

Introduction

Grasping Legal Time

To everything there is a season,
and a time for every purpose under heaven.

Ecclesiastes 3

At the start of this millennium, a Ghanaian woman moved to the Netherlands to live with her Dutch partner. In 2002, her son is born out of wedlock and, because of the Dutch nationality of the father, the child becomes a Dutch national. The mother, however, resides on a residence permit with her family, a residence that is dependent on the relationship with her partner. When this relationship comes to an end in 2006 and the partner subsequently leaves the Netherlands, her residence status is withdrawn. The mother continues to live with her son in the Netherlands, unlawfully but without this being noticed by the Dutch authorities.

In 2012, she successfully applies for a residence permit on the basis of a new ruling of the European Court of Justice of the European Union (CJEU) that allows her to reside with her son on the basis of Article 20 of the Treaty for the Functioning of the European Union (EU). This *Zambrano* ruling dictates that the mother should be granted a residence status to reside with her son, which she receives in 2013. The reasoning of the CJEU is that if the mother would be sent back to Ghana, the boy's rights as an EU citizen would be impaired because he would effectively be forced to leave the territory of the union to join his mother.¹ In other words, her residence is derivative on the son's union citizenship, which would be harmed if he was to follow the mother to her country of origin.

The new status allows the mother to reside happily out of harm's way for the subsequent five years. At this time, she decides to perpetuate her residence in the Netherlands with an application for permanent residence on the basis of the Long-Term Residence Directive. Alas, this application is declined by the Dutch government, which argues that the specific "Zambrano-residence permit," on the basis of which she has been residing in the country, is by its very nature temporary because the boy will inevitably reach the age of majority and his adulthood will break the relationship of dependency. After all, the residence of the mother is based on the relationship with her child. As a consequence, the mother can no longer derive a residence right based on the EU citizenship of her son when he turns eighteen. Therefore, the mother, who has at that time effectively resided in the Netherlands

¹ CJEU March 8, 2011, *Ruiz Zambrano*, C-34/09, this residence permit is nowadays referred to as the Chavez-Vilchez permit, as a result of a more recent judgment, CJEU May 10, 2017, *Chavez-Vilchez*, C-133/15. See further, H. Kroeze and P. van Elsuwege, "Revisiting Ruiz Zambrano: A Never Ending Story?," *European Journal of Migration and Law* 23, no. 1 (2021).

for more than eighteen years, legally speaking still remains “temporary” within the country. This raises the question of how long can long-term residence legally still be qualified as “temporary”?

This question led to preliminary questions before the CJEU, questions that at the time of writing are still pending.² Nevertheless, the case can, already before the CJEU has come to a decision, serve as paradigmatic example for the Janus face of time in migration law. The legal reasoning of the Dutch government shows that the qualification of temporariness of residence is an effective means to differentiate residence entitlements. The mere qualification of the residence as “temporary” is enough to exclude the women from stronger residence entitlements and such is apparently still possible if the migrant has resided up to eighteen years in the country. In other words, time serves as an excellent means to regulate the presence of migrants within a given territory.

The case therefore serves first of all to exemplify the functioning of what Melanie Griffiths has called “temporal governance.”³ I argue in this book that time is indeed one of the most important means for legal control of migrants present within a territory. While migration has become increasingly selective – with smooth migration for some, and difficult or impossible migration for others – time has become more significant for the selection and supervision of migrants. The use of time is not restricted to the qualification of temporariness, in fact it is omnipresent in law,⁴ not just in migration law.⁵ It is by means of time that migration law makes crucial distinctions between different categories of people, distinctions that have profound consequences for migrants’ residence entitlements. As we have seen, some migrants are only allowed to stay temporarily, whilst others may extend their

² CJEU (pending), E. K., C-624/20.

³ M. B. E. Griffiths, “The Changing Politics of Time in the UK Immigration System,” in *Timespace and International Migration*, eds. E. Mavroudi, A. Christou, and B. Page (Camberley: Edward Elgar Publishing, 2017).

⁴ There is a growing body of literature on the role of time in law, see for an example T. Chowdhury, *Time, Temporality and Legal Judgment* (Abingdon: Taylor & Francis Group, 2020); L. Corrias and L. Francot, eds., *Temporal Boundaries of Law: Time Out of Joint* (London: Routledge, 2018); S. Ranchordás and Y. Roznai, eds., *Time, Law and Change: An Interdisciplinary Study* (London: Hart Publishers, 2020). Not to forget the seminal work of F. Ost, *Le Temps du Droit* (Paris: Editions Odile Jacob, 1999).

⁵ Also, there is ample literature on the relationship between time and migration, see for an overview B. Anderson, M. Griffiths, and A. Rogers, “Migration, Time and Temporalities: Review and Prospect,” Compass Research Resources Paper, 2013. See for a more recent work on time and migration C. Brux, P. K. Hilden, and A. L. O. Middelthon, “Klokka Tikker, Tiden Gar’: Time and Irregular Migration,” *Time and Society* 28, no. 4 (2019); T. G. Eule et al., *Migrants before the Law* (Cham: Palgrave, 2019); C. M. Jacobsen, M.-A. Karlsen, and S. Khosravi, eds., *Waiting and the Temporalities of Irregular Migration* (London: Routledge, 2020); S. Robertson, “Time and Temporary Migration: The Case of Temporary Graduate Workers and Working Holiday Makers in Australia,” *Journal of Ethnic and Migration Studies* 40, no. 12 (2014), and the references therein. As regards time and migration law, see for example C. Dauvergne and S. Marsden, “The Ideology of Temporary Labour Migration in the Post-global Era,” *Citizenship Studies* 18, no. 2 (2014); M. Ineli-Ciger, *Temporary Protection in Law and Practice*, International Refugee Law Series (Leiden: Martinus Nijhoff, 2018); S. Mantu, “Concepts of Time and European Citizenship,” *European Journal of Migration and Law* 15, no. 4 (2013); A. Somek, “Solidarity Decomposed: Being and Time in European Citizenship,” *University of Iowa Legal Studies Research Paper* nos. 7–13 (2007). The argument in this book does not serve to provide an overview of all of the different forms of time that are at work in migration law, rather the aim is to show the complex relationship one particular form of time, human time, has with the dominant clock time, while both are at work in legal time.

