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The Virtues of Legal Time

> Waiting is one of the privileged ways of experiencing the effect of power, and the link between time and power – and one would need to catalogue, and analyse, all the behaviours associated with the exercise of power over other people's time both on the side of the powerful (adjourning, deferring, delaying, raising false hopes, or, conversely, rushing, taking by surprise) and on the side of the "patient" as they say in the medical universe, one of the sites par excellence of anxious, powerless waiting.
>
> Pierre Bourdieu, *Pascalian Meditations*, 2000 AD

> Have you never noticed that when a Russian says "four hours" it means no more to him than "one hour" does to us? The idea comes easily to mind that the nonchalance with which these people treat time has something to do with the savage expanse of their land. Too much room – too much time. It has been said that they are a nation with time on their hands – they can afford to wait. We Europeans can't wait. We have just as little time as our noble, tidily segmented continent has space; we must carefully husband the resources of the former just as we do those of the latter – put time and space to use, good use, engineer!
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> Thomas Mann, *Magic Mountain*, 1924 AD

This chapter commences with the story of a girl at a young age, with which characterization we find ourselves *in medias res*. On February 26, 2014, an Eritrean teenager applied for asylum in the Netherlands. After a rather quick asylum procedure, her claim was successful and she received a residence permit on October 21, 2014. The permit was valid for five years, with effect from the moment that her application was submitted. Like all refugees, the girl had the right to family reunification, so immediately after she was granted refugee status, she requested to be reunited with her parents. The procedure for family reunification of refugees is, according to the European Union (EU) Family Reunification Directive (Directive 2003/86), more favorable than general regulations for family reunification. The reason for this is that the refugees' flight from their country prevents them from leading a normal family life there. Specifically, this means children can be reunited with their family members, including their parents, without further restrictions (such as integration tests or income requirements). Adults can reunite with their parents but only if the parents are dependent on them and lack family support in their country of origin. Although both rules are more favorable than the rules for nonrefugee cases of family reunification, it made quite a difference whether the Eritrean girl was a minor or an adult. In the former case, her parents could reunite with her, in the latter, only if her parents were dependent on her and lacked family support in Eritrea. So, the pivotal question to this case of family reunification was: How old is the girl?

As plain and simple as this question might seem at first, it led to a fierce legal dispute. For the issue was that between the time when the girl requested asylum and the moment that she received refugee protection, she had attained legal majority. On June 2, 2014, she became eighteen years old. Due to a lapse of time in the procedure, however short, the facts changed drastically, entailing far-reaching consequences for the girl. In her case, as an adult, the girl would have no opportunity to reunite with her parents since they were not dependent on her. But as a child, she would have an unrestricted right to reunite with her parents. So how old was the girl?

The Dutch government argued that the relevant moment to establish the age of the girl was the moment of the decision to grant her refugee status (eighteen). The girl argued that the relevant moment should be the moment of her entry into the Netherlands and her asylum application (seventeen). Proceedings went all the way to the Dutch Council of State, the highest administrative judge in migration law, which, in its turn, raised a preliminary question with the European Court of Justice of the EU (CJEU).[1] On April 12, 2018, roughly two months before the Eritrean girl turned twenty-two, the CJEU declared that the girl was, legally speaking, seventeen years old, and could therefore reunite with her parents.

The case of the Eritrean girl serves as an example of "temporal governance," a term coined by Melanie Griffiths to refer to the diverse manifestations of the role of time in governing migration.[2] Temporal governance can be seen as a governmental strategy to discipline and control migrants by means of time. Indeed, power operates as much through temporal devices as it does through spatial control.[3] As Griffiths shows, migration is not an exception to the central use of time in the operationalization of state power. This politics of time, in some fields called chronopolitics,[4] plays a pivotal role in the governance of migration and borders.[5] There is a growing body of anthropological literature on the different and contradictory forms of time at work in migrant experiences. Time can be stagnated, such as is clearly the case in waiting times in asylum centers or camps,[6] but it can also be "frenzied," with sudden ruptures and accelerations.[7] Moreover, Martina Tazzioli argues that frequently changing the temporal deadlines for procedures of entry at the borders of Europe, "is part of a mode of government through confusion and uncertainty that in itself produces effects of temporal suspension and spatial confinement on

[1] CJEU April 12, 2018, *A & S*, C-550/16, the Migration Law Clinic of the Amsterdam Centre for Migration and Refugee Law wrote an expert opinion in this case, which I supervised together with Lieneke Slingenberg, see www.migrationlawclinic.org/2018/04/12/cjeu-date-asylum-application-decisive-for-right-to-family-reunification-unaccompanied-minor/.

[2] Griffiths, "The Changing Politics of Time in the UK Immigration System."

[3] Eule et al., *Migrants before the Law*, p 149.

[4] Klinke, "Chronopolitics."

[5] S. B. Cwerner, "The Times of Migration," *Journal of Ethnic and Migration Studies* 27, no. 1 (2001).

[6] R. Anderson, "Time and the Migrant Other: European Border Controls and the Temporal Economics of Illegality," *American Anthropologist* 116, no. 4 (2014); M. B. E. Griffiths, "Frenzied, Decelerating and Suspended: the Temporal Uncertainties of Failed Asylum Seekers and Immigration Detainees," *Compas Research Resources Papers*, no. 105 (2013); M. B. E. Griffiths, "Out of Time: The Temporal Uncertainties of Refused Asylum Seekers and Immigration Detainees," *Journal of Ethnic and Migration Studies* 40, no. 12 (2014); S. Khosravi, "Waiting," in *A COMPAS Anthology*, eds. B. Anderson and M. Keith (Oxford: COMPAS, 2014), p. 74.

[7] Griffiths, "Frenzied, Decelerating and Suspended"; Griffiths, "The Changing Politics of Time in the UK Immigration System"; M. B. E. Griffiths, "Living with Uncertainty: Indefinite Immigration Detention," *Journal of Legal Anthropology* 1, no. 3 (2013).

migrants."[8] Another manifestation of such politics of time can be found in "timing," the moment in which certain policies are installed. As Brux, Hilden, and Middelthon argue, the timing of the construction of fences after the "refugee crisis" in 2015 can be understood as a clear example of a temporal element in the "spectacle of enforcement of the border," to use an expression of Nicholas de Genova.[9]

One other important means for the temporal control over the entry and presence of people on a certain territory is the categorization of different types of migrants. For all of these categories, different sets of rules and regulations apply, and time plays a pivotal role in this form of governance. Hannah Arendt and Michel Foucault have argued that modern forms of power and politics should be conceived as control by means of the administration, categorization, and calculation of human life. In his lectures at the Collège de France, Foucault famously dubs this form of governmental power "governmentalité," a new form of power that aims to manage the life of a population. Whereas traditional forms of power controlled its subjects by means of the threat of death, or the direct control over the physical body, the modern subject is controlled by taking charge of the life of the population. This entails the control and study of processes, which occur over a period of time, and not so much the mere control of individual bodies.[10]

In migration law, such temporal control by categorization is rather apparent.[11] Residence rights and entitlements are not equally distributed among everyone present on a certain territory. As Linda Bosniak has argued, one of the main forms of immigration control takes place on the territory, and to a lesser extent at the territorial borders. This immigration control takes the form of differentiation between different legal statuses.

> The operation of a state's immigration admissions and citizenship allocation system produces an array of statuses among members of the society's population, so that at any given time, some people are citizens and some are Aliens, and among Aliens, there are various status locations assigned by the state. The result is that different people in the society enjoy different sets of right and recognition by virtue of their legal status and assignment.[12]

In this chapter, I demonstrate that this legal differentiation often makes use of time. I focus on two pivotal conceptions of time in this book, clock time and human time, and investigate how they are used in law to gain control over the processes of migrants living on a territory.

The Success of Clock Time

We live in what Robert Hassan has called "clock time modernity," in which life is ruled by an unambiguous and dominating conception of clock time, which is the time of money,

[8] Tazzioli, "The Temporal Borders of Asylum: Temporality of Control in the EU Border Regime," p. 17.
[9] Brux, Hilden, and Middelthon, "Klokka Tikker, Tiden Gar."
[10] K. Braun, "Biopolitics and Temporality in Arendt and Foucault," *Time and Society* 16, no. 1 (2007), p. 11. See also, Reneman and Stronks, "What Are They Waiting For?"
[11] This phenomenon of the "temporal border" is part of the what Ayelet Shachar has dubbed the phenomenon of the "the shifting border," see Shachar, *The Shifting Border*, and also Tazzioli, "The Temporal Borders of Asylum." It will be further discussed in the Conclusion of this book.
[12] L. Bosniak, "Being Here: Ethical Territoriality and the Rights of Immigrants," *Theoretical Inquiries in Law* 8, no. 2 (2007), p. 390.

industry, and technology. Hassan argues in his book *Empires of Speed* that the clock has created its own temporal reality since the Industrial Revolution.

> What does the clock do? Through its mathematical gearing system, its design-function is to "measure" time in society. However like trying to measure the waves on the seas, or clouds in the skies, or memories in the consciousness, and to attempt to measure these as regular and rhythmic sequences, it measures what cannot be measured in such a way. It slices the diverse timescapes of cultures, of societies and of the natural environment into uniform, precise and predictable bits that we can supposedly count and measure and value like pennies in a coin cylinder.[13]

Disguising itself as the measurement of time, the clock transforms what it supposedly measures. As such, the clock functions as a powerful tool to regulate and coordinate actions of individuals and groups in society.

Clock time is therefore perfectly apt for usage in law. It is uniform, precise, and has a predictable character that allows clock time to be used as a quantifiable good in regulations. If one thinks for example about the difficulties we would encounter if a criterion like "maturity" was used as prerequisite for people to be able to vote in elections, one would immediately grasp the advantage of a straightforward age criterion. Everyone has an age, or at least can be assigned one, so an age criterion allows for a simple application in law. Clock time allows for quantification so that it can be applied universally as common currency, as Elizabeth Cohen explains in her book *The Political Value of Time*.[14] Such quantification provides a clarity and logic to processes that are intangible, or at least very difficult to grasp. Take a term for naturalization, almost every law on naturalization will use a time criterion, often five years of residence, as a prerequisite for becoming a national. Such a criterion might refer to becoming "rooted" as a migrant, or the social integration or assimilation in the host society. One of the advantages of a time criterion for naturalization is that it refers to such processes without pinning down the exact relationship. Since everyone seems to accept that rootedness and integration have something to do with lapse of time, the abstraction from the individual processes in general time criteria works very well in law and politics. The processes might be intangible but they happen in time and the reference to lapse of time makes it more tangible. Moreover, it is precisely this abstraction from individual life stories that provides time with its objective and impartial character. As Hassan points out, the clock measures what cannot be measured in such a way; it transforms the variable into the invariable. And it is precisely this characteristic that provides the clock the force of organizational logic. Every individual life might be unique, just as every life on a certain territory might develop at a different pace or in specific directions, but all of these different lives surely share the fact that they happen in time and that they can be translated into hours and days of clock time.

[13] Hassan, *Empires of Speed*, p. 51.

[14] Cohen argues that there are five attributes of time that make it an ideal means for valuation and transaction over rights in liberal democratic states.

> These are: (1) ideas about time are embedded in contingent social circumstances and histories that are of particular relevance to the formation of national communities; (2) time can be scientifically measured and quantified ; (3) time's quantification lends it an air of scientific objectivity and impartiality; (4) the connection of time's supposed impartiality with the appearance of fair, or even egalitarian political rules; (5) time is able to be both embedded and appear objective, while most other means of valuation are either on or the other. (p. 104)

Furthermore, this quantification of time by means of the clock not only allows for simple application of the general rule to an individual case, it also permits commensuration by means of calculation. Calculation on the basis of time in legal criteria is the ultimate example of how a legal decision about the life of a human being can be detached from the singularities of that particular life, while still referring to it. It puts varied and undetermined processes into common, comparable criteria, which allow for political calculation to obtain different policy aims.

The Dutch policy for the withdrawal of residence status for public order offenses might serve as an illustration for the advantages of calculations on the basis of time. Breach of public order is a generally accepted ground for the withdrawal of residence status.[15] A residence status is in this sense always conditional: if the migrant commits a (severe) crime, the status can be revoked. In addition to the conditionality, however, another principle is at work in whether a residence status can be revoked. Generally, it is the case that the longer the migrant resides on a territory, the more difficult it is to withdraw a residence status. One could say that the conditionality of the migrant's residence status diminishes over time. When precisely a breach of public order is severe enough to withdraw residence status, however, is a difficult question that leads to a complex balancing of the different interests at hand. The best illustration for the complexity of such a balancing exercise can be found in the case-law of the European Court of Human Rights (ECtHR) on Article 8 ECHR (European Convention on Human Rights) in judgments concerning the withdrawal of residence status for breach of public order.[16]

This Dutch policy is a good example of such a calculation because it has replaced this multifaceted balancing exercise with a rather straightforward form of time calculation. The question whether a migrant can lose a residence permit because of a criminal offense depends in the Netherlands since 1990 on the application of the so-called sliding scale. This sliding scale is, in fact, a chart in which the relation between time and crime is objectified. The chart consists of two axes – the horizontal axis representing the quantity of time lawfully spent in the country, and the vertical axis reflecting the seriousness of the crime as expressed by the length of the unconditional part of the imposed sentence. If the unconditional part of the prison sentence falls within the criterion of the sliding scale, the residence permit of the migrant may be withdrawn or not renewed. So, for example, if a migrant is convicted of shoplifting, this would be enough to withdraw residence status after a residence of one year but not after a residence of fifteen years. The sliding scale therefore objectifies the legal judgment by means of time. This allows, in theory at least, for general, simple, and equal application of the norm to different cases.

The calculation with clock time serves yet another political and legal value; not only does it make an individual process tangible and generalized, it moreover makes policy and policy changes very visible. The history of the Dutch sliding scale may again serve as a good example of this.[17] The sliding scale was created in 1990 for two reasons. First, it was the result of an urge for legal certainty and legal equality. These principles were apparently not

[15] See, for example, ECHR November 2, 2001, *Boultif* v. *Switzerland*, 54273/00 or Article 12 Directive 2003/109.

[16] ECHR November 2, 2001, *Boultif* v. *Switzerland*, 54273/00; ECHR October 18, 2006, *Üner* v. *the Netherlands*, 46410/99; ECHR June 23, 2008, *Maslov* v. *Austria*, 1638/03.

[17] M. C. Stronks, "Een Bijna Ongebrijdelde Beteugeling van de Tijd: Een Analyse van Aanscherpingen van de Glijdende Schaal," *Nederlands Juristenblad*, no. 34 (2013).

well served with the open public order norm at that time in force and in particular with the highly case-based and individualistic application of that norm.[18] The sliding scale was meant to fill in the gaps. It was considered to be a simple norm with a general application, and was meant to cover every imaginable situation. Second, with the systematic approach of the sliding scale, the legal position of the migrant became much stronger. The applicable norms stipulated very clearly when migrants could lose their status. Consequently, if the said norm was not met, the residence permit would not be withdrawn. In addition, the norms of the sliding scale were, in general, much more generous for the migrant than in the situation before 1990.

Within the period 2001–12, however, the sliding scale was altered six times, with the most notable changes being the modifications of 2002, 2010, and 2012. It became much easier to withdraw a given residence permit when the migrant committed a criminal offense. Lighter trespassing of the criminal law was brought under the application of the sliding scale and a separate scale was introduced for recidivists. The extent of the change is best visible if the last step of the 1990s sliding scale is compared with that of the recidivist scale of 2012. In the 1990s, only drug trafficking with an imposed unconditional sentence of eight years or more (ninety-six months) constituted a possibility to withdraw the status after more than fifteen years of legal residence. In 2012, every imposed unconditional sentence of a little more than one year (fourteen months) was sufficient to take away legal status from recidivists who legally resided more than fifteen years in the Netherlands. Nonetheless, the most sweeping change in the policy was the removal of the twenty-year clause – the clause that made it impossible to withdraw status after residence of more than twenty years. As a result of this change, the conditionality of residence was no longer limited by an end term. Potentially, migrants could lose their residence status at any time, irrespective of how long they had already resided in the country.[19]

Certainly, this changed attitude toward criminality of migrants is part of a broader development in (European) migration law, and not typically Dutch.[20] However, another way to look at this history is to see that the time criteria of this policy instrument were discovered to be a rather easy way to change rules and regulations to adjust migration policy.[21] With a simple change of the terms of the sliding scale, a more restrictive policy was achieved. Just as migrants who breach public order are an easy target for a restrictive and firm migration policy is, clock time is a likely candidate for simple and visible changes of

[18] Interestingly enough, the case-law of the European Court of Human Rights on the withdrawal of residence status of long-term residing migrants is similarly accused of being arbitrary, see e.g., C. Steinorth, "Üner v the Netherlands : Expulsion of Long-Term Immigrants and the Right to Respect for Private and Family Life," *Human Rights Law Review* 8, no. 1 (2008); or see more mildly, Thym who writes "[t]he assessment of individual cases under the proportionality test was never supposed to resemble a mathematical formula," D. Thym, "Residence as de Facto Citizenship? Protection of Long-Term Residence under Article 8 ECHR," in *Human Rights and Immigration* (Oxford: Oxford University Press, 2014), pp. 126. In his dissenting opinion to the case of *Boughanemi* v. *France*, Judge Martens notoriously dubbed the case-law "a lottery" and a "source of embarrassment for the Court," see ECHR March 27, 1996, *Boughanemi* v *France*, 16/1995/522/608, dissenting opinion Judge Martens, par. 4.

[19] The Dutch Council of State has recently filed a request for a preliminary ruling with the CJEU inquiring whether the changed Dutch policy to allow for withdrawal of residence status after twenty years of residence of Turkish nationals would be at odds with the "standstill-clause" of Article 13 Decision 1/80 of the earlier mentioned Association Agreement, CJEU (pending), *E & C*, C-402/21.

[20] Cpr. Griffiths, "The Changing Politics of Time in the UK Immigration System," pp. 52–3.

[21] Stronks, "Een Bijna Ongebrijdelde Beteugeling van de Tijd."

policies toward such an aim. One does not have to be an expert in migration law to understand that if residence status can still be withdrawn after ten years based on a single conviction of shop lifting, this is more restrictive than reducing the period to the first five years of residence. If you compare such time criteria with a material assessment of the relevant interests at stake, the advantages of time criteria come clearly to the fore.

My favorite example of the success of clock time in migration law, however, stems from the EU Long-Term Residence Directive.[22] It is in this example that all of the virtues of legal time become apparent. In fact, it serves as an example of the use of clock time, while it can also function as bridge to the next discussion on the role of human time. Migrants who lawfully reside in one of the Member States of the EU for a period of five continuous years can apply for Long-Term Resident Status. Such a status is stronger, for there are fewer possibilities to withdraw the said permit. Migrants who reside on the territory for temporary purposes are excluded from the application of the Directive.

The CJEU has explained in the case of *Mangat Singh* why such residence falls outside the scope of the Long-Term Resident Directive. Whilst the residence of temporary migrants is lawful and of a possibly continuous nature,

> [the temporary residence] does not prima facie reflect any intention on the part of such nationals to settle on a long-term basis in the territory of the Member States. Thus, Article 3(2)(e) of Directive 2003/109 excludes from the scope of that directive, residence "on temporary grounds." Such grounds imply residence by a third-country national in the Member State concerned which is not long term.[23]

Nevertheless, the Court hastens to add, this does not preclude a continuous residence. After all, intentions might change, someone who intends to stay temporarily today, might wish to reside permanently tomorrow, and vice versa.

The Long-Term Residence Directive facilitates this change and does so by means of a fine example of time calculation. Students fall outside the scope of the Directive since their residence is deemed to be temporary. However, it is perfectly conceivable that they acquire another residence status after graduation because they start working or are granted a status on the basis of family reunification. In such a scenario, their temporary status after lapse of time could turn out to be more permanent than initially intended. Based on the general rule, their residence during study would not count for the five-year period of the Directive since such temporary residence does not count. If this temporary residence turns out to be nontemporary after all due to acquiring a nontemporary residence title, this retrospectively influences the previous period of presumed temporary residence. Article 4, paragraph 2, second subparagraph, stipulates that in such cases, the earlier period of residence for study purposes does count, although only half of the periods can be taken into account.

Clock time has many virtues, so much has become clear: it is seemingly objective; it is general while it refers to individual lives; it allows for quantification and calculation; and it has a certain clarity and visibility that are appealing for transparent and understandable policy making. Yet, next to clock time, another form of time is at work in law. The example of the temporary student changing his mind about his future can again help to pinpoint this form of time; this reference to human time.

[22] Directive 2003/109. [23] CJEU October 18, 2012, *Mangat Singh*, C-502/10, paragraphs 47–8.

The Function of Human Time in Law

The student who finds a job after graduation and changes his mind about the future (or always intended to aim for prolonged stay) serves as a nice example of time calculation in the Long-Term Residence Directive. Nonetheless, his case can just as well function as an illustration of the meaning of the adjective "temporary" in law. What does it mean when a residence is deemed to be temporary? Trying to answer that question is a good way to illustrate the use of human time in law.

It is important to observe from the outset that the adjective "temporary" does not relate well to clock time. As mentioned in the Introduction, clock time is standardized, which has the advantage that it serves as an objective standard. It can be applied to a migrant in order to establish at which moment in clock time they arrived and how long the residence subsequently took. However, purely on the basis of clock time, one cannot establish whether a certain residence is temporary. Certainly, the residence of the migrant can be established as temporary when the migrant leaves the territory without intention to return and thereby proves the residence was retrospectively temporary. The point is, however, that even such a perspective of temporary residence presumes human time because it presumes that their presence in the territory has become a definite part of their past, since they no longer reside and will not reside there in the future. Temporariness is therefore primarily a question of the temporality of human time, the time of someone with its past, present, and future as perceived at a certain moment in time.

The strain between temporariness and clock time becomes even more apparent if one thinks about the meaning of temporariness when the migrant has *not* left the territory. It is clear from the aforementioned example that residence can be retrospectively deemed as temporary, but can temporariness also be prospective and relate to the future? This is an urgent question, since the law uses temporary as a distinguishing category for migrants present within territory. Categories such as temporary, permanent, or long-term would be inoperable if one would have to wait until the actual migration of the migrant to another country. Migration law therefore uses a prospective conception of temporary. Such a prospective understanding cannot be objectified in a similar vein to the retrospective conception of temporariness. So, what determines when some residence is deemed to be temporary and other residence is deemed nontemporary in the future? Rainer Bauböck has argued that, indeed, different meanings of temporary should be discerned. He discusses several prospective understandings of temporary; the most important being for this discussion: subjectively intended; collectively expected; and legally prescribed.[24] It becomes apparent that there is a complex interplay at stake between these three perceptions in the meaning of temporary residence.

The temporary character of time in the territory relates in the first place to the supposed intention of the migrant that is attributed to their residence permit. This intention does not exclusively refer to the intention of the migrant. Obviously, the intention of the migrant plays a role, after all they choose to migrate to the country and to apply for a particular residence permit (work, asylum, family reunification, study, work as an *au pair*, etc.). Moreover, what will actually happen in the future very much depends on the intention of

[24] Bauböck also discerns "morally justified" and "demographically objective," the latter being the retrospective variant that I have just described. R. Bauböck, "Temporary Migrants, Partial Citizenship and Hypermigration," *Critical Review of International Social and Political Philosophy* 14, no. 5 (2011), p. 670.

the migrant, which may change. Whatever is intended at a particular moment can change in the future because the migrant may change initial plans. It is perfectly conceivable that a migrant, who has gained a strong residence permit, decides after a couple of years to migrate again and settle somewhere else; just as someone with a temporary permit (e.g. study) might decide to settle (find a job or fall in love) despite an initial plan to leave. Therefore, the subjective intention of the migrant is a rather unreliable proxy to predict the future. It is for this reason that migration law has a construction relating to the temporary character of the migrant's presence on the basis of a reasonable expectation of the future, instead of a purely subjective intention.

In fact, this is present in the previous argument of the CJEU in *Mangat Singh*: the residence of migrants who stay for temporary purposes does not reflect any prima facie intention on the part of these migrants to settle on a long-term basis. This does not imply an inquiry into the actual intention of these migrants, it is a constructed legal expectation. This reasonable expectation comes close to Bauböck's "collectively expected." It is the legal attempt to construct a reasonable expectation based on the objective of the visit. If such a goal is temporary, if the end of the stay is implied in the goal, then the time of residence is expected to be temporary as well. If a migrant comes to work as a seasonal worker, for a particular study, or for temporary protection, these forms of residence have a (more or less) clear end point. Therefore, these forms of temporary residence are exempted from the Long-Term Residence Directive.

Consequently, what can "temporary residence" mean? It implies a prospective qualification of the time a migrant wants to spend on the territory. Such an expectation is necessary since it is not just clock time in the territory, it is the time *someone* will spend in the territory. Mere clock time will not suffice as qualification of their presence as (non) temporary, for it implies a temporal understanding of the time of the migrant. The qualification refers to the future of the migrant and this reflects a complicated interplay between objectively expected, subjectively intended, and legally prescribed.

This example serves not only to show how human time is at work in migration law, it also demonstrates how human time is used to make categorizations between different migrants. It would, in other words, be too simple a conclusion to say that the success of time in migration law is purely based on its use of clock time. Although the virtues of clock time for application in law are apparent, in the end, it is the human time of the migrant that is the object of governance. It is, in fact, in the interplay between clock time and human time that we can identify different forms of temporal differentiations: legal distinctions to govern the presence of migrants on the territory based on their human time.

Techniques of Temporal Differentiation

As discussed in the introduction of this chapter, the governance of migrants present within a given territory makes use of intricate forms of differentiations – differentiations that are often based on time. Since the presence of people on a territory is not static but a process that develops over time, I argue here that these processes lend themselves for differentiation. I discern four differentiations that make use of time: differentiation based on temporality; differentiation based on deadlines; differentiation by qualification of time; and procedural differentiation. All four sorts will be discussed and it will become apparent that in many of the examples, multiple forms of temporal differentiation are at work.

Clearly, there is overlap between them, differentiation on the basis of temporality is for example an obvious form of qualification, whilst procedural sorts of differentiation often make use of deadlines. The point is however to show that their functioning makes a different usage of time, and the interplay between clock and human time.

Temporality

Bridget Anderson has observed that the United Nations' (UN's) definition of who constitutes a migrant is one of time. The UN data on global migration define a migrant as "a person who moves to a country other than that of his or her usual residence for a period of twelve months or more so that the country of destination effectively becomes his or her new country of usual residence." What matters is time away from the usual residence and the length of time planned to stay.[25] Temporality – the distinction between past, present, and future – is pivotal in such a definition; not only does it rely on an estimation of the length of the visit, the qualification of "usual residence" is based on an estimation of past, present, and future. Temporality is not just used for the definition of who constitutes a migrant, in migration law it is used to further categorize migrants and to differentiate between their entitlements, or to use Elizabeth Cohen's words, to "discriminate" by means of "temporal boundaries."[26]

Just as differentiations can be made focussing on clock time (e.g. five years of residence before long-term residence status), it is possible to categorize based on temporality.[27] As already seen in the previous paragraph, based on the distinction between temporary, nontemporary, and permanent residence, differentiations can be made between different forms of migration and different entitlements can be attached to the respective categories. Seasonal workers, *au pairs*, and students are deemed to reside temporarily on the territory and are therefore excluded from the stronger residence status of the Long-Term Residence Directive; just as refugees receive temporary protection until the situation in their country of origin has become safe enough to return.[28] The crux in this form of differentiation is that distinctions are based on the past or the future of the migrant, at a certain moment in time.

[25] Anderson, "And About Time Too . . . Migration Documentation, and Temporalities."

[26] Cohen, *The Political Value of Time*, p. 60.

[27] This aspect of temporality – the relationship between past, present, and future – is one of the central questions of the phenomenology of time in the work of, for example, Edmund Husserl, Martin Heidegger, and Merleau-Ponty, see for a helpful introduction to this question, Hoy, *The Time of Our Lives*, pp. 41–95. In the next chapter, this question will be further discussed as the problem of extension in the work of Bergson and Heidegger.

[28] The most obvious example of this latter category of temporariness is the Temporary Protection Directive, Directive 2001/55, a directive that has never been implemented, see Ineli-Ciger, *Temporary Protection in Law and Practice*, pp. 149–93. Interestingly enough, the new proposal for a regulation addressing situations of crisis and force majeure in the field of migration and asylum presented by the European Commission proposes to repeal the Temporary Protection Directive and introduce "immediate protection," see for a first discussion of the differences, M. Ineli-Ciger, "What a Difference Two Decades Make? The Shift from Temporary to Immediate Protection in the New European Pact on Asylum and Migration," *EU Migration Blog* (2020), https://eumigrationlawblog.eu/what-a-difference-two-decades-make-the-shift-from-temporary-to-immediate-protection-in-the-new-european-pact-on-asylum-and-migration/. For a concise discussion of temporary protection in the USA, see N. Lori, "Migration, Time and the Shift to Autocracy," in *The Shifting Border*, eds. A. Shachar and P. Niesen, pp. 118–38 (Manchester: Manchester University Press, 2020).

Seasonal workers receive a temporary residence status because the aim and prospect of this form of residence is that it will stop when the season has come to an end. This form of temporal differentiation therefore always presupposes a moment in time when a prediction of the future (or the assessment of the past) is made. At this moment, the future is fixated by means of legal categorization, which is linked to certain residence entitlements.

While such temporal differentiation is based on the qualification of the future, it can endure long-term, as can be exemplified by the case of the Ghanaian woman with which this book commenced but also with the earlier mentioned case of *Mangat Singh* before the CJEU. Mr. Singh, an Indian national, was granted an "ordinary fixed-period residence permit" in the Netherlands, the validity of which was limited to the exercise of an activity as a spiritual leader or religious teacher for a fixed period of time. The permit was first granted for one year and subsequently multiple times extended for a fixed period of an extra three years. After Mr. Singh had resided for five years, he requested Long-Term Resident status, under the Long-Term Residence Directive. This was, however, rejected; the Dutch government qualified the residence as temporary because its duration was "formally limited" in the sense of Article 3(2)(e) of the Long-Term Residence Directive. In the meantime, the government kept prolonging the said residence permit, therewith precluding that Mr. Singh would gain a stronger residence status while remaining lawfully within the territory. In other words, Mr. Singh was kept in long-term temporariness, and as political philosopher Michael Walzer puts it in *Spheres of Justice*: "the purpose of their status is to prevent them from improving their condition."[29]

Even though the CJEU ruled in this case that this form of long-term temporariness is not allowed under EU law, the case of Mr. Singh still serves as an excellent example of the differentiating effect of temporal governance by means of temporality. It is clear from this example that the relevant moment in time is the moment that the residence status is being granted, the expectation at that moment determines whether the residence is qualified as temporary or nontemporary. It is this expectation of the future of the migrant that is the locus of temporal differentiation. And in an ultimate form, it implies that the qualification as temporary can be renewed time and again, keeping the de facto long-term residence temporary.

A related but slightly different example of the central role of temporariness in the qualification of presence within a territory is the case-law relating to the so-called Europe-route. The example of Mr. Singh explicates how the assessment of the future of the migrant is linked to a certain moment in time, after which the future remains unaltered. The example of the Europe-route shows how temporality is used to qualify presence within a given territory. One of the fundamental rights of EU citizens is their right to move and reside freely within the territory of one of the Member States of the EU. This right can be found in Article 21 TFEU (Treaty for the Functioning of the European Union), and the Citizenship Directive (Directive 2004/38) aims to facilitate and strengthen the exercise of this right. One of the important rights that follows from this Directive is the right to family reunification with a third-country national family member. This right is a derived right, which means that it follows from the exercise of freedom of movement by an EU citizen.[30] Even though it is not an autonomous right for the third-country national, it clearly is a

[29] M. Walzer, *Spheres of Justice* (New York: Basic Books, 1983), p. 58.
[30] CJEU November 8, 2012, *Iida*, C-40/11, paragraphs 66–7.

strong entitlement, often more lenient than national rules for family reunification. Importantly, the right to reunite with a family member does not apply when the EU citizen remains in the country of their nationality. After all, the right is attached to the freedom of movement of the citizen. Yet, the CJEU argued that if the EU citizen was not able to bring their family member to the other Member State *and* back to the Member State of their nationality, this could be an obstacle to the EU citizen exercising their freedom of movement in the first place. For this reason, the CJEU has ruled that when an EU citizen has resided in a Member State other than the one where they are a national, the family member also has a derived right to reside in the Member State of the EU citizen's nationality after they return from their residence abroad.[31]

It was feared by some Member States that this could be a way to circumvent more restrictive rules for family reunification.[32] Such construction is called the Europe-route and it implies that residence in another Member State would be enough to exempt the family from national rules for family reunification. The decisive question to apply the lenient European rules in such cases is: *When* is residence of an EU citizen in another Member State of the EU long enough to qualify for this derived right of EU law? In other words, the question of temporariness of residence has become nothing less than the boundary between national and European law.

This question could have been answered merely by reference to a clock time criterion: after a certain period of time, residence would be long enough to activate the derived residence rights for family members. Yet, the Court has clarified in the case of O and B that the relevant criterion is that "only where the residence of the Union citizen in the host Member State has been sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State."[33] Residence on the basis of Article 6 of the Citizenship Directive, which is restricted to a period of three months, does not reflect an intention of the EU citizen to settle in the host Member State. Residence on the basis of Article 7, however, is in principle evidence of settling and therefore of the aforementioned genuine residence. Yet, it is for the national government to determine whether the EU citizen has settled, therewith proving that the said residence is sufficiently genuine to create or strengthen family life in the host state. Such an assessment of whether residence is sufficiently genuine is reminiscent of the earlier mentioned UN definition of "usual residence," or a notion like "habitual residence" that can be found back in tax law, social security law, and international private law. This criterion therewith implies an assessment of the future of the migrant, or upon return of an assessment of whether the previous residence was sufficiently genuine in order to take the family member back to the home country of the EU citizen.

These examples show that temporality – the past, present, and future – of the migrant are used to differentiate the presence of migrants within a certain territory. It requires time and again an assessment of the future and/or the past of the individual at a particular moment.

[31] CJEU July 7, 1992, *Surinder Singh*, C-370/90; CJEU December 11, 2007, *Eind*, C-291/05.

[32] H. Kroeze, "Distinguishing between Use and Abuse of EU Free Movement Law: Evaluating Use of the 'Europe-Route' for Family Reunification to Overcome Reverse Discrimination," in *European Citizenship under Stress*, eds. N. Cambien, D. Kochenov, and E. Muir (Leiden: Martinus Nijhoff, 2020), p. 227; E. Spaventa, "Family Rights for Circular Migrants and Frontier Workers: O and B, and S and G," *Common Market Law Review* 52, no. 3 (2015).

[33] CJEU March 12, 2014, *O & B*, C-456-12, paragraph 51.

Moreover, it has become clear that this temporal differentiation aims at the process of the migrant's presence within a given territory. Distinctions are made based on the past and future of the migrant within a certain territory to differentiate legal entitlements.

There is, however, another sort of application of temporality that deserves to be discussed; notably, the usage of the "present or actual danger" criterion within the case-law of the CJEU in public order cases.[34] In this line of case-law, temporality is used not so much to differentiate the presence within a territory such as in the cases of *Mangat Singh* and the Europe-route, but instead the *behavior* of the migrant is the locus of differentiation.

Article 28 of the Citizenship Directive stipulates that Member States may restrict the freedom of movement of EU citizens on grounds of public policy and public security. In cases in which an EU citizen has been convicted of criminal offenses, they might be expelled to their country of origin. Such a decision should be proportionate and based exclusively on the conduct of the individual concerned. Moreover, and importantly, mere previous convictions do not constitute grounds for taking such measures; "the personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society." This criterion has come to be known as the "present or actual danger criterion"; the relevant assessment is not whether there was in the past a sufficiently serious and genuine threat, there should still be a danger that still exists in the present of the legal decision. *When* is such a danger still present?

The CJEU has held in the case of Orfanopoulos and Oliveri that the time that elapsed between the decision to expel the person concerned and that of the review of the competent courts should be taken into account when considering whether the danger is still present.[35] What happens in that period of time is therewith determinative for the question of whether there still exists an actual danger. If the person reoffends, this is obviously indicative that there still exists a danger, especially if the time that lapsed since the last crime is relatively short. Yet, the seriousness of the offense is also an important criterion to take into account. As we will see in Chapter 2, some offenses can be so disturbing for society – such as war crimes or crimes against humanity – that the danger will not easily diminish over a (long) period of time. Yet, the Court held already in its judgment in Bouchereau in 1977 that a previous criminal conviction cannot in itself justify an expulsion measure, the relevant question is whether there exists in the individual concerned "a propensity to act in the same way in the future."[36] Are there any positive signs of reintegration, reports from psychiatrists, or indications of structurally changed behavior such as the end of a drug addiction? Such elements can be used as substantiation of the absence of a propensity to reoffend. This implies that the assessment constitutes an estimation of the future – of the risk the person constitutes for society. Temporality is used to pinpoint the present moment, in which a qualification of the future risk is being made, this qualified future serves to differentiate between those whose residence status can be withdrawn or not. Whereas in the previous

[34] Also, the European Court of Human Rights has held in certain public order cases under Article 8 ECHR that the proportionality assessment was "ultimately designed to help evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities," ECHR June 23, 2008, *Maslov* v. *Austria*, 1638/03, paragraph 70. The case-law is, however, not consistent on this point, only in eleven of fifty-eight cases does it explicitly refer to this danger assessment, see H. van Oort, "De Strafrechtelijk Veroordeelde Vreemdeling en Artikel 8 EVRM," *Asiele&Migrantenrecht*, no. 5 (2020).

[35] CJEU April 29, 2004, *Orfanopoulos and Oliveri*, C-482/01 and C-493/01, paragraphs 78–81.

[36] CJEU October 27, 1977, *Bouchereau*, C-30-77, paragraph 29.

examples, presence within the territory was the locus for differentiation by means of temporality, the case-law on the "present danger" criterion shows that temporality can also be used to differentiate between acceptable and unacceptable behavior.

Deadlines

Probably the most frequently used form of temporal differentiation is the one based on deadlines. For example, the residence status of family members often remains dependent on that of the sponsor for a period of five years (e.g. Article 15 of the Family Reunification Directive). Similarly, it is possible to allow family reunification only after the sponsor has first lawfully resided a fixed period of time on the territory (e.g. two years in the Family Reunification Directive). These are examples of what Elizabeth Cohen calls "countdown deadlines," a type of temporal boundary in which limitations are linked to two dates by a precise quantity of time.[37] In the example of the dependent status of the family member, the former date would be the acquisition of the dependent residence status as family member, the latter would be the fixed amount of lapsed years before the family member may apply for an autonomous status.

Countdown deadlines can be used to regulate certain entitlements, such as the earlier mentioned autonomous status, a long-term resident status, or naturalization, or for procedural differentiations (see further "Procedures"). Just as they can be linked to the grant of a (stronger) residence status or other entitlement, they can be used to end certain entitlements. Residence permits are always first granted for a certain period of time, after which, the entitlement if not renewed or changed, ceases to exist. Another example of a countdown deadline is the "period of voluntary departure" that can be granted to a migrant who no longer has authorization to stay within the territory. Article 7 of the Returns Directive stipulates that as a general rule, return decisions shall provide for an "appropriate period" for voluntary departure of between seven and thirty days. Another example of a fixed time limit by means of a countdown deadline is the maximum period of immigration detention, which is set at eighteen months (Article 15 (6)) in the Returns Directive. It is interesting to contrast this with the conclusion of the ECtHR in the case of *J. N.* v. *the United Kingdom* that Article 5 (1) of the ECHR does not require states to be contracted to establish a maximum period of immigration detention.[38] In other words, the justified duration of detention can be based on a countdown deadline just as well as on a review of all of the particularities of the individual case. I will return to this distinction in the next chapter when discussing the formal/material problem in referring to processes.

[37] Cohen, *The Political Value of Time*, p. 56.

[38] ECHR May 19, 2016, *J. N.* v. *the United Kingdom*, 37289/12, paragraphs 90–3; the Court concludes

> It is clear that the existence or absence of time-limits is one of a number of factors which the Court might take into consideration in its overall assessment of whether domestic law was "sufficiently accessible, precise and foreseeable" (in other words, whether there existed "sufficient procedural safeguards against arbitrariness"). However, in and of themselves they are neither necessary nor sufficient to ensure compliance with the requirements of Article 5 § 1(f) (see, for example, Gallardo Sanchez, cited above, § 39, and Auad, cited above, § 131, in which the Court made it clear that even if fixed time-limits were complied with, it would still find an applicant's detention to be in breach of Article 5 § 1(f) if deportation was not pursued with due diligence). (paragraph 90)

In their functioning countdown deadlines make use of both clock and human time, albeit, that the former is most prominent. They stipulate that after a certain amount of clock time, a legal effect occurs, whilst this obviously implies the lapse of human time, such deadlines are generally not linked to specific periods of human time (e.g. first five years of the migrants life, or the time after the age of retirement). Because such countdown deadlines are expressed in terms of clock time, they can be repeated. The time for naturalization, for example, can start anew, in case someone has left the territory or when there is a period of unlawful residence.

Alongside "countdown deadlines" Cohen distinguishes yet another variant of deadlines: the "single moment deadlines" – deadlines based on a fixed, single moment in time. The most obvious example of such a temporal boundary is the acquisition of nationality at birth based on either ius soli or ius sanguinis principles. In the former, the child receives the nationality of the place of birth, in the latter, it receives nationality from the parents. Such a deadline is the basis for what Ayelet Shachar has criticized as the "birthright lottery", in which birthright determines the future of a child from the single moment of birth.[39] With such single-moment deadlines, the moment in time is merely expressed in terms of human time, which implies that it is not only an individual deadline but moreover unrepeatable. Also, the distinction between minor/adult can be seen as a single-moment boundary.[40] Single-moment deadlines can, however, also be expressed in terms of clock time (or to be precise, calendar time). An illustration of such a single moment deadline is the temporal clause in the Refugee Definition, which initially determined that refugee protection was restricted to events occurring before January 1, 1951 (this deadline was dropped after the Protocol of 1967). Equally, the date in which new laws and regulations come into force is an example of a single-moment deadline, after this particular moment, entitlements and procedures will be changed and have different legal effect. Just as rules regulating the acquisition of citizenship after the establishment of new sovereign borders make use of single-moment deadlines, such as in the case of the breakup of the Soviet Union into new states.[41] Another typical example of this form of deadline is "standstill agreements" in the Association Agreement that provide Turkish nationals residence rights. These standstill clauses provide that the EU Member States may not introduce new restrictions on the conditions to the right of establishment and the freedom to provide services and movement for workers after the date of entry into force of the legal measures. This implies that, for example, an application for a residence permit for a Turkish national starting a business should be dealt with according to the national immigration legislation of a Member State *as if it was still 1973*.[42]

A characteristic for single-moment deadlines that are expressed in terms of clock time is that they have a general application: the moment in time is fixed on a moment on the calendar. Single-moment deadlines are – both in human and clock time – to be

[39] A. Shachar, *The Birthright Lottery* (Cambridge, MA: Harvard University Press, 2009).

[40] See for a discussion of age assessment in European asylum law, E. Brouwer and R. Lanneau, "Age Assessment and the Protection of Minor Asylum Seekers: Time for a Harmonised Approach in the EU," *Refugee Law Initiative* (2020), https://rli.blogs.sas.ac.uk/2020/08/10/age-assessment-and-the-protection-of-minor-asylum-seekers-time-for-a-harmonised-approach-in-the-eu/.

[41] E. F. Cohen, "Citizenship and the Law of Time in the United States," *Duke Journal of Constitution Law & Public Policy* 53, no. 8 (2013).

[42] See further, P. Boeles et al., *European Migration Law* (Cambridge: Intersentia, 2014), pp. 118–26.

distinguished from countdown deadlines because they cannot be repeated. They make use of the arrow of time in both clock and human time to differentiate between a "before" and "after." Single-moment deadlines, Cohen argues, have limited normative potential because they cannot accommodate change, "they make no allowances for the fact that time, unlike land, is not static."[43] Countdown deadlines, on the contrary, leave room for more normative complexity, for they allow decisions to be made over a longer period of time. Such time is thought to have meaning, and the period of time allows the process of judgment and claim making to over many more points in time than the judgment affixed to one moment in time.[44]

In addition, the third form of deadline that Cohen describes are recurrent deadlines. Whilst countdown deadlines can be repeated, recurrent boundaries repeat themselves, "they create a schedule for the periodic re-evaluation and alteration of the boundary they demarcate."[45] Election cycles are based on such recurrent deadlines and are clearly linked to fixed periods of clock time. Recurrent deadlines can, however, also be linked to less specific periods of time. The Returns Directive requires, for example, that detention for the purpose of the removal of the unlawfully residing migrants "shall be reviewed at reasonable intervals of time" (Article 15 (3)).

The most interesting example of a recurrent deadline in the field of migration law is the amnesty or regularization for unlawfully residing migrants, which I will elaborately discuss in Chapter 3.

Qualification

Another form of temporal governance by means of differentiation is the qualification of time. We have already seen this at work in the discussion of temporality as a form of differentiation, after all, temporary residence is a form of qualification of residence. In temporal differentiation on the basis of temporality, however, the emphasis is on the usage of the past, present, and future of the migrant to differentiate. Yet, there is more to say about the usage of qualification, this is often used to qualify the presence of the migrant within a territory in other ways. One of the advantages of the use of time in law is that everyone has time. Humans are temporal beings, they live in time, and it is their individual time that is the focus of legal control. This does not serve to say, however, that legal time equates the simple lapse of individual human time. The deadlines that are often used in law almost never take time as unqualified, individual human time. Some form of qualification of time is always used to differentiate between different categories. The residence status of the family member, for example, remains dependent on that of their sponsor for a period of five years. Yet, this does not mean that mere lapse of time will make the status autonomous. As a rule, the relationship should not have been broken as a result of divorce or separation. One could say that it is not just time that should have lapsed, but marital or relational time.

A more informative example, however, of the seemingly endless possibilities of the qualification of time is the use of time in the Long-Term Residence Directive. Only time that is continuous qualifies for the Long-Term Resident Status. The period of five years may not be interrupted, stipulates Article 4, paragraph 1, as a general rule. This is a clear

[43] Cohen, *The Political Value of Time*, p. 55. [44] Ibid., p. 56. [45] Ibid., p. 58.

qualification of time, it is not merely the sum of years spent in the territory that counts for the Long-Term Residence Directive, they must have been consecutive years.

Recall Bridget Anderson's observation that what matters is time away from "usual residence." We already witnessed this differentiation of presence in discussing the genuine residence criterion in cases of the Europe-route, yet upon close scrutiny it turns outs that the continuity of residence can also be further qualified. On the basis of the wording of Article 4 one would think that continuous residence in the territory does not leave room for interruption by way of presence outside the territory. If the criterion of continuity would merely refer to clock time, it would be straightforward. The legal meaning of continuity appears, however, to be more complicated. Article 4, paragraph 3, stipulates that periods outside the territory shorter than six consecutive months, not exceeding in total ten months, do not interrupt the period of five years within the meaning of Article 4, paragraph 1. A migrant can therefore reside outside the territory (for holidays, visits, work, etc.) without this implying that the clock starts to tick all over again regarding their application for a long-term resident permit. Continuous time in the territory is accordingly defined as "uninterrupted not" or "not interrupted for too long."

Nonetheless, if a migrant is outside the territory, does that time compute for the countdown deadline of the long-term resident status? If a migrant leaves the territory for a four-week holiday, do these weeks count? Interestingly enough, the time of these non-intervals actually does count: they add to the period of five years, according to Article 4, paragraph 3. So, we have to discern the question of (non)interruption from the question of calculation. (Some) time on the outside does not interrupt time on the inside, and these noninterrupting intervals outside the territory even count as time on the inside. Longer time on the outside, however, does interrupt the continuous time on the inside and therefore makes the clock start ticking all over again.

It becomes, however, even more complicated. While the general rule of continuous time implies a form of "not often interrupted time," and these nonintervals count for the period of five years, there can be exceptions to this. In very exceptional circumstances of a temporary nature, Member States may agree that longer periods of absence of the territory will not interrupt the continuous time of five years (Article 4, paragraph 3, second subparagraph). In such cases, however, the relevant period of absence from the territory should not be taken into account in the calculation of the five-year period.

The possibilities for qualification of time are, in other words, endless. The example of the Long-Term Residence Directive shows that the detailed qualification of what constitutes as continuity can lead to complicated forms of time calculation. The quantifiable character of clock time lends itself for detailed regulations by means of qualification, which enables one to make very specific differentiations. Some time counts, while other time does not. However, the (dis)qualification of time does not have to be so meticulous, chunks of time can be entirely disqualified. If a migrant resides unlawfully on a territory, this time has not much legal value. Only after five years of lawful residence, for example, can a migrant apply for naturalization. I know of no country in the world that grants naturalization, no matter whether the time spent in the territory was lawful or unlawful.[46]

[46] Rubio-Marín has argued that a full version of the jus domicilii principle would entail the inclusion of migrants after a fixed period of time, no matter their legal status, see. R. Rubio-Marín, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* (Cambridge: Cambridge University Press, 2000).

A final example of qualification of time as unlawful stems from the case-law of the ECtHR. It is instructive because the ECtHR uses temporality to distinguish between precarious and unprecarous family life. In its case-law under Article 8, the Court has time and again held that Article 8 does not oblige states to respect an immigrant's choice of the country of their residence and to authorize family reunion in this territory. Nevertheless, there can be circumstances under which the family life should be protected in immigration cases, this will vary according to the particular circumstances of the case. One particularly important aspect is, however, "whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious."[47] Where this is the case, the removal of the nonnational family member would be incompatible with Article 8 only in exceptional circumstances. Ever since the judgment of *Abdulaziz*, the Court has reiterated this formula as one of the important elements in the assessment whether family life is protected under the Convention. In this reasoning, the Court makes use of temporality, by using the moment that the family life started. When at that time the family members were aware that the persistence of the family life in the host country would be uncertain, this weighs heavily in the proportionality assessment. In other words, the court pinpoints a certain moment in the life of the migrant that is crucial for the evaluation of the weight of the subsequent family life. The awareness of the precarity of the immigration status at that time qualifies the family life as precarious, which implies that the removal of the family member would only be incompatible with Article 8 in exceptional circumstances.

Antedating

Antedating is a form of differentiation that could be defined as taking an earlier moment in time as the relevant legal moment. The most obvious example of this differentiation is the antedating of a residence permit. This implies that the starting moment of the permits antedates the moment of the legal decision to provide such a status, the best example of such is the antedating of the refugee permit to the moment of the application.

A second example of such differentiation relates to the relevant moment in time of the judicial decision. In continental traditions, such a distinction is, as mentioned when discussing the case of the Eritrean girl in the introduction of this chapter, often called the difference between ex nunc and ex tunc judgments. In an ex tunc judgment, the circumstances after the moment of the administrative decision cannot be taken into account in a subsequent judicial review, whilst in an ex nunc judgment, the relevant legal moment coincides with the moment of the judicial review. The case of the Eritrean girl serves as a good example. In the time taken for the procedure she had reached legal majority. The question of majority was of crucial importance for the case: as a child, she had the right to reunite with her parents, as an adult, such reunification would be difficult to achieve. The relevant moment in the procedure to establish the child's age was therefore pivotal. The CJEU held that only an ex tunc judgment would lead to a just

[47] ECHR June 28, 2011, *Nunez* v. *Norway*, 55597/09, paragraph 70, this criterion was to put to the fore for the first time in ECHR May 28, 1985, *Abdulaziz, Cabalis and Balkandali* v. *the United Kingdom*, 9214/80, 9473/81, and 9474/81, paragraph 68.

outcome, declaring that the girl was, legally speaking, seventeen years old (despite it being just before her twenty-second birthday).

Likewise, in the case-law of Article 8 ECHR, the question of the relevant moment plays an important role, especially regarding cases of expulsion of long-term residing migrants. Such cases often deal with migrants who have committed criminal offenses, after which the government withdrew their residence status. Immigration procedures, however, often encompass a long period of time, which implies that when the case reaches the (highest) court, a long time may have passed since the decision to withdraw the residence status. Since the moment of this decision, circumstances may have drastically changed. A migrant may have repeated their behavior or, on the contrary, have changed their life drastically for the better. Again, the relevant moment of the decision will be decisive for the outcome of such cases.[48]

This manipulation of the legally relevant moment is not only based on human time, it clearly refers to clock time as well. Actually, it is a revealing example of the intricate relationship between human time and clock time, as it implies a form of time traveling. As mentioned in the Introduction, it is possible to traverse a calendar in two directions because of its axial moment and the existence of a perceived human present. Because of this, it is possible to go "back" from the tangible present to the past and "forward" from the past to the present. This is what is at stake in the determination of the legally relevant moment with an ex nunc or ex tunc judgment. as a result of the calendar and the human "present" of the migrant, it is possible to go back to determine the relevant moment on the basis of an ex tunc assessment.

Procedures

The last sort of temporal differentiation that I would want to highlight is procedural differentiations. In the first place, there are several procedural deadlines, often countdown deadlines that stipulