually playing what part. I have just finished co-editing, with Willem Maas and Annette Schrauwen, just such an interdisciplinary book on money matters in migration, which will be out later this year.<sup>13</sup>

So, while the story of Mike is fictional, the legal questions raised in his case are not. I studied the text of the relevant law and the drafting of the Blue Card Directive and what literature has said about this specific right, to understand its implications and how Mike’s argument could be presented in court. If you wonder how many people there are like Mike I have to disappoint you. We do not know, such data is not collected, although a new Regulation on migration data just came into force last year.<sup>14</sup> Although the EU Member States have an obligation to submit statistics to the European Commission, and although such data does, for instance, tell us that Germany grants for more blue-card residence permits than any other country in the EU, it’s hard to say anything reliable about how welcoming its policies are, based on the available data. Although I am a big fan of numbers, qualitative data cannot give a full picture of the functioning of the law. My preferred method is in-depth, possibly longitudinal interviews with respondents, so I can hear about their experience with the law.<sup>15</sup>

#### WELCOMING TALENT

Having said a few words about the approach I take in my research, I will now turn to what *Welcoming Talent* is all about.

Ylva Johansson, the European Commissioner for Migration and Home Affairs, has said:

13 per cent of key workers are born outside their Member State. They clean our houses and hospitals. Work in mining and construction. Operate machinery in factories. They teach our children and work on ICT technology. If all migrants stopped working tomorrow, our economies would close down immediately. That shows migrants are not “them”. They are part of “us”. We have today 35 million people living in the European Union born outside the Union. 10 per cent of young people in the European Union, have at least one foreign parent.

We are an ageing society, with a huge shortage of nursing professionals in twenty-one Member States. It’s obvious we need migration. But it’s also obvious that we must make better use of the talent that is already here.<sup>16</sup>

‘Welcoming talent’ is what the Commissioner calls for, for professionals such as Mike.

Talent is more than highly skilled and information - and technology-driven experts. If the pandemic has made anything clear, it’s that Europe’s demand for international talent goes beyond what the highly skilled can offer.<sup>17</sup> In my research, I have focussed on a wide range of talented internationals: from the self-employed American yoga instructor coming to the Netherlands under the Dutch American Friendship Treaty, domestic workers staying without authorisation in Hong Kong, the Netherlands, or Italy from managers of multinationals *from* all over the world to seafarers on board ships *travelling* all over the world, from highly educated game designers such as Mike to those performing work that requires less education, such as Spanish or Polish workers picking orders in our distribution centres or slaughtering the animals that end up on some of our plates.

According to this approach, everyone has a talent. I support the societal trend according to which we’re moving away from a mere ‘merit’- or diploma-driven labour market to one in which talent based on practical skills and experience matters just as much. European institutions are, as we speak, negotiating entry policies for the more practically skilled. However, those entry policies may play only a minor part, because the EU Member States still have the right to put caps on the numbers they admit.<sup>18</sup>

How welcoming a policy, and the practices based on it, are can be scrutinised with a model I designed earlier.<sup>19</sup> The model builds on the EU’s founding values, such as respect for human dignity, non-discrimination, tolerance, justice, solidarity, and equality between women and men.<sup>20</sup> It also builds on notions of sustainable development, full employment and social progress,<sup>21</sup> as well as solidarity and mutual respect among peoples, free and fair trade, eradication of poverty, and the protection of human rights.<sup>22</sup>

The model also takes its inspiration from the EU Charter of Fundamental Rights, which says that everyone has the right to have their affairs handled impartially, fairly, and within a reasonable time,<sup>23</sup> and that everyone whose rights and freedoms as guaranteed by the law of the Union are violated, has the right to an effective remedy and a fair trial.<sup>24</sup> You can also see these values reflected in the goals of the United Nations Global Compact for Safe, Orderly and Regular Migration.

The notion of welcoming is not the same as hospitality, but it is close, and my study could have taken me into the work of French Philosopher Jacques Derrida or of feminist theorist Seyla Benhabib.<sup>25</sup> One passage from Benhabib is key, though:

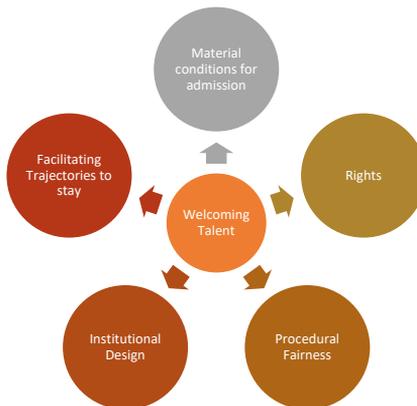
The right to universal hospitality is sacrificed on the altar of state interest. We need to decriminalize the worldwide movement of peoples, and treat each person, whatever his or her political citizenship status, in accordance with the dignity of moral personhood.<sup>26</sup>

However, “his or her...status” is exactly what determines how people are being treated under migration law. So what I want to know is not just how things *should* be, morally speaking, but how welcoming values work out on the ground.

I have finetuned my original model, which now has five parts:

- a. The material conditions for admission.
- b. The rights that come with the acquired migration status.
- c. Procedural fairness.
- d. Institutional design.
- e. Support for people staying on and possibly obtain citizenship?

Figure 1: Welcoming Talent Model, expanded version



### **a. Material conditions for admission**

On my reading, material conditions are welcoming if they leave some room for manoeuvring and allow a certain level of discretion, to take into account personal circumstances, and if the required burden of proof is not so stringent that it is unlikely to be met at all. A “policy” is unwelcoming if it is absent altogether: for instance, in the Netherlands, if instead of visiting his father in Canada Mike had wanted to invite him to live with him, he would have found that this was simply not an option. Let me give another example where absence of policy can even be labelled as “regulatory neglect”<sup>27</sup> thus, clearly, not welcoming. In most EU member states a proper entry route for migrant domestic workers is absent, while it cannot be denied that there is a demand for migrant domestic workers. ETUC, the European Trade Union Confederation, has recently called for their inclusion in admission policies in all EU member states, a call I support.<sup>28</sup>

Admission policies around labour migration usually include requirements regarding the level of skill a prospective migrant has, how much they will be earning, how long their contract is for, and what kind of work is involved. A high salary threshold can, of course, be unwelcoming.<sup>29</sup> A policy will also be less welcoming if it doesn’t allow for any derogations from formal qualifications, for instance by taking into account work experience in the field in question.

Another common tool in labour-migration policies is the labour-market test, whereby the receiving state will evaluate whether the job can be performed by the local workforce or, in the EU context, by other EU nationals. Systems of evaluating labour-market demand and subsequent admission can be more welcoming or less so. Obviously, a labour-market test is not welcoming if it starts from the assumption that a national workforce is available, as the current Dutch test does. A policy that exempts an applicant from a labour-market test if the job they will be doing is on a shortage occupation list, would certainly be an improvement.

Vagueness around who qualifies under one or another admission policy is not very welcoming. I will give two examples of vague entry conditions that create uncertainty, and that can thus be seen as unwelcoming. First, there’s the example of the manager of a multinational corporation, and then of a trainee in the hospitality sector.

#### *The manager in a multinational corporation*

The regulation and facilitation of migration by managers in multinational corporations goes back to old-time trade agreements, such as the 1956 Dutch American Trade Agreement. The EU now has the authority to enter into trade agreements, and it has done this with many countries across the globe. Although these have the force of international law and have direct effect within the EU Member States, not all Member States are fully aware of their implications for their migration law.<sup>30</sup> In a study commissioned by the European Commission, Simon Tans, Amy Azhar, and I concluded that harmoni-

sing measures, although legally speaking not necessary, would be preferable for reasons of legal certainty.<sup>31</sup> This is also one of the reasons why we have the EU Intra-Corporate Transfer Directive.<sup>32</sup> If we look at entry conditions for a manager of a multinational corporation, we see it requires that there be a manager and a multinational. The Directive defines a manager as follows:

‘manager’ means a person holding a senior position, who primarily directs the management of the host entity, receiving general supervision or guidance principally from the board of directors or shareholders of the business or equivalent; that position shall include: directing the host entity or a department or subdivision of the host entity; supervising and controlling work of the other supervisory, professional or managerial employees; having the authority to recommend hiring, dismissing or other personnel action.<sup>33</sup>

And here’s how it defines a multinational corporation:

‘group of undertakings’ means two or more undertakings recognised as linked under national law in the following ways: an undertaking, in relation to another undertaking directly or indirectly, holds a majority of that undertaking’s subscribed capital; controls a majority of the votes attached to that undertaking’s issued share capital; is entitled to appoint more than half of the members of that undertaking’s administrative, management or supervisory body; or the undertakings are managed on a unified basis by the parent undertaking.<sup>34</sup>

These definitions do not answer a question that immigration lawyers have raised, namely whether a manager can themselves be a shareholder in this corporation. Dutch law arranged for this to be possible through a set of frequently asked questions. There is a question of whether a Member State can implement EU law in such “soft” instruments as online information. I have argued that the answer should be no. And there is also the question: At what point does a manager stop being a manager and become an entrepreneur? According to the Dutch interpretation, the answer is: When they own more than 25% of the shares.<sup>35</sup> Is this in compliance with EU migration law? This interpretation is also presented in another “soft” instrument.

QUESTION: Is there a common definition of self-employed in EU law/regulations? Or do Member States have the opportunity to use a national definition? (For example in national legislation of a Member State, a third-country national who possesses 25% of the shares of a company and who has a large extent of influence within the company is considered to be self-employed.

We cannot see who posed the question, but it appears to be a very Dutch one.

ANSWER: There is no established definition of “self-employed” in EU legislation, and Member States may use their own definition. However, there is a need to ensure that the national definition does not conflict with the ICT Directive, notably the definition of “manager”. The intention of the ICT Directive (as expressed in the wording of the definition of ICT in Article 3(b) read in conjunction with the definition of manager in Article 3(e)) was not to exclude a person who has a work contract with the undertaking. If there is such a contract, the person cannot be considered as self-employed. The fact that the person has shares of the company does not prevent him/her from being employed by the company. If so, he/she would probably fall under the definition of “manager”.<sup>36</sup>

What should count, then, is not the number of shares or the level of influence, but whether there is a job contract. Plain and simple. But is this interpretation of the Ad Hoc Group correct? Maybe, maybe not. The EU Court of Justice has ruled in a different setting that an evaluation of all circumstances is called for.<sup>37</sup> It is indeed ultimately for the EU Court of Justice to rule on the entry conditions for managers, but so far no questions on this topic have been submitted to it. And actually, as far as I know, no questions on the topic have actually been brought before the Dutch courts either. Going to court is time-consuming, and businesses and managers do not exercise their right to migrate under this Directive even if they hold more than 50% of the shares, because it costs too much time to sort it out. They want a solution, and they want it now. So lawyers advise them to opt for workarounds instead of challenging the restrictive interpretations of these admission criteria.

I expect that more questions will be raised in the future on the scope and meaning of admission criteria for mobility under the EU trade agreements. The most recent agreement is between the EU and the UK, following Brexit.<sup>38</sup> For instance, a service provider from the UK, who had been working in various EU Member States on a regular basis, would now need to check 27 jurisdictions on market access and work-permit requirements. Some harmonisation, if not in law then at least in the transparency of the available online information, would be preferable from the standpoint of welcoming talent.

*The trainee in the hospitality sector*

There is another tricky thing about admission criteria: a residence permit may be, or must be, withdrawn if the permit holder no longer meets the conditions for entry and residence, or is residing for purposes other than those that originally applied.<sup>39</sup>

This happened to a group of Indonesian hospitality student trainees on an international traineeship programme in the Netherlands some years ago. I will introduce to you one of them: Dewi. Again, I did not talk to her: Dewi is another composite character. She held a one-year residence permit as a trainee. These days, her stay would possibly fall under the scope of Directive 2016/801/EU, which sets out specific entry conditions for trainees who have obtained a degree two years or less before applying for the residence permit, and for those who are still pursuing a degree.<sup>40</sup> Two optional conditions for trainees were controversial during the negotiations over this Directive: Member States may require the traineeship to be in the same field of study as the degree—which would not have been an obstacle for Dewi. Also, Member States may require the host entity, which was a hotel chain in the Netherlands, to prove that the traineeship does not replace a job.<sup>41</sup> Both the European Parliament and the European Commission wondered about the enforcement of this condition: How would this be checked in practice, and what kind of evidence would be required? “The concern was it would give Member States’ authorities a wide margin of discretion to admit or not to admit a trainee.”<sup>42</sup>

Ninety-three trainees *were* admitted, were given their trainee residence permits, and went to work. Their duties included housekeeping - cleaning rooms - by way of training. Some four months into their training, the labour inspectorate came by and reported that, in their reading of the facts, the trainees were workers, because they were doing the same chores for four months, instead of rotating every two months as their traineeship programme prescribed. The inspectors found that this meant they did not meet the conditions of their residence permits, and the hotel chain was fined EUR 754,000 for illegally employing 93 trainees. The trainees lost their residence permits and were sent back to Indonesia. Had they stayed, they would have been irregularised by the labour inspection’s decision.

The hotel chain challenged the inspectors’ finding, and the administrative fine, in court. And it eventually won. It argued that the Indonesians were trainees, not workers. The evidence? The labour authority granting the work permits had agreed to a change in the training plan, allowing the trainees to continue performing the same duties for at least six months instead of rotating every two months. Also, permits had been granted since 2000, and regular contacts took place between the hotel chain and the labour authority, a fact that the labour inspection had ignored.

This type of case made Conny Rijken, Lisa Berntsen, and me wonder whether employer sanctions are an instrument of labour market regulation, migration control, and worker protection.<sup>43</sup> There was no sign of abuse of the Indonesian trainees. If they were indeed workers, they should have received a proper salary, but they were not informed

of that right as far as we know. (And they had to go back home—which for some trainees might have been devastating in terms of costs, and opportunities lost, due to the inspectors' faulty assessment).

The European Directive on employer sanctions and the rights of illegally staying and illegally employed migrant workers prescribes that Member States have a mechanism to help illegally employed migrants claim their rights.<sup>44</sup> But not for Dewi: EU migration law would have offered some measure of protection only if she had indeed been illegally employed *and* illegally staying in the Netherlands, and this protection does not necessarily apply to irregularised migrants or to those who stay here legally. Meeting entry conditions, and fitting with the right category, are key. Regardless: the question of whether, in practice, the protection mechanism offered by this Directive offers migrant workers even minimal protection from underpayment or abusive practices has not been studied enough, and the answer is far from clear.

This example takes us to the next part of the welcoming talent model: what rights go with what migration status or with no migration status?

### **b. Rights**

What rights can be acquired by which migrant workers also determines the extent to which a policy can be seen as welcoming.<sup>45</sup> If we compare the Blue Card Directive, which regulates the entry of highly qualified people, with the Seasonal Workers Directive, which deals with entry for the purpose of performing practical jobs such as harvesting, we see that workers in the latter category clearly have fewer rights than those in the former.<sup>46</sup> However, EU citizens using their right to free movement as workers are among the many migrant workers performing such practically skilled, seasonal, jobs, and they actually have stronger rights than the most highly educated Blue Card holder. In the welcoming talent model, rights cannot simply be linked to levels of skill or duration of residence. Rather, the different legal entry categories need to be considered if a full picture is to be had.

Here, too, I will give two examples.

*The right to family reunification.* The right to have your family accompany you and the rights that family members are accorded on arrival are addressed in the Citizenship Directive, the Family Reunification Directive. Derogations may apply in other directives, and how welcoming or unwelcoming a policy is varies by category. The Seasonal Workers Directive, for instance, does not allow for family reunification, so in that respect it is not very welcoming to a migrant. The Blue Card Directive, as well as the Intra-Corporate Transfer Directive derogate from restrictions on family migration set in the Family Reunification Directive.<sup>47</sup> Member States may, but do not have to, allow parents to join their adult children.<sup>48</sup> Because he was in the Netherlands, for instance, Mike

could not have had his father join him, but he might have been able to if he had been living in one of a number of other EU Member States. Of course, having more elderly people who need caring for is not necessarily what the EU is looking for, so it is easy to come up with a justification for any refusal. But what if Mike had offered to cover all the costs for his father's care while he was in the Netherlands with him? A Dutch court actually granted a visa, under circumstances that were much more severe than Mike's, to a Syrian mother who had spent four years waiting for a decision on her application to come and live with her son and his family, partly because the son would cover all the costs so that no financial burden was foreseen for the Dutch State.<sup>49</sup> But this seems to be an outlier in the context of Dutch case law.

The right to housing, and to equal treatment in this regard, are among the topics I am now looking into. It has become a hot topic in relation to COVID-19 and the housing of EU citizens working in the Netherlands and Germany. Some municipalities apply quotas to restrict the number of labour migrants per street, while others refuse to register them in the standard way if they are living in holiday homes. This may well obstruct their full access to rights later on and, as a practical matter, may reduce the likelihood—at least at the time of writing - that they will be invited for vaccinations. One of our respondents in the COVID-19 and migrant workers research project said, “It is not very *welcoming* if you don't offer people proper housing while you do want them to come and work for you.” That seems crashingly obvious, but Dutch municipalities have allowed companies such as new distribution centres to be established, without seeing to accommodation for the migrant workers who are needed to run them. Next time you order something online, bear in mind that the person packing it for you might not have been offered a decent place to live in this country.<sup>50</sup> Not so welcoming.<sup>51</sup>

### **c. Procedural fairness**

In its 2020 Strategy, the European Commission expressed the EU's goal to become an economy based on knowledge and innovation. To reach that goal, it must, according to this policy document, reduce the administrative burden on companies. I would add that it should also do the same for migrants. But even that will not be enough. A minimum requirement is that Member States comply with procedural norms laid down in primary EU law<sup>52</sup> and in the migration-law-directives, which increasingly address administrative procedural requirements.<sup>53</sup>

A policy may seem to be welcoming on paper, but if the procedures that must be followed pursuant to it are a nightmare, it will be anything but. Procedural rights apply in such areas as the time it takes to decide an application, the fees to be paid, the transparency and fairness of the procedure, the justification given in the decision, how readily understandable that justification is, and what legal remedies are available if they are needed.

In terms of timeliness in regard to procedures, I would draw your attention to the often lengthy asylum procedures and to the conditions in reception centres that applicants face while they await a decision.<sup>54</sup> For this purpose, let me introduce Rima. Rima is a trained nurse from Iraq, ready to help out during the COVID-19 pandemic. She is in Ireland, where she has applied for asylum. However, she is awaiting a decision on which country in Europe will handle her asylum application, because Ireland claims that the UK, which during the period we're talking about was still an EU Member State, is responsible. And Rima is being forced to stay in a reception centre while she awaits a decision on who will decide on her application.<sup>55</sup>

Everyone agrees that timeliness is of the essence. Undue delays while the applicant has to bide their time in a reception centre - where the conditions may or may not be up to par, depending on where it is - do no one any good. Allowing people who seek asylum to be more active if the procedure cannot be expedited was the first policy recommendation I was involved in crafting during my eight-year tenure on the Dutch Advisory Committee on Migration Affairs.<sup>56</sup>

According to the Reception Conditions Directive, if the procedure takes longer than nine months, asylum seekers have the right to seek employment.<sup>57</sup>

A number of studies I have conducted on this topic concluded that giving practical effect to this formal right to work has proved difficult.<sup>58</sup> Last year, together with student assistant Ezgi Özdemir, my long-time colleague Liesbeth van Amersfoort at the Dutch Work Permit Authority, and Ben & Jerry's - yes, *that* Ben & Jerry's - I studied the mostly procedural difficulties asylum seekers face in accessing the Dutch labour market.<sup>59</sup> Ben & Jerry's, as part of their corporate policy of contributing to a better world, made a toolkit for employers to try to make the application procedure easier for them.

Earlier this year, the European Court of Justice had the following to say on the right of access to the labour market during the asylum procedure:

“work clearly contributes to the preservation of the applicant’s dignity, since the income from employment enables him or her not only to provide for his or her own needs, but also to obtain housing outside the reception facilities in which he or she can, where necessary, accommodate his or her family.”<sup>61</sup>

When I posted this decision on LinkedIn, one comment (which I will come back to in a moment) read, “Better not to have to wait that long at all and get the decision on time.” True, but the fact is, procedures take time. But the huge amount of time asylum procedures sometimes take, means applicants can lose their skills. So to expedite administrative procedures, Dutch administrative law imposes a financial penalty to be paid by the government to the asylum seeker if the procedure lasts too long. There are plans to exempt migration cases from the penalty payment, a plan criticised by highly

esteemed professor emeritus Ulli d'Oliveira in a seminal issue of the weekly Dutch legal journal *Nederlands Juristenblad*.<sup>62</sup> Again in response to my social-media posts, I got a response from someone working at the Dutch Council for Refugees. Having checked with her colleagues at the Council and in reception centres, who confirm this practice, she wrote (I have tweaked her remarks in places):

Hi Tesseltje, I'm writing to you with regard to the penalty [on delays in decision-making]. The fact is that I am actually glad that no penalty is paid to the refugee status holder. This sounds absurd, and it is. I have now had three cases in one week of refugee status holders who have received a large amount of money - as a penalty for delayed decisions - from the Immigration Department and who are now in financial difficulty. Firstly, they have to repay the reception centre for living costs. Of course, they did not know this and were not told when they received the money. Secondly, they are no longer eligible for social welfare because they have financial assets. They have, however, never had so much money and have spent it all.

In short, their refugee status came with a nice sum as a penalty payment for the delay, which they feasted on. But now they are in debt and have no welfare. So while, procedurally speaking, the penalty payment may seem welcoming, it is in fact not welcoming at all. We recall the comment on LinkedIn: better to simply decide on time.

#### **d. Institutional design**

This example also gets us to another theme that runs through my research and which is the fourth part of the welcoming talent model: the institutional design.

Different government bodies are at work here, and apparently don't consult with each other on the wider effects their policies and procedures may have, or communicate about these effects to migrants or to society at large.<sup>63</sup> The issues around the length of time asylum procedures take and the right to work pending a decision, illustrate how the parts of the welcoming talent model - the material, the procedural, *and* the institutional, are interrelated. That is my point: the conditions may seem welcoming, but if the procedure or institutions are not, we're back to square one.

How welcoming a policy is has to do with which public or private actors decide on an application, inspect workplaces, or enforce rights and obligations. Who plays what part?

##### *Public institutions*

Public institutions within one state may have diverging interests. A mix of encounters with institutions serving different interests can be rather unwelcoming. To avoid such unwelcoming results, which are often hard to anticipate because of the highly segmen-

ted character of administrations, a "whole of government" approach is the obvious solution. To that end, the European Commission proposed a Single Permit that would combine work permits and residence permits into one, precisely for that reason.<sup>64</sup> The Directive is currently under review because the procedures Member States now have in place are still overly complicated.<sup>65</sup>

In the course of my research, I have come across many public institutions involved in migration in the Netherlands. I will name a few, and I am sure that similar actors also have a part to play in other Member States, even if the institutional design differs. That design is relevant to the experience of welcoming.<sup>66</sup> I have studied the practices of institutions such as the fines imposed on employers by labour inspectors for illegally employing migrants,<sup>68</sup> decisions by the Immigration and Naturalisation Service on applications from migrant entrepreneurs and the advice from the Netherlands Enterprise Agency in this respect, and decisions by the Labour Authority on work permits for newly arriving migrants or asylum seekers.<sup>69</sup> As I concluded in my PhD dissertation, the interests and goals of each institutions, and the data they each have, which are quite relevant for research purposes, don't always align. European Migration Law definitely has a part to play here, possibly through an improved Single Permit Directive.<sup>70</sup>

The institutional role that regions or cities play in migration policy is key, in terms of both legislation and administration. Although migration law and policy are designed at the EU or the national level, the relevance of regional labour markets, and of economic as well as social preferences and capacities, cannot be ignored when it comes to how welcoming a policy actually is in practice.<sup>71</sup>

Courts may seem unlikely actors in the welcoming talent model. National and European courts - both the Court of Justice of the European Union (CJEU) and the European Court of Human Rights - have an important part to play in explaining the law. Such an explanation might, for instance, help Mike to exercise a right he thinks he has, but that the street-level bureaucrat denies him. Courts may, however, be reluctant to play a major role.<sup>72</sup>

#### *Countries of origin Partnerships*

In the Global Approach to Migration, which was launched in December 2005, the European Commission presented a framework for cooperation on the part of the EU with third countries on migration and asylum.<sup>73</sup> Since that time, partnerships with countries of origin have blurred legal responsibilities and made less clear what part the EU plays, and what responsibilities it has, when migration is 'managed' in countries of origin or transit.<sup>74</sup> The idea was, and still is, that partnerships with countries of origin will create opportunities for migrants with practical skills to enter European labour markets, but so far the focus of such mobility partnerships is often more on returning or keeping out unwanted migrants.<sup>75</sup>

I hope, but I am not yet convinced, that the so called “Talent Partnerships” will contribute to a welcoming cooperation with countries of origin. These Talent Partnerships entail an:

“enhanced commitment to support legal migration and mobility with key partners. They should be launched first in the EU’s Neighbourhood, the Western Balkans, and in Africa, with a view to expanding to other regions. These will provide a comprehensive EU policy framework as well as funding support for cooperation with third countries, to better match labour and skills needs in the EU, as well as being part of the EU’s toolbox for engaging partner countries strategically on migration.”<sup>76</sup>

The European Commission think these partnerships will address the *needs* of Europe and of the countries of origin to make talented people available for the European labour market. The Talent Partnerships are also development tool, striving for better job opportunities in countries of origin *and* (temporary) legal migration routes into the EU. The pilot projects we have seen so far are mostly training schemes with EU funding and matching EU vacancies and skills. The partnerships are presented as a triple win, to benefit not just Europe and the countries of origin, but migrants too. A good way to test whether these partnerships will indeed benefit migrants, and are not temporary guest-worker programs all over again, has to my knowledge not been brought to the fore. Obviously, I think my welcoming talent model would be helpful. These partnerships have yet to yield any significant results.<sup>77</sup> And that in turn means that Europe is still an unwelcoming and, at an operative level, an untrustworthy partner.<sup>78</sup>

A truly global approach calls for less Euro-centrism: Europe is not the centre of the world. See for instance the work done by Amanda Bisong, on Europe and migration from a non-EU perspective.<sup>79</sup> The initiatives that Thomas Spijkerboer of the Amsterdam Centre for Migration and Refugee Law at the VU is developing in this respect are thus most welcome.

#### *Employers, educators, and facilitators*

Private actors have a part to play as well.<sup>80</sup> European migration law has increasingly adopted options for fast-tracking migration procedures for recognised sponsors: in order to be welcoming, Member States can make such a facility available to institutions of higher education and multinationals. Institutionally, the decision to grant a residence permit remains with national immigration authorities. The Netherlands seems to be a pioneer in using this facility. Though I can certainly see the benefit of fast-tracking procedures, I am hesitant, from a values and welcoming perspective, to advocate such privatisation. A less welcoming aspect of this near-privatisation of migration decisions is that, in Dutch practice, the migrant has to rely on the employer for all employment

and immigration affairs. The recognised-sponsorship system replicates the pitfalls of Posting for the purpose of providing services, another legal category of intra-EU mobility.<sup>81</sup> Posting makes EU nationals and third-country nationals alike highly dependent on their employers or temporary-employment agencies for work, housing, transport, and health insurance. Employers and other facilitators thus have an important part to play in making a host country welcoming. In sum, when it comes to institutional design, I look beyond actors who implement immigration law only.

Besides employers, there are, as a final example, national banks that can irregulate migrants by unbanking them to comply with anti-money laundering laws.<sup>82</sup>

All these institutions, and the laws they enforce, have a part to play in the welcoming of talent and should be part of what migration scholars look at.

#### **e. Facilitating trajectories into permanent residence and citizenship**

The fifth and final part is about the future, and about facilitating trajectories towards permanent residence and citizenship. You could call it a matter of human dignity that Mike should be offered the opportunity to care for his father without losing his EU residency rights. The European Commission wrote in its impact assessment of the implementation of the Blue Card Directive:

“the Blue Card Directive aims to give migrant workers the possibility of longer ‘time-outs’, enabling them to return to their country of origin without being penalised with a loss of their residence permit, or expiration of the years of residence that count towards the right to long-term resident status.”<sup>83</sup>

If you want to welcome people, you should not stand in the way of their gaining permanent status. A migration policy that includes options, maybe even an accelerated path to permanent residence or possibly citizenship, can be said to be welcoming. If he had been in Germany, for instance, Mike could have switched from his Blue Card to a German permanent-residence permit after three years. But that permit might not allow him to stay away for twelve months, so hanging on to the Blue Card delivers, at least on paper, a more welcoming scenario.

I often play a what-if game with my students to train them in how to see the relevance of different legal migration categories have on the available trajectories towards permanent residence. What if Mike had been a German national working in the Netherlands, for instance? In that case a different set of rules would apply. The Citizens Directive, which deals with the rights of EU citizens and their third-country (non-EU) spouses, does, however, provide for a somewhat similar circular migration right while a mobile Union citizen is awaiting permanent residence. The free movement of EU citizens facilitates ‘circular’ migration, thus allowing them to temporarily return home,

stopping the timer, as it were, on their residence without interrupting its continuity or losing rights, but only for “important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.”<sup>85</sup>

If Mike had been a German national, then, he could have gone home for the birth of a child (or would he have had to be a she?), without losing any entitlements. In a similar though not identical way, the Blue Card Directive gives Member States the option of limiting a migrant’s reasons for being away to “exercise an economic activity in an employed or self-employed capacity, or to perform a voluntary service, or to study in his own country of origin”. Caring for a family member, then, is not among these reasons. Mike is lucky the Netherlands did not impose this restriction.

There is no case law from the CJEU on a situation such as Mike’s. There is other case law, but Mike’s case cannot be compared to that of Nnamdi Onuekwere, for instance.<sup>86</sup> Nnamdi was a Nigerian national. He was married to an Irish woman exercising her right of freedom of movement. They were living in the UK, which at the time was an EU Member State. Nnamdi didn’t go away like Mike, he was put away—sent to prison. Periods in prison, the Court ruled, do not count in the context of the acquisition of permanent residence. So they interrupt continuity of residence, while periods of pregnancy or study abroad do not.<sup>87</sup>

“Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union.”<sup>88</sup>

Social ties are not the sort one could build up in prison.<sup>89</sup> But even if Mike had been put in prison, his application for permanent residence ought not to have been rejected without motivation. According to the CJEU case law on questions of protection against expulsion or the rejection of long-term residence, the interests of people who murdered, stole, or had other criminal issues need to be considered before they are rejected. There is no case law - at least not yet - on people who temporarily go home to care for relatives.

Let’s take another what-if: let’s say Rima, our Iraqi nurse, eventually received a residence permit as a refugee in Greece. Today, we see quite some mobility among people who have been granted protection in one EU Member State, for instance in Greece or Hungary, but who are not properly welcomed, say with access to the labour market. They refuse to stay put and move on to other Member States to earn a dignified livelihood. These so called ‘secondary movements’,<sup>90</sup> before the migrant has obtained a long-term residence permit are, in principle, not in accordance with EU migration law: the preferred mode is immobility, and premature mobility may cause irregularisation.<sup>91</sup>

This obligation to stay put or be put off the trajectory towards permanent residence or citizenship is a construct of EU migration law that the European Commission aims to address in the future.<sup>92</sup> It is a development I welcome.

Let's take one last and brief what-if: let's say Rima is immensely rich. Instead of applying for asylum in Greece she obtains Cypriote citizenship through its citizenship for sale program, buying herself a so called 'golden passport'.<sup>93</sup> The European Commission considers that, by operating investor citizenship schemes Cyprus and Malta fail to fulfil their obligations under the principle of sincere cooperation.<sup>94</sup> Becoming the national of a Member State means becoming an EU citizen too.<sup>95</sup> This link is reason for the European Commission to find Cyprus a bit *too welcoming*. This boils down to a discussion over sovereignty and who is deserving our welcoming for what reasons: Money does not, at least not in the eyes of the European Commission, equal talent.

#### IN CONCLUSION: ON BUBBLES AND ZONES

Mike, Dewi, and Rima fit into different legal categories: worker, student, and asylum seeker. They have found themselves caught in a bubble - a COVID-19 word I'm repurposing here to illustrate how legal categories lock people up, immobilize them, or allow them to move within restricted "zones".<sup>97</sup> In these "zones of exception", rules either don't apply or systematically prevent migrants from finding their moorings and moving towards a secure residence status or even citizenship. It is not always easy to step out of the bubble by switching between categories or zones, questioning how welcoming the rigorous categorisation of people according to their migration status, or the status of their parents, is.

And bubbles can pop. In the course of this lecture, I have presented the bubbles and zones that Mike, Dewi, and Rima found themselves in. Migration law in the widest sense of the word - that is, not just the regulation of admission, but the rights that are subsequently granted or withheld, the procedures that migrants must go through, the institutions they encounter, *and* the actual availability of security of stay - all of these help determine whether and to what extent the bubbles and zones of exception in which people remain outsiders, are welcoming or unwelcoming. There is a thin line separating welcoming from unwelcoming, and hospitality from hostility.<sup>98</sup>

#### FUTURE TEACHING AND RESEARCH AGENDA

Mike ran up against *legal uncertainty*, among other things; Dewi was *irregularised*; and Rima was given an *undignified reception*.

I offer my students complex puzzles where European migration law is intertwined with industrial politics and global power relations. With Karen Geertsema, and Sandra Mantu, I hope we can soon present you with our Migration Game, a simulation, to study European migration law. The idea is to give you, and other students across the EU and possibly beyond, a fuller sense of what all actors involved in European migration law experience.<sup>99</sup>

My research agenda builds on the title of my PhD, which was ‘State, Market and Migrant’, and it covered the Dutch context. I will now focus on *EU migration law: migrants, markets, and the EU Member States* as well as states beyond the EU and migration law and the part it plays in migrants’ lives, in the choices businesses make to recruit migrant workers, and in Member States’ attitudes towards it, taking a global approach. To name a few topics:

- At the level of migration law and policy, and its impact on the individual migrant, I will be looking at: The legal aspects of the European Commission’s migration plans, which are being developed as we speak.<sup>100</sup> For starters, on 17 May this year, the European Council and the European Parliament reached an agreement on a recast version of the Blue Card Directive.<sup>101</sup>
- Also, I want to study how the Intra-Corporate Transfer Directive and other trade-related global mobility schemes function on the ground. To my knowledge, no research has been done on this yet. How does existing and new EU migration law with regard to economic migration regulate and impact the welcoming of *migrants, what responsibility is given to market actors and how do they play their part, and how do we explain the part Member States play in giving the corporate world a say in regulating migration?*
- Migrants who stay in an EU Member State without authorisation, migrants without legal residence, irregulars, or “undocumented” individuals constitute another group of interest. People staying irregularly in one Member State could be legal migrants elsewhere in the EU. They are not necessarily less skilled or less talented. What part can the EU, EU migration law, and EU Member States play in improving the lives of irregular *migrants and the markets that employ them?*
- The role of legal professionals is also a topic of interest.<sup>102</sup> I’ve mentioned these professionals a few times in the course of my lecture. Legal professionals play a part in the making of EU migration law - whether academics such as Kees Groenendijk, who, with his usual vim and vigour, represents the Meijers Committee in the consultations with civil society on the legislative and policy changes to migration that are being envisaged, or lawyers such as Fragomen Immigration Lawyers, who make the case in Brussels for the needs of business when it comes to migration law and policy.

On the functioning of law in society more generally, I am curious to learn whether we’ll see a paradigm shift towards a more “sustainable” welcoming of talent as the demography of Europe changes. If there are too few people to do the work, as demographics forecast, you can get more people, as the Commission advocates. Or we can try to curb overconsumption and bring down the number of precarious jobs, or robotize, which is, in fact already happening. Given existing tensions in receiving societies, I will

cite a statement by Dutch the Dutch Minister of Justice, Carel Polak, in 1969, in a shortened version:

The continuing strong demand for foreign labour gives me reason, with an eye on the future, to draw attention to their integration. A social problem can grow, of which later generations would reap the bitter fruits.<sup>103</sup>

I am not a politician, and I don't think his fear, or his reference to *their* integration, does justice to the positive processes of community-building that are taking place today. Based on my research over the years, I do support his call to consider carefully the impact that the decisions we make today have on the wellbeing of future generations. I hope my research can contribute to a sustainable EU migration policy that--considering the EU's founding values - does not obscure the perverse co-existence of the demand for, and the fear of, migrant workers. If the demographics are right, we are leaving behind the "battle for brains" and moving towards a global "struggle for skills". Europe and the European Member States need to develop future proof welcoming migration policies.

I am grateful for the opportunity that Radboud University is giving me to teach, research, and contribute to shaping the future of Welcoming Talent and the part European migration law plays.

#### ACKNOWLEDGMENTS

In this lecture, and the extended printed version, I have looked back on almost 30 years of thinking on economic migration law and practice. I have drawn on my exchanges with many people in a plethora of organisations: Everaert Immigration Lawyers and my mentor Ted Badoux, who introduced me to lawyering; Pieter Boeles, who inspired me to go into academia; Carl Everaert, from whom I have learned so much; and the lawyers at Kroes Immigration Lawyers, many of whom have been my students or co-workers, my colleagues at the University of Amsterdam, of who Ben Olivier I name especially as the person who introduced me to immigration law in the early 1990s.

Over the past eight years, I have had the honour of being a member of the Dutch Advisory Committee on Migration Affairs, and I would like to thank the other members of the Committee for the inspiring projects and, above all, for the wind tunnelling of our policy options for 2030.

My work over the years has drawn in various ways on the contributions made by a host of other organisations, such as Ben & Jerrys, the Dutch Council on Refugees, both of whom I referred to above. But also The Permits Foundation, Refugee Company, the National Support Organization for Undocumented People, FairWork, the recently established Knowledge Centre for Migrant Workers, the European Migration Network, the

Dutch branch of the International Organization for Migration, and the International Centre for Migration Policy Development. I would also like to thank, in the same vein, the people at the European Commission and various institutions within the Dutch government, who have always been kind enough to make themselves available to exchange thoughts and ideas. It would be hard to overstate the importance of these interactions, and I am looking forward to our continued work together. I also thank the academic networks I participate in, such as the Odysseus Network, for the ever inspiring exchanges.

I'd also like to say a special thankyou to all the small businesses for their service and support, and their warm smiles - especially during the lockdown: Kaffa Ethiopian Coffee, Birun Office & Copy Center, Java Bookshop, Tom's Repair Shop, Labutina Beauty Institute, Edit Personal Training, and - very important! - New World Nails.

My apologies to the many others I've worked with over the years and whom space doesn't allow me to mention here.

*Dear colleagues,*

I benefitted immensely from the intellectually vibrant Centre of Migration Law and the Department of the Sociology of Law for my PhD, and feel blessed to have been able to return to the roost, so to speak, as Professor of European Migration Law. Kees Groenendijk and Anita Böcker, my PhD supervisors, have shaped my work as a researcher. And a big thankyou to Elspeth Guild for her invaluable cooperation and our stimulating discussions. I've certainly got some big shoes to fill. The excellent team at the Centre of Migration Law - already very dear to me - have created such a stimulating environment to which I feel this strong connection, the pandemic notwithstanding. And last but by no means least, a big shout-out to the people at the Radboud University Network on Migration Inclusion (RUNOMI) and EUROPAL. Thank you! The work you do is nothing short of inspiring!

*Dear students,*

Do you know the song *It Ain't Necessarily So*, from Gershwin's Porgy and Bess? Well in that spirit, I would encourage you to keep on digging, and keep wondering why. Why is the law as it is, or why is there no law, or poor or no enforcement of one or another law? Why do people use the law as they do, and could or should they use it differently? Thank you for sharing your thoughts and your hard work.

*Dear friends and family,*

Please forgive me my mistakes and my workaholic episodes. Thank you for your immense and nearly infinite patience, and for all you have done for me. I'm forever in your debt. And finally, dear Boukje, this is your world. Enjoy the journey you're on as you discover what part you want to play. Its a great joy to be your mother.

And with that, I conclude my lecture: *Ik heb gezegd.*

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## NOTES

- 1 Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155.
- 2 Tesselte Lange & Kees Groenendijk, “The EU’s Legal Migration Acquis: Patching up the Patchwork”, *EPC Issue Paper*, 16 March 2021.
- 3 ILO Global Estimates on International Migrant Workers - Results and Methodology. 2nd ed. International Labour Office - Geneva: ILO, 2018.
- 4 See Tesselte de Lange et al., ‘*Money Matters in Migration: A Synthetic Approach*’ in De Lange, Willem Maas, and Annette Schrauwen (eds), *Money Matters in Migration: Policy, Participation, and Citizenship*, Cambridge University Press (in press).
- 5 Tesselte de Lange, “Middelen van bestaan bij gezinshereniging en gezinsvorming”, *Migrantenrecht*, 1997-3, pp. 47 – 54 and 1997-4, pp. 81 – 87; Roeleke Depping and Tesselte de Lange, “Middelen van bestaan bij gezinshereniging en gezinsvorming”, *Migrantenrecht*, 1999-7, pp. 171 – 178, 1999-8, pp. 199 – 205.
- 6 Article 16(3), Blue Card Directive 2009/50/EU. Article 18, to which Article 16(3) refers, sets conditions for intra-EU mobility, a right Mike did not, indeed, use. Article 17(3) of the recast Directive on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment COM(2016) 378 final, 2016/0176 (COD), is similar.
- 7 In general, in the EU and the Dutch contexts at least, six months is the ‘standard’ maximum time a migrant can stay away before jeopardising migration rights, although the immigration authorities have discretionary powers to allow for longer periods of absence. If they stay away longer, it is assumed they no longer want to exercise those rights. We might get some insights on the evaluation of periods of absence from a case now before the European Court of Justice, CJEU C-432/20, *Landeshauptmann von Wien*. It deals with 12 months of absence on the part of a holder of the long-term residence permit under Article 9(1)(c) LTRD.
- 8 Michael Lipsky, “Street-Level Bureaucracy: Dilemmas of the Individual in Public Service”, Russel Sage Foundation, 2010.
- 9 Nora Dörrenbächer, *Europe at the Frontline of Migration Law: Legal Discretion, Bureaucratic Context and individual Attitudes* (RU doctoral dissertation), 2018, <http://hdl.handle.net/2066/190085>.
- 10 <https://ec.europa.eu/futurium/en/inclusion-migrants-and-refugees/european-migrant-advisory-board-emab#What%20is%20the%20EMAB?> (Accessed 21 May 2021).
- 11 The interdisciplinary projects I have done include the book *Van azc naar een baan: De Nederlandse regelgeving over en praktijk van arbeidsmarktintegratie van vluchtelingen* with Elles Besselsen, Soumaya Rahouti and Conny Rijken, 2017; Tesselte de Lange and Conny Rijken (eds), *Towards a Decent Labour Market for Low-Waged Migrant Workers*, which includes an article I wrote with Lisa Berntsen, “Employer Sanctions: Instrument of Labour Market Regulation, Migration Control, and Worker Protection?”; Tesselte de Lange, Lisa Berntsen, Romy Hanoeman, Ivana Kalas (eds), *Wat werkt voor ondernemende migranten?*\* a study published by Instituut Gak and to which Ous Haider, Omar Achfay, Natalia Skowronek, Shareefa Musa Deedee Gintel and others also contributed; my current project on the impact of COVID-19 on migrant workers, together with the Radboud University Network on Migrant Inclusion (RUNOMI), chaired by Pascal Beckers and with Radboud UMC, and *Migration Law and Sociology of Law*, which is funded by NWO/ZonMW. The mixed-methods approach in this last study is exemplary of my favourite research method: it builds on doctrinal research, media analysis, in-depth interviews with stakeholders and migrants, and employer surveys.

- 12 See Latefa Narriman Guemar and Helen Hintjens, "Is the Peer Ethnographic Approach a Suitable Method for Researching Lives of Undocumented Migrants?", *Tijdschrift over Cultuur & Criminaliteit* 3, no. 1 (2013), pp. 69–81. This work builds implicitly on participatory action research. See, for instance, Bev Gatenby and Maria Humphries, "Feminist Participatory Action Research", *Women's Studies International Forum* 23, pp. 89–105. doi:10.1016/S0277-5395(99)00095-3.
- 13 Tesseltje de Lange et al., "Money Matters in Migration: A Synthetic Approach" in De Lange, Willem Maas, and Annette Schrauwen (eds), *Money Matters in Migration: Policy, Participation, and Citizenship*, Cambridge University Press (in press).
- 14 Regulation (EU) 2020/851 of the European Parliament and of the Council of 18 June 2020 amending Regulation (EC) No 862/2007 on Community statistics on migration and international protection (Text with EEA relevance), PE/19/2020/INIT, OJ L 198, 22.6.2020, pp. 1–12.
- 15 By interviewing Syrian and American entrepreneurs, for instance, we learned about their lack of understanding of Dutch municipal "terrace" laws: before you can put a chair out in front of your shop, you need a permit, so if you do that without a permit, you may get a fine. The entrepreneurs we interviewed felt quite unwelcome. Tesseltje de Lange, Lisa Berntsen, Romy Hanoeman, and Ous Haidar, "Highly Skilled Entrepreneurial Refugees: Legal and Practical Barriers and Enablers to Start Up in the Netherlands," *International Migration* 2020, <https://doi.org/10.1111/imig.12745>.
- 16 Speech by Commissioner Ilya Johansson at the meeting of the European Integration Network, 31 March 2021, [https://ec.europa.eu/commission/commissioners/2019-2024/johansson/announcements/commissioner-johanssons-speech-meeting-european-integration-network\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/johansson/announcements/commissioner-johanssons-speech-meeting-european-integration-network_en)
- 17 Hein De Haas, Stephen Castles, and Mark J Miller, *The Age of Migration*, 6th ed., London, Red Globe Press, 2020.
- 18 Article 79(5) of the Treaty on the Functioning of the European Union. On quotas, see Saskia Duis, *What's in a Number? Quotas as an Instrument to Manage Labour Migration into the EU*, master's thesis, Radboud University 2020.
- 19 Tesseltje De Lange, "Welcoming Talent ? A Comparative Study of Immigrant Entrepreneurs' Entry Policies in France , Germany and the Netherlands," *Comparative Migration Studies* 6, no. 27 (2018); Tesseltje De Lange, "Is the Intra-Corporate Transfer Directive Welcoming International Talent?", in *The Intra Corporate Transferee mDirective: Central Themes, Problem Issues and Implementation in Selected Member States*, Wolf Legal Publishers 2018, 155–65.
- 20 Article 3(2) of the Treaty on European Union (TEU).
- 21 Article 3(3) of the TEU.
- 22 Article 3(5) of the TEU.
- 23 Article 41(1) EU Charter.
- 24 Article 47 EU Charter.
- 25 See Maurice Hamington, "Toward a Theory of Feminist Hospitality". In *Feminist Formations*, 22(1), pp. 21–38.
- 26 Seyla Benhabib, *Another Cosmopolitanism*, Oxford University Press, 2004, p. 177

- 27 The term came to my attention during a recent inspiring discussion with Ferruccio Pastore, Director at FIERI is an independent research institute on migration, mobility and integration.
- 28 “All Member States should include domestic work in general labour migration schemes”, ETUC Resolution on Fair Labour Mobility and Migration, Adopted at the Executive Committee Meeting of 22 March 2021, available at <https://www.etuc.org/en/document/etuc-resolution-fair-labour-mobility-and-migration>.
- 29 Tesselte De Lange and Pedro De Sena, “Your Income Is Too High, Your Income Is Too Low: Discretion in Labour Migration Law and Policy in the Netherlands and Macau,” *Theory and Practice of Legislation*, 2020, pp. 1-17, <https://doi.org/10.1080/20508840.2020.1729559>.
- 30 Simon Tans and Jelle Kroes, “Implementation and Application of the International Legal Framework for Intra-Corporate Transfers in the Netherlands”. In P. Minderhoud and Tesselte de Lange (eds), *The Intra Corporate Transferee Directive: Central Themes, Problem Issues and Implementation in Selected Member States*, 2018, pp. 85-100.
- 31 Tesselte de Lange, Simon Tans and Amy Azhar, *The Interaction between EU Trade Commitments and Immigration Rules in EU Member States*, forthcoming in 2021.
- 32 ICT Directive 2014/66/EU.
- 33 Article 3(e), ICT Directive 2014/66/EU.
- 34 Article 3 (l), ICT Directive 2014/66/EU.
- 35 In *Frequently Asked Questions: Directive Intra Corporate Transferees*, published online by Dutch Immigration Authorities, the question is: “Within the framework of the highly skilled migrant regulation a managing director may not possess more than 25% of the shares. Does this also apply to managers within the scope of the ICT Directive? A: No, this condition does not apply to managing directors within the scope of the ICT Directive. In the definition of manager is included the element that the person must do his work ‘receiving general supervision or guidance principally from the board of directors or shareholders of the business or equivalent’. This must be checked factually. If a person, however, has more than 50% of the shares it can reasonably be concluded that this person should be considered self-employed and, therefore, the ICT Directive does not apply to this person. Is there any doubt about the number of shares owned by the managing director (more or less than 50%)? Then the IND will request additional documents from the applicant.” [https://ind.nl/en/documents/faq\\_ict\\_richtlijn\\_eng.pdf](https://ind.nl/en/documents/faq_ict_richtlijn_eng.pdf) (last accessed 23 May 2021).
- 36 European Commission DG Migration and Home Affairs, Directorate C: Migration, Protection and Visa Unit C.2: Legal Pathways and Integration (MIGRAPOL Contact Group, Mig-Dir 179), a discussion document, *Questions for discussion at the meeting of 25 February 2021 related to Directive 2014/66/EU on the conditions of entry and residence of Third-Country Nationals in the Framework of an Intra-Corporate Transfer (“ICT-Directive”)* 25 February 2021, <https://ec.europa.eu/transparency/expert-groups-register/screen/meetings/consult?lang=en&meetingId=24116&fromExpertGroups=true> (last accessed 23 May 2021).
- 37 In *Holterman v. Spies von Bülllesheim*, which involved an employment relationship with a director, the Court considered that “the main feature of the employment relationship is that someone delivers a performance during a specific time for someone else under the latter’s authority, against a remuneration. With regard to the subordination bond in particular, it must be determined per individual case, based on all data and circumstances that characterize the relationship between the parties, whether such a bond actually applies.” CJEU, 10 September 2015, C-47/14 (*Holterman et al. v. Spies von Bülllesheim*), ECLI:EU:C:2015:574.

- 38 Trade and cooperation agreement between the European Union and the European atomic energy community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [https://eur-lex.europa.eu/legal-content/NL/TXT/PDF/?uri=CELEX:22020A1231\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/NL/TXT/PDF/?uri=CELEX:22020A1231(01)&from=EN)
- 39 Article 16(1)(a) Directive 2003/86/EC; Article 9 Directive 2003/109/EC; Article 9(1)(b) Directive 2009/50/EC; Article 8(1) Directive 2011/98/EU; Article 8 Directive 2014/66/EU; Article 9 Directive 2014/36/EU; Article 9(3) Directive 2016/801/EU.
- 40 Article 13 Directive 2016/801/EU.
- 41 Article 13(3) Directive 2016/801/EU, See Helene Calers, “The SRD: Analysis and Implementation Challenges”. In De Lange and Minderhoud (eds), *The Student and Researchers Directive* (2020).
- 42 Ibid, p. 25.
- 43 Lisa Berntsen and Tesselte de Lange, “Employer Sanctions Instrument of Labour Market Regulation, Migration Control, and Worker Protection?”, in Conny Rijken and Tesselte de Lange (eds), *Towards a Decent Labour Market for Low-Waged Migrant Workers*, Amsterdam, AUP, 2018, pp. 189–206.
- 44 On this directive. see Pieter J. Krop, *De handhaving van het verbod op illegale tewerkstelling: De verhouding tussen strafrechtelijke en bestuursrechtelijke handhaving in de Werkgeverssanctierichtlijn, Nederland en Duitsland*, Boom Juridische uitgevers, 2014.
- 45 Bjarney Friðriksdóttir, *What Happened to Equality? : The Construction of the Right to Equal Treatment of Third-Country Nationals in European Union Law on Labour Migration*, Brill Nijhoff, 2017.
- 46 For instance, Ruhs compared migrant rights and skill levels, and concluded those who are highly skilled have more rights, while practically skilled migrants have fewer. See Martin Ruhs, “The Rights of Migrant Workers: Economics, Politics and Ethics,” *International Labour Review*, vol. 155 (2), 2016, , pp. 281–296, <https://doi.org/10.1111/ilr.12025>. Pastore argues that this does not explain policy choices made in countries such as Italy, where periodical regularisations of migrants take place. See Ferruccio Pastore, “The Governance of Migrant Labour Supply in Europe, before and during the Crisis: An Introduction”. In *Comparative Migration Studies* 2, no. 4 (2014), pp.385–415, <https://doi.org/10.5117/CMS2014.4.PAST>.
- 47 Family Reunification Directive 2003/86/EC; Article 15 Blue Card Directive 2009/50/EC; Article 19 ICT Directive 2014/66/EU.
- 48 Article 4(2) of the Family Reunification Directive reads as follows: “The Member States *may*, by law or regulation, authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the following family members: (a) first-degree relatives in the direct ascending line of the sponsor or his or her spouse, where they are dependent on them and do not enjoy proper family support in the country of origin”. If Mike were German (irrespective of his father’s nationality), the Citizenship Directive would apply. This directive obliges member states to grant family reunification rights (under Articles 4 and 2(d)) to dependent direct relatives in the ascending line.
- 49 District Court of The Hague, 24 February 2020, ECLI:NL:RBDHA:2020:14577 <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2020:14577>, published on 13 April 2021. The Dutch State Secretary for Justice and Security assumed more than emotional ties between the Syrian man and his mother. This was evident from the combination of factors such as the fact that they had lived together for a long time, the mother’s advanced age, her health problems, the fact that she was a widow, and that the man was her only child. This constitutes family life under Article 8 of the Convention on Human Rights. However, the State

- Secretary decided that the subsequent weighing of interests was to the disadvantage of the Syrian man and his mother. Even though the Syrian man faced an objective obstacle to living in Syria because of the asylum residence permit granted to him, the State Secretary found that the interests of the Netherlands outweighed those of the Syrian man and his mother—a conclusion the District Court found could not be justified.
- 50 The Dutch government installed the *Aanjaagteam Bescherming Arbeidsmigranten* (Taskforce for the Protection of Labour Migrants) to advise it on the improvement of the working and living conditions of migrant workers in the Netherlands during and after the COVID-19 pandemic. Among the reports the Taskforce published is Lisa Berntsen and Natalia Skrowonek, “State-of-the-Art Research Overview of the Impact of COVID-19 on Migrant Workers in the EU and the Netherlands”, Nijmegen Sociology of Law Working Papers Series, 2021/01.
- 51 In this respect, I welcome the initiative by the European Labour Authority, and am curious to see what the effects will be: <https://www.ela.europa.eu/news/safeguarding-seasonal-workers-rights-european-labour-authority-takes-action> (last accessed 24 May 2021).
- 52 Article 47 EU Charter of Fundamental Rights on the Right to an Effective Remedy and to a Fair Trial.
- 53 Tesselte 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*, Wolf Legal Publishers, 2015, pp. 5–14.
- 54 As we speak, these procedures are being redesigned. See the European Commission’s *New Pact on Migration and Asylum*, 23 September 2020, COM (2020), 609.
- 55 This is the Dublin procedure: Regulation (EU) No 604/2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (recast), Dublin-III.
- 56 *Verloren Tijd: Advies over dagbesteding in de opvang voor vreemdelingen*, 2013, Adviescommissie voor Vreemdelingenzaken.
- 57 Article 15(1) of the Reception Conditions Directive on employment reads: “Member States shall ensure that applicants have access to the labour market no later than 9 months from the date when the application for international protection was lodged if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant.” The period varies by Member State. In the Netherlands, it is six months.
- 58 Tesselte de Lange et al., *Van azc naar een baan*, Universiteit van Amsterdam, 2017.
- 59 Tesselte de Lange and Ezgi Özdemir, “Asielzoekers & daadwerkelijke toegang tot werk in nederland,” 2020, <https://repository.uibn.ru.nl/handle/2066/220303>.
- 60 <https://www.benjerry.nl/wat-is-nieuw/2020/06/come-together-toolkit-voor-werkgevers> (last accessed on 23 May 2021).
- 61 CJEU 14 January 2021, C-322/19 and C-385/19 *K.S., M.H.K. and R.A.T.*, D.S. ECLI:EU:C:2021:11 on access to work during the asylum procedure under the Reception Conditions Directive 2013/33/EU. The right to work falls within the right to human dignity guaranteed in Article 1 of the Charter of Fundamental Rights of the European Union. An earlier case was about access to reception facilities more generally, see Karin Zwaan, “Commentary. Human Dignity and a Dignified Standard of Living: The Judgment of the Court of Justice in the Case of Zubair Haqbin (C 233/18)”, *Białostockie Studia Prawnicze*, 26 (1), pp. 143–154.

- 62 Ulli d'Oliveira, "‘Geen dwangssommen bij de Vreemdelingenwet?’ Kom nou!", *Nederlands juristenblad* 2021-14, pp. 1071–1073. This issue also contained an article by staff, Karen Geertsema, Kees Groenendijk, Carolus Grütters, Paul Minderhoud, Ellen Nissen, Tineke Strik, Ashley Terlouw, and Karin Zwaan, all of the Centre of Migration Law, *Ongezien onrecht in het vreemdelingenrecht* (Hidden injustice in Migration Law) *Nederlands juristenblad* 2021-14, pp. 1046–1053, which received considerable media attention and which has been nicely presented on our website by Carolus Grütters, <https://www.ru.nl/rechten/cmr/actueel/nieuws/@1310390/media-aandacht-vreemdelingenonrecht/> (last accessed on 24 May 2021). The topic is the hidden injustice in Dutch migration law, its application in practice, and the failure of the Dutch highest court, the Council of State, to correct these injustices. Dutch immigration lawyers, working together in two professional associations, the Specialist Association of Migration Lawyers (SVMA) and the Association of Asylum Lawyers and Jurists in the Netherlands (VAJN), simultaneously presented a report that listed a wide range of practices the authors say are unjust: *Ongehoord onrecht in het vreemdelingenrecht* [Untold Injustice in Migration Law], 12 April 2021, <https://www.vajn.org/ongehoord-onrecht-in-het-vreemdelingenrecht/>.
- 63 In *Van azc naar een baan*, we concluded that the obligation imposed on asylum seekers to refund living costs to reception centres when they actually go out and work (something that, at least formally, few are able to do) is not in conformity with the Reception Conditions Directive. I would like to repeat here that the obligation to repay that is imposed in the Netherlands, without giving reception centres themselves any discretion on whether to ask for payment, needs adjusting. There we used, instead of welcoming, the concept of *kwartiermaken* (quarter-making), which had been developed by my aunt, Doortje Kal, a distinguished emeritus lector.
- 64 Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 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, OJ L 343, 23.12.2011, p. 1–9.
- 65 Tesselte de Lange and Kees Groenendijk, "The EU's Legal Migration Acquis: Patching up the Patchwork," 2021, <https://www.epc.eu/en/publications/The-EUs-legal-migration-acquis-Patching-up-the-patchwork~3cad34>.
- 66 Tesselte de Lange et al., *Van azc naar een baan; Tesselte De Lange et al., Wat werkt voor ondernemende migranten?\** Een studie naar ervaren mechanismen van in- en uitsluiting in recht en praktijk, 2019.
- 67 Lisa Berntsen and Tesselte de Lange, "Employer Sanctions: Instrument of Labour Market Regulation, Migration Control, and Worker Protection?". In Conny Rijken and Tesselte de Lange (eds), *Towards a Decent Labour Market for Low-Waged Migrant Workers*, Amsterdam University Press, 2018.
- 68 Tesselte de Lange, *Wezenlijk Nederlands Belang: De Toelating van Ondernemers van Buiten de EU*, Wolf Legal Publishers, 2016.
- 69 Tesselte de Lange and Ezgi Özdemir, "Asielzoekers & Daadwerkelijke Toegang Tot Werk in Nederland," 2020.
- 70 De Lange and Groenendijk, "The EU's Legal Migration Acquis: Patching up the Patchwork", 2021.
- 71 See, for instance, Barbara Oomen, Moritz Baumgärtel, and Elif Durmus, "Accelerating Cities, Constitutional Brakes? Exploring the Local Authorities between Global Challenges and Domestic Law". In Ernst Hirsch Ballin et al (eds), *European Yearbook of Constitutional Law 2020: The City in Constitutional Law*, vol. 2

- (Springer, 2021), pp. 249–72. See, too, the Cities of Refuge Research headed by Barbara Oomen, <https://citiesofrefuge.eu/>.
- 72 Jasper Krommendijk, “The Highest Dutch Courts and the Preliminary Ruling Procedure: Critically Obedient Interlocutors of the Court of Justice,” *European Law Journal* 25, no. 4 (2019), pp.394–415, <https://doi.org/10.1111/eulj.12322>.
- 73 Commission Communication, COM(2007) 247. Externalisation of responsibilities in the field of migration and asylum is yet another field of study, which is covered by my colleague Professor Tineke Strik.
- 74 Annick Pijnenburg, *At the Frontiers of State Responsibility*, Intersentia, 2021.
- 75 Natasja Reslow, “The Role of Third Countries in EU Migration Policy: The Mobility Partnerships.” *European Journal of Migration and Law* 14-4 (2012): 393–415.
- 76 European Commission's *New Pact on Migration and Asylum*, 23 September 2020, COM (2020), 609, p. 23
- 77 Martin Ruhs, *Expanding Legal Labour Migration Pathways to the EU: Will This Time Be Different?*. In *Istituto Affari Internazionali*, 2020.
- 78 Sylvie Sarolea, “Legal Migration in the “New Pact”: Modesty or Unease in the Berlaymont?”, *EU Migration Law Blog*, 2021; Marie de Somer, Philippe de Bruycker, and Jean-Louis de Brouwer, *From Tampere 20 to Tampere 2.0: Towards a New European Consensus on Migration*, European Policy Centre, 2019, p. 158.
- 79 See, for instance, Amanda Bisong, “Trans-Regional Institutional Co-Operation As Multilevel Governance: ECOWAS Migration policy and the EU”, *Journal of Ethnic and Migration Studies* (2019): 1294–1309 and Nora El Qadim, “The Symbolic Meaning of International Mobility: EU-Morocco Negotiations on Visa Facilitation”, *Migration Studies*, 6-2 (2018): 279–305.
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