residence or even become nationals. Yet, time can also be used to stipulate whether and how long someone may lawfully stay on the territory; when someone can ask for a renewal of their entitlement or a stronger residence status; while it can equally be used to determine the maximum time of the migration procedure, or the time one has to wait before such a procedure starts. In addition, time can be used to determine whether people can lose their residence entitlements – for example, after committing a criminal offense. In the case of irregular migration, the time human beings have spent on the territory can legally speaking simply be ignored, and prevent migrants from ever being included even though they might claim to have been integrated or “rooted” in the country in the meantime. In other words, it seems as if the possibilities to use time in the legal control of migration are not only numerous but, more strikingly, seemingly limitless. Such temporal governance of the presence of migrants move, as Anderson and Shachar have observed, the border ineluctably inward.⁶

Yet, close scrutiny of the role of time as a means of control also reveals that hidden in the use of time in migration law is an argument for inclusion of migrants based on time. One of the central aims of this book is to make this argument explicit, thereby revealing both pros and cons of the temporal legal control of migrants. And the case of the Ghanaian woman is a great example to use for this argument. While we can read the case as an excellent example of temporal governance, the case could also be understood as precisely how such temporal qualification reaches its limits (and it would not surprise me if the CJEU would come to that conclusion in this case). Calling residence of almost two decades still “temporary” after all begs the question: What is the meaning of such temporariness and can states, normatively and legally, leave migrants endlessly in such a situation of legal limbo? In this book, I argue that temporal governance, such as in this case, finds its limitation in the normative value of human time.

In order to make this normative limitation explicit in this book, I have to simplify the meaning and use of time in law. Hence, I will focus on the role of time in law from different artificial angles. I think it is important to mention this to make clear that the aim of this book is by no means to discuss the role of time in law, or even migration law, from all angles in order to reveal all of the different meanings of time in law. I focus on two conceptions of time in law: human time and clock time. Yet, even the discussion of these conceptions of time risks becoming artificial because clock time and human time are entangled in several ways, so any discussion of their role risks becoming superficial. Still, my aim in this book is not only to show their intricate relationship in the functioning of temporal governance but also to show their fundamental difference. The point of temporal governance is that it is precisely the interplay between the lapse of human time and clock time that enables the legal differentiation based on time. In the end, however, both conceptions of time belong to an entirely different framework, and one of the main conclusions of this book is that legal time can never fully grasp human time. I claim that the eighteen years that the woman has lived in the Netherlands have normative value, irrespective of how they are legally qualified.

⁶ B. Anderson, “And About Time Too ... Migration Documentation, and Temporalities,” in *Global Insecurities. Paper Trails: Migrants, Documents, and Legal Insecurity* eds. S. B. Horton and J. Heyman (Durham, NC: Duke University Press, 2020), p. 56; A. Shachar, *The Shifting Border: Legal Cartographies of Migration and Mobility* (Manchester: Manchester University Press 2020).

What Then Is Time?

The analysis of time in migration law is pivotal to this book, and at the heart of it is the question of the meaning of time. Time is allegedly the most widely used noun in the English language.⁷ Just as in everyday communication, the references to it in migration law are numerous: the time limit for an application, appeal, or a judicial decision; temporary residence permits; long-term residence status; the length of an entry ban; the (adaptable) age of a migrant; the formative years of a child; the right moment to bring forward a legal argument; the time the government has not effectuated a return decision; the review of detention at reasonable intervals of time; a limited period of detention; the traumatic past of a refugee; the future of a migrant worker in the territory; the time since a crime has been committed; the actual risk and so on. In her study *Timewatch: The Social Analysis of Time*, Barbara Adam stresses that in our normal usage of time, we constantly shift between different senses of time and know them intimately without giving much thought to their differences. In her book she wants “to disrupt this natural attitude by giving some attention to those differences and extracting from them clusters of characteristics that allow us to see the complexity.”⁸

Adam has put forward that one can find a “when time,” the time of timing and temporal location of social activities and natural phenomena – for example, when the working day starts, when my daughter was born, when we were young, when Brexit happened, when the Corona measures will be lifted, and so on. Adam stresses that in Western societies, this “when time” is certainly to a large extent based on clocks and calendars, but it is unlikely that they will form the only sources for it. An ordinary working day in the building trade will start just after the sun has risen; a child may be born too early, because the gestation is for a long time; the scheduling of a train may equally be governed by seasonal variations or peak hours, and so on. Moreover, we might think of the past, present, and future through references to events, processes, and social relations. The invention of the art of printing or the declaration of independence but also less historical events such as the moment that someone heard that they were terminally ill can be remembered without knowing the exact date. This leads Adam to conclude that

[w]e need to recognize that considerations relating to social interactions and the physical environment have not been replaced by the rationalization of time . . . The abstract, quantified, spatialized time of clocks and calendars forms only one aspect of the complexity of meanings associated with the time “when,” the time that forms a parameter of our existence and locates us *in* time.⁹

In a similar vein, I try to unravel the meaning of time in migration law. Just as Adam argues that the complexity of meanings associated with time cannot be replaced by the

⁷ B. Adam, *Timewatch: The Social Analysis of Time* (Cambridge: Polity Press, 2004), p. 19. She gives a long list of examples in the book, e.g. clock time, winter time, opening times, bad times, the right time for action, the timing of interaction, time of physical processes and social conventions, the time abstract relations of mathematics and concrete relations between people, the lifetime of a person, etc., not to mention all the time-related references such as the minute, the hour, the week, the day, the phase of the moon, the year, Christmas and Easter, productions of growth cycles, generations, etc.

⁸ *Ibid.*, p. 20, emphasis in original.

⁹ *Ibid.*, p. 21. See also, N. Elias, *An Essay on Time* (Dublin: University College Dublin Press, 2007), pp. 59–60.

rationalized conception of clock time, in law we cannot simply equate time with clock time. So, which sense of time is implied next to the common understanding of the clock and the calendar? Which assumptions inform the *legal time* of migration law? My argument is that the success as well as the shortcoming of the use of time in migration law lies in the difference between legal time and human time. I argue that while time in (migration) law is commonly understood to refer merely to *clock time*, the reference to *human time*, to the temporal experience of the passage of time in human affairs, remains hidden. It is the intricate interplay between clock and human time that is such a perfect means for legal control. However, it is human time that constantly slips through the grasping fingers of legal control. To be sure, this is not to say that such a bifurcation of time is the only meaningful typology of time in law. As Bridget Anderson observes, it is precisely one of the responses to the inability to fully grasp the meaning of time to create different typologies of time that repeatedly put a different aspect of time at the fore.¹⁰ What I endeavor in this book is to show how at the heart of the governance of the presence of migrants within a territory is a sophisticated interplay between human and clock time.

Human Time

Human time can best be characterized in comparison with cosmic time. Time is not purely a human invention; we often call “cosmic time” the time that relates to the seemingly infinite age of the cosmos and its celestial bodies. The latter signifies an endless anonymous time, characterized by motion, measure, and serial order. At least, that is the representation of it in science, where it is constituted merely by relations of simultaneity and succession between abstract “instants” demarcated by “before” and “after.”¹¹ Characteristic for the cosmic perception of time is its impersonal character: it is the time that is not dependent on a human observer,¹² or “at least whose endless passage is above and beyond any one

¹⁰ Anderson, “And About Time Too . . . Migration Documentation, and Temporalities,” p. 55. Anderson’s typology is closely related to what I argue in this book, yet slightly different. Anderson distinguishes between the bureaucratic time of the state and the subjective time of the individual. Even though I also contrast the usage of time in governance by states with the biological and subjective time of individuals, I additionally show how this individual time of the human being is precisely the locus of the state’s temporal governance. In other words, while I argue that temporal governance is limited by the normative quality of human time, at the same time, this human time is intricately entangled with the chronological time of the clock in the exercise of temporal governance. The two are therefore not only opposed but also interwoven.

¹¹ This and the following conceptual demarcation is largely based on M. Muldoon, “Time, Self, and Meaning in the Works of Henri Bergson, Maurice Merleau-Ponty, and Paul Ricoeur,” *Philosophy Today* 35, no. 3 (1991), p. 254, see in that Article most notably the first two footnotes for a clear conceptual description. Ricoeur uses many of these concepts as well, albeit not always after clearly defining the differences between them, e.g. P. Ricoeur, *Time and Narrative*. Volume 3 (Chicago: The University of Chicago Press, 1988); P. Ricoeur, *Memory, History, Forgetting* (Chicago: The University of Chicago Press, 2004). See for a very readable introduction to this “cosmic time,” S. Hawking, *A Brief History of Time* (New York: Bantam books, 1995).

¹² That is to say, as Bergson remarks, without an elementary memory that unities two instants as the former preceding the latter, there would be no instant, no succession and no time, reference taken from Muldoon, “Time, Self, and Meaning in the Works of Henri Bergson, Maurice Merleau-Ponty, and Paul Ricoeur,” original reference from H. Bergson, *Durée et Simultanité* (Paris: Alcan, 1923), p. 61.

person's ability to generate or destroy," as Mark Muldoon has put it succinctly.¹³ It is the form of time that would also exist without the presence of human beings (at least that is what we assume). Or, in the words of Bridget Anderson while referring to what she calls natural time (including both biological and astronomical times):

I mean temporal passing that proceeds irrespective of interference by humans: the length of daylight, the seasons, processes of aging, and so on. It is not that this time cannot be bypassed – heavy blinds can shut out daylight, heating can mimic summer, cosmetic surgery alleviates the physical signs of aging – but there is a process that proceeds nonetheless, or is ready to take over as soon as interventions ceases.¹⁴

A large part of my argument in this book is meant to show how three characteristic aspects of human time are easily overlooked in the legal management of the presence of migrants. These characteristics come to the fore when comparing the time of the cosmos. The latter is to be distinguished from human time in the first place because human beings are mortal, which means that their time necessarily punctuates the (seemingly) endless cosmic time. This also implies that the time of human beings is, as mentioned earlier, irreversible, and moreover that it cannot be stopped. Human time is, secondly, always the time of someone and this lived experience is therefore not reducible to the mere passage of cosmic time. Thirdly, human time is characterized by temporality: the need for a temporal present, which implies a past and a future.

Such a temporal present is elementary for human time and is related to the other two characteristics. As Muldoon rightly puts forward, the temporal present is "always the product of some principle of unity in the midst of change that draws upon the operation of perception, discrimination, memory and anticipation."¹⁵ The present constitutes a unity that in mere anonymous cosmic time does not exist. The very function of such a unifying principle is to mediate precisely between the time of the cosmos on the one hand and the lived experience of a mortal human being on the other hand. In order to further introduce this complicated point, I would like to briefly deliberate the best known and oldest example of such a principal, Augustine's *distentio animi*.

In his *Confessions*, Augustine famously questioned how time could be measured if the present has no extension. After all, the moment slips away time and again.

[Present time] is measured while it passes, but when it has passed it is not measured; for then there is nothing that could be measured . . . Therefore, from what is not yet, through what has no length, it passes into what is now no longer . . . But in what "length," then, do we measure passing time? Is it in the future, from which it passes over? But what does not yet exist cannot be measured. Or, is it in the present, through which it passes? But what has no length we cannot measure. Or is it in the past into which it passes? But what is no longer we cannot measure.¹⁶

¹³ Muldoon, "Time, Self, and Meaning in the Works of Henri Bergson, Maurice Merleau-Ponty, and Paul Ricoeur," p. 254.

¹⁴ Anderson, "And About Time Too . . . Migration Documentation, and Temporalities," pp. 55–6.

¹⁵ In the course of this book, I will discuss one of these unifying principles: durational consciousness of Bergson. Muldoon further puts forward "*distentio animi*" (Augustine), "transcendental ego" (Husserl), "lived body" (Merleau-Ponty), "*Dasein*" (Heidegger), and the commonly used "self." Muldoon, "Time, Self, and Meaning in the Works of Henri Bergson, Maurice Merleau-Ponty, and Paul Ricoeur," p. 254.

¹⁶ Augustine, *Confessions*, trans. A. C. Outler (Grand Rapids, MI: Christian Classics Ethereal Library, 1955), book XI, chapter XXI, par. 27 (or pagenummer 197).

We see here that the anonymous passage of cosmic time does not easily fit the human frame of time as past, present, and future.¹⁷

Augustine's answer to these persisting ontological questions is that we measure time in the mind (*distentio animi*). In the mind, the future and the past are present by way of expectation and remembrance. It is our attention that has continuity, stresses Augustine, through which what is present may become absent in the past. "Therefore, future time, which is nonexistent, is not long; but 'a long future' is 'a long expectation of the future.' Nor is time past, which is now no longer, long; a 'long past' is 'a long memory of the past.'"¹⁸ Augustine's solution is a rigorous limitation of time to the mere present of the conscious mind.

His thought experiment shows the clear distinction between the seemingly endless passage of cosmic time and the human time of the temporal experience as past, present, and future.¹⁹ In cosmic time, there is no past, present, nor future, for this implies an observer who is situated *in time*. Human time is always the time of someone, who constitutes a present, implying a future and a past, whose time is finite due to their mortality. As we later observe, law takes into account human time, for example, by creating the temporal present of a legal decision but mostly it makes use of yet another form of time.

Clock Time

Before the invention of the mechanical clock, time would be measured on the sun, moon, or stars, or even running water or the sand in a sandglass. Regarding celestial bodies, the measurement would differ along with the slight differences of night and day and seasons. The measurement without reference to the sky, however, would lack the relationship with nature and would only be based on the constant and reliable stream of sand or water.

In contrast with natural rhythms, the time frame of the clock is characterized by invariability, context independence, and precision. It shares these criteria with the measurement of water or the sandglass, while it still refers to natural rhythms. Until approximately 1840, practically every city in the world made use of local time, based on the meridian passage of the sun. The local habits for the measurement of the other hours of the day could differ to a great extent. For example, until the nineteenth century, the Italian day started at sunset, meaning that Italian noon fell around eighteen hours into the day.²⁰

Most notably, the electric telegraph and the railways increased the need for a universal standardized time. The speed with which long distances could be traveled made it increasingly problematic to work with all kinds of different local times. The standardized clock time, which was determined in Washington, DC, at the International Meridian Conference

¹⁷ McTaggart has referred to this as the problem of the A-series and B-series of time that must both be rejected for inconsistency (and therefore prove the "unreality" of time), see J. E. McTaggart, "The Unreality of Time," *Mind: A Quarterly Review of Psychology and Philosophy* 17 (1908).

¹⁸ Augustine, *Confessions*, trans. Outler, book XI, chapter XXVIII, par. 37 (or page number 203).

¹⁹ See for a readable, critical, and more elaborate discussion of Augustine's *distentio animi*, P. Ricoeur, *Time and Narrative*. Volume 1 (Chicago: The University of Chicago Press, 1984), chapter 1. Ricoeur puts forward that in resolving the enigma of measurement, Augustine reaches the ultimate characterization of human time. For a clear introduction to more philosophy of temporality, see D. C. Hoy, *The Time of Our Lives: A Critical History of Temporality* (Cambridge, MA: The MIT Press, 2009).

²⁰ K. Lippincott, U. Eco, and E. H. Gombrich, *The Story of Time* (London: Merrell Publishers, 2003).

in 1884, made sure that everywhere on the globe one hour of clock time would have the same duration. The standardized time replaced the variable “hours” that changed with the seasons and the continuum of “local time.” This standardized form of time became an omnipresent part of our contemporary lives. One could say that we live in, to borrow a phrase from Robert Hassan, “clock time modernity,”²¹ or in times of “chronopolitics.”²²

This standardization of time, however, begs the question: What does clock time refer to, after all? The measure of a clock is designed on the principle of invariance, every time-unit is measured exactly the same time and again, while the “natural time” based on the local rhythms of days and seasons is characterized by fundamental variance. The hours of daylight change minimally every day, the constellation of the stars do not recur in exactly the same position, not every year has 365 days. This was after all the very reason for the introduction of standard time; yet, the result is that it makes the measure of the clock qualitatively different from what it measures.²³

It is this qualitative difference that differentiates clock time from the time of the cosmos, but also from human time. At least that is what the French philosopher Henri Bergson (1859–1941) argues in his *Time and Free Will*,²⁴ which was originally published as *Essai sur les données immédiates de la conscience* in 1889. Bergson argues that there is a confusion of concrete duration with abstract clock time. He shows that the idea of a homogeneous and measurable time is an artificial concept based on the intrusion of space into the realm of pure duration. Alongside this homogenous understanding of the time of the clock, Bergson argued that for a proper temporal understanding, a heterogeneous time of duration should be incorporated. Such duration could not be put on a par with standardized clock time, for the latter reduces the lapse of time to a series of moments that succeed each other. Bergson, on the other hand, sought for an understanding of time that is not based on space; thereby taking up the problem of extension where Augustine left it. In Chapter 3, I argue that for a proper understanding of migrants becoming “rooted” (“rootedness” is often used as an argument for inclusion of migrants over time), this lived experience of a finite human time is crucial. It is this form of durational time that cannot be fully grasped by clock time, which is so central to legal control. I expose in Chapter 1 how this homogenous and general character of the clock makes time so appropriate for legal control.

In literature, clock time is often discussed together with calendar time.²⁵ Whereas clock time and calendar time might often be taken together, they have a different meaning and history. It is important to briefly discuss their difference, for clock and calendar time will both play a role in the analysis of legal time. For reasons of readability, I will just refer to clock time (albeit, often the time of the calendar is at stake, e.g., when time is expressed in terms of days, months, or years). It is their rationalized, homogenous, and general character that allows for objectification and quantification that is important for my analysis of legal time.

²¹ See chapter 2 of R. Hassan, *Empires of Speed: Time and the Acceleration of Politics and Society* (The Hague: Brill, 2009).

²² I. Klinke, “Chronopolitics: A Conceptual Matrix,” *Progress in Human Geography* 37, no. 5 (2012).

²³ Adam, *Timewatch*, pp. 24–5.

²⁴ H. Bergson, *Time and Free Will: An Essay on the Immediate Data of Consciousness* [Essai sur les données immédiates de la conscience], trans. F. L. Pogson (New York: Dover Publications, 2001).

²⁵ See e.g. J. Postill, “Clock and Calendar Time: A Missing Anthropological Problem,” *Time & Society* 11, nos. 2/3 (2002).

Paul Ricoeur argues that calendar time is the first attempt to bridge the gap between what I have called human time and the time of the cosmos. Other mediations that bridge the time of the cosmos with human time (and thereby enable history) are, according to Ricoeur, the “succession of generations” and “archives, documents and traces.”²⁶ The short time span of mortal human beings is situated on a calendar and similarly related to the endless time of the cosmos.

Moreover, the calendar constitutes a socialized form of time, allegedly a necessary condition of the life of societies as well as of individuals in a society. Benedict Anderson famously argues that the calendar plays an important role in the construction of national imaginations. “The idea of a sociological organism moving calendrically through homogenous, empty time is a precise analogue of the idea of the nation, which also is conceived as a solid community moving steadily down (or up) history.”²⁷ The calendrical appearance of newspapers, for example, importantly provides the steady onward clocking of homogenous empty time.

If Mali disappears from the pages of *The New York Times* after two days of famine reportage, for months on end, readers do not for a moment imagine that Mali has disappeared or that famine has wiped out all its citizens. The novelistic format of the newspaper assures them that somewhere out there the “character” Mali moves along quietly, awaiting its next reappearance in the plot.²⁸

The clock and the calendar are state-standardized conceptions of time, and they are both necessary for modern states to function.²⁹

Both calendar time and cosmic time are constituted as a uniform, infinite continuum that is segmentable at will, yet our conception of calendar time is interlaced with the temporality of human time. Calendars are constituted by a founding moment (Christ, Buddha, the beginning of the reign of a monarch, etc.) determined by a set of units of measurement, and due to this, it is possible to traverse time in two directions, from the past to the present and from the present toward the past.³⁰ For this reason, it becomes possible to relate different events, experiences, and lives to each other by reference to a common standard of time.

After all, without the temporal human understanding of time as the present, as the “today,” of which there is a “tomorrow” and a “yesterday,” we would not be able to make any sense of a new event that breaks with a preceding era, that inaugurates a course of events entirely different from what preceded it. One needs a sense of memory and expectation to be able to *traverse* time, for we need to have a sense of the present moment to be able to discern this from earlier and later moments in time. In this book’s analysis, I will clump together clock time and calendar time, just as in ordinary parlance we usually refer to both times together.

²⁶ Ricoeur, *Time and Narrative*. Volume 3, p. 109. Ricoeur elaborately argues that the relationship between time and history is marked by narrativity. There is therefore a clear overlap between human identity and history, they are firmly entangled.

²⁷ B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 2016), p. 26.

²⁸ *Ibid.*, p. 33. ²⁹ D. Gross, “Temporality and the Modern State,” *Theory and Society* 14, no. 1 (1985).

³⁰ Ricoeur, *Time and Narrative*. Volume 3, p. 105.

Legal Time and Lawful Time

Carol Greenhouse argues that in Western legal systems, it is law's cultural role to precisely preserve the indeterminacies of time that follow from the distinction between individual lifetimes and the social order.³¹ One of the aims of this book is to show how this indeterminacy in legal time is at work; stemming from the intricate relationship between clock time and human time. The strain that I describe in legal time follows from the fact that human time is structurally different from legal time, a problem that cannot be solved in legal time. Yet, it can be acknowledged, and taking into account the peculiar character of human time in itself has normative value. When I refer to legal time in this book, I also refer to the complex and sometimes contradictory usage of time in (migration) law. However, this legal time cannot be equated with lawful time. Lawful time has a very specific meaning in migration law, as it entails the legally permitted presence over time of a migrant on a territory. Its counterpart is unlawful time, which designates the presence in the territory without legal authorization.

The Arrow of Time

This book is about the governance of residence entitlements of migrants present within a certain territory by means of time and the question of the arrow of time is one of the central elements of the argument that I put to the fore. Yet, the meaning of such an arrow of time is far from straightforward, the different significations of time that have already come across equally complicate the question as to whether the process of time has a certain direction.

Clock time is not linear, at least, if we understand it as the mechanical device that shows the time of day. After all, merely on the basis of a clock, one cannot tell what day it is, and on a traditional clock, one could not even tell whether it is day or night. Clock time is, technically speaking, cyclical not linear. Yet, clock time is often clumped together with calendar time, as we observed earlier, and the calendar seems, at least at first sight, to have an arrow; it refers to time moving forward.

Human time equally has a direction, it goes from birth to death, and it cannot be stopped.³² That is not to say, however, that human time, as I described it earlier, can only be understood as moving in a certain direction. Human time is also determined by temporality, the need for a temporal present, which constitutes a past and a future and such temporality has no direction. As Norbert Elias explains, while concepts like "earlier" and "later" might be related to a sequence that develops in a certain direction (like the calendar), terms like "now," "today," and "past, present, and future" depend on the persons or groups that refer to these positions and therefore do not have a general linear trajectory.³³

Yet, if we take this into account, the functioning of the calendar also becomes less straightforward. As pointed out earlier, the calendar presupposes human temporality, which allows for the possibility of "time traveling." After all, a calendar does not show

³¹ C. J. Greenhouse, "Just in Time: Temporality and the Cultural Legitimation of Law," *Yale Law Journal* 98 (1989), p. 1641.

³² Cosmic time also has an arrow, which goes in the same direction, see for a helpful introduction to this Hawking, *A Brief History of Time*, pp. 148–9.

³³ Elias, *An Essay on Time*, p. 65

what time it is in abstracto, the calendar presumes the present moment of a spectator, which constitutes the “now,” from the past and future to follow. Still, both the calendar and human time can be related to the arrow of time. In both cases, the temporal passing proceeds irrespective of interference by humans, or is beyond anyone’s capacity to generate or destroy it, as mentioned earlier. One can act *as if* it is still 2010, such as a relevant moment for the legal decision, we cannot actually turn back time. As we will see, this trait of the calendar – this possibility of time traveling based on the difference between human time and calendar time – is one of the characteristics that makes clock and calendar time apt for temporal governance.

What about the process of migrants being present over a long period of time within a certain territory, does such a process follow a certain direction? Bridget Anderson claims that in research on migration and migration policy one finds an assumption that migrants move from being temporary to permanent and integrated in a linear progress over the course of time.³⁴ And if one was to have a look at for example the structure and principles of the European Long-Term Residence Directive, one might actually start to believe that migrants generally receive stronger residence entitlements over the course of time because their long-term residence shows that “the person has put down roots in the country.”³⁵ Yet, as Anderson argues, the social reality does not align with the reality that these legal norms might suggest – not only is the process “far from smooth, but many people find themselves in prolonged liminal statuses.”³⁶

Claiming that the development of certain rights follows a certain clear direction seems to take into account a teleological if not Enlightenment conception of the relationship between rights and progress of time.³⁷ Such a “chrono-logic of rights,” as Bonnie Honig calls it, focuses on the right-as-symbol and not on the actual behavior of a right. “The right-as-symbol is the right as it is seen by those who privilege as its meaning its capacity to be extended and tapped in certain ways that fulfil what they see as its true function or promise, regardless of its operations.”³⁸ In such a perspective, the social reality of people finding themselves in prolonged liminal statuses might be the malfunctioning of the right, it does not contest its intrinsic arrow of time.

A chrono-logic of rights is a tale of law’s progress, and does not tell us much about the practice of the right. Such an account of law’s temporality also neglects the implicit exclusionary normativity at work in law. Building on the work of Fabian, Johannes Anne McNevin goes as far to argue that such a progressive temporality, such a chrono-logic of rights, even functions as a means of exclusion, or at least as a way to justify the waiting and delays that migrants endure at the borders and in their trajectory toward citizenship.

In these cases, progressive temporality, including the assumption that the future of citizenship is universally better than its past, is part of what holds in place a recurring

³⁴ Anderson, “And About Time Too . . . Migration Documentation, and Temporalities,” p. 53.

³⁵ Recital 6, Long-Term Residence Directive (Directive 2003/109).

³⁶ Anderson, “And About Time Too . . . Migration Documentation, and Temporalities,” p. 53.

³⁷ Ost, *Le Temps du Droit*, p. 179–80. Ost points at three characteristics of such an optimist Enlightenment concept of progression: it valorizes the future to be superior to the past; the near future is foreseeable and transparent in a rational and mobilizing discourse; and the future is a progressive actualization of the essence of man, the accomplishment of the promise of humanity (p. 179).

³⁸ B. Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton, NJ: Princeton University Press, 2009) p. 55.

present in which differential access to citizenship is continually reinforced. The sense of a linear temporal trajectory – that one threshold step leads to another in a movement towards citizenship – on one hand tempers discontent with the promise of citizenship-to-come. It also tempers dissent because waiting patiently, in the right way, becomes part of the criteria for citizenship's future acquisition.³⁹

The promise of citizenship as a way to legitimize delays and waiting might indeed in certain instances of waiting be an important element of the techniques of inclusion and exclusion, just as “integration schemes” have been criticized for legitimizing legal and symbolic precarity for admitted migrants more than fostering the integration of newcomers in the host country.⁴⁰ At the same time, for certain migrants, the promise of citizenship will be fulfilled, migrants do receive long-term resident status or successfully naturalize. That might be precisely the way to temper discontent with the promise of citizenship-to-come for others, it is *also* the fulfillment of that promise to some.

Yet, it is clear that such a promise is not a function of a mere lapse of time. Still, one of the central aims in this book is precisely to argue that residence entitlements of migrants *should* be linked to the amount of time that they have spent in the territory. The arrow of time, which I distinguish in the governance of the presence of migrants, is therefore not one of empirical fact, nor a function of clock time. Contemporary European migration law increasingly provides evidence to the contrary; especially regarding the treatment of asylum seekers and irregular migrants, there seems to be almost no relationship between lapse of time and the possibilities to end their situation of “stuckedness.”⁴¹ However, the normative argument that I put to the fore is not linked to lapse of clock time but to the progress of human time and finds its value in the latter's finite, irreversible, and unstoppable character. I claim that there is – or should be – a normative arrow of time at work in the regulation of the presence of migrants within a given territory.

The Argument

The argument in this book consists of three interrelated discussions of the connections between clock time, human time, and legal control. The basis of my analysis is a discussion of how time is used in migration law. The focus will be on how legal time is central to controlling the presence of migrants on a territory and start by endeavoring to unravel the intricate interplay between clock and human time in legal time.

It is the objective and calculable character of clock time that makes it so suited to the manipulation of rules. For example, a term for naturalization of five years can easily be changed to seven years, precisely because of its objective, calculable, and formal character. A formal time criterion is easier to use than, for example, material integration tests that require a complex and individual assessment on a case-by-case basis. Moreover, one of the

³⁹ A. McNevin, “Time and the Figure of the Citizen,” *International Journal of Politics, Culture, and Society* 33 (2020), p. 550.

⁴⁰ T. M. de Waal, “Conditional Belonging: Evaluating Integration Requirements from a Social Equality Perspective,” *Journal of Intercultural Studies* 41, no. 2 (2020).

⁴¹ A. M. Reneman and M. C. Stronks, “What Are They Waiting For? The Use of Acceleration and Deceleration in Asylum Procedures by the Dutch Government,” *Time & Society* 30, no. 3 (2021); M. Tazzioli, “The Temporal Borders of Asylum: Temporality of Control in the EU Border Regime,” *Political Geography* 64, no. 15 (2018).

advantages of clock time criteria is, as Elizabeth Cohen has argued, that they refer to processes that happen in time but that would otherwise be hard to put into words, let alone in clear material criteria.⁴² The relationship between time spent on the territory, rootedness, and integration exactly serves to prove this point. After all, processes of integration and rootedness clearly happen in time but at a different pace and with diverse outcomes for everyone. A simple time criterion is useful because it relates to such processes, without becoming too arbitrary or too individualistic. Time enables quantification, and this allows for a fairly easy and general application of the rule to individual cases.

Nonetheless, it is not just clock time that is being used in migration law. The object of governance in migration law is after all the life of the migrant, and this is characterized by human time, the time of someone, which constitutes a past, present, and future, can just as well be the object of temporal control. Most notably, categorizing legal presence within a territory as “temporary” is a way that the prospected or assigned future of the migrant is used to make important legal differentiations. Yet, simultaneously in the use of deadlines or the qualification of time spent within the territory, the object is the actual human time of someone. I argue in Chapter 1 that the interplay between clock and human time makes legal time particularly apt for “temporal governance,” for the control of the presence of migrants by means of time.

That said, the interactions between human and clock time in legal time can also be strained; in the end, the two conceptions of time are fundamentally different. The second discussion in this book focuses on the difference between human time and legal time. After having argued how clock time is apt for legal control, the complex relations between human time and legal time will be central. The limit to the manipulability of legal time lies in the fact that legal time can never fully grasp human time. Whereas human time has an important role to play in law, it is also a source for constant problems. In the second chapter, two philosophical problems of time are discussed: the problem of extension; and the problem of eternity.

Based on the work of the French philosopher Henri Bergson, I argue that the problem of extension, or the problem of lapse of time, is at the heart of the usage of time in law. Clock time might be very suitable because it can refer to processes that would otherwise be very difficult to grasp, but the problem is that with the measurement of the clock, the durable presence of migrants within a territory can never be fully captured. Clock time presumes a form of exteriority that fixates time in the moment, from which other moments can be discerned and a line can be drawn. Yet, the opposite of such an exterior perspective of time does not freeze time in the moment but its succession can hardly be grasped in any comprehensive analysis. This leads to what I call the formal/material time problem, the problem that if one uses a formal clock time criterion, one loses reference to the individual process (of rootedness or integration), whereas if one uses a material criterion, eventually the reference to lapse of time is lost. Obviously, in contemporary migration law both criteria are used often simultaneously, for example, naturalization criteria often complements a probationary period of time with an integration test. Still, the point here is rather that the durable human time of a migrant within a territory always risks escaping the grasp of legal time.

⁴² E. F. Cohen, *The Political Value of Time* (Cambridge: Cambridge University Press, 2018).

The second substantial discussion in this chapter is based on the work of the German philosopher Martin Heidegger. Heidegger criticizes clock time for secretly making use of an eternal conception of time: time as a moving image of eternity, which is always present and endless. This conception of time is fundamentally different from human time, which is characterized by its finite character. Human time is singular, finite, can be neither stopped nor traversed because it is characterized by mortality. Whilst one of the advantages of legal time is that it is general, endless, can be paused, and traversed in both directions, these characteristics are all at odds with human time. I elucidate that in legal time this can lead to frictions, or at the very least, simply forgetting the character and value of human time is unjust. I hold that human time has value, simply because of its peculiar characteristics: it is a scarce good, human time is finite, cannot be stopped nor traversed. That modest observation – that human time has a direction and is finite and is therefore in the end profoundly different from legal time – is the shortest version of the conclusion of this book.

The aim of this book is precisely that – to bring to the forefront the character and value of human time in the usage of legal time in migration law. I argue in the third chapter that hidden in plain sight, as Elizabeth Cohen nicely puts it, is a temporal argument for the inclusion of migrants who reside long term within the territory based on their human time. In short, human time within a territory matters. I will use the term *jus temporis* to refer to this argument, following Elizabeth Cohen who has coined this concept.⁴³ I argue that *jus temporis* in fact is at work in contemporary (European) migration law, and that it functions alongside arguments for inclusion that are also based on presence within a territory, such as *jus domicili* and *jus nexi*. At the heart of the argument of *jus temporis* is “rootedness” as grounds for inclusion, a concept that I propose should be distinguished from “integration.” In literature, case-law, and statutes, these terms are often used interchangeably: frequently as arguments for inclusion of migrants over time, yet without precisely pinpointing their (respective) meaning(s). I argue that integration has a normative and meritocratic meaning: it relates to the ascribed values and norms of a particular society; certain knowledge of the language; and qualifies the behavior and character of someone’s presence within a territory. Rootedness, however, has a more factual character, it simply refers to the lapse of human time and gives it value because it is finite, irreversible, and cannot be stopped. Both are at work in migration law, I hold.

For that reason, I argue that one can discern in legislation and case-law another principle that works alongside normative, material time criteria, albeit silently and often confused or equated with integration: becoming rooted or rootedness. References to rootedness can be found in EU law, such as the Long-term Resident Directive, case-law on Article 8 ECHR (European Convention on Human Rights), and in national debates about the regularization of irregular migrants.⁴⁴ Rootedness is in fact omnipresent in contemporary migration law, although it is often implicitly at work. Even though most countries in Europe use integration criteria for residence entitlements and naturalization, such countries almost without

⁴³ E. F. Cohen, “Citizenship and the Law of Time in the United States,” *Duke Journal of Constitutional Law & Public Policy* 53, no. 8 (2013) .

⁴⁴ See recital 12, Long-Term Residence Directive (Directive 2003/109); ECHR October 18, 2006, *Üner v. the Netherlands*, 46410/99, paragraph 58; and e.g. the Dutch “Wortelingswet” [literally translated Rootedness Act], *Kamerstukken II* 33068, nr. 1.

exception also require individuals to spend formal time on the territory before applying for such entitlements.⁴⁵

I argue that rootedness should be defined as the entanglement of presence within a territory with the lapse of finite and irreversible human time of someone's life. That might sound more cryptic than it is; what I simply mean is that the lapse of human time has normative value, and that human time should not be wasted. No matter whether the time that a migrant has spent within a territory has been qualified as positive or negative, by oneself, others or the (imagined) communities, the time has value as human time. Rootedness should therefore not be confused with inclusion, acceptance, assimilation, or integration. Rootedness is merely the reference to someone's human time within a territory.

From the outset, it is important to note that I do not intend to argue that this *ius temporis* should replace existing grounds for inclusion, such as *ius soli*, *ius sanguinis*, *ius nexi*, or *ius domicilii*. My argument is closely related to the arguments for inclusion after birth, *ius nexi* and *ius domicilii*, and to a large extent coincides with the latter. I do think, however, that it is important to make a distinguishing claim based on time, because in any claim for inclusion, time plays an important but implicit role. Time, ties, and domicile are often clumped together in claims for inclusion as if they do not have a different argumentative force. I aim to show that all three have their own merits but that the temporal argument can be valued as a separate ground for inclusion, together with ties and domicile.

The temporal argument consists of two elements central to this book: human time structurally escapes legal time, and rootedness is a temporal ground for inclusion. Since human time can never be fully grasped by law, any attempt to find a criterion that does give full justice to the presence of migrants on the territory over time is doomed to fail. Nevertheless, this is not a recipe for skepticism or the lack of legal criteria – quite the contrary. My conclusion in this book is that an *ius temporis* should (and in fact often does) always consist of the following two elements: the *possibility* to gain (stronger) residence entitlements in the future, and eventually the *impossibility* to remove the person from the territory.

⁴⁵ An interesting and still rather limited exception to this rule is the application for citizenship on the basis of money. In some European countries, there is the possibility to invest a very large sum of money in the economy of the country, which then serves as ground for naturalization (without the prerequisite of spending time on the territory beforehand), see also A. Shachar, "Citizenship for Sale?," in *The Oxford Handbook of Citizenship*, eds. A. Shachar et al. (Oxford: Oxford University Press, 2017), pp. 789–816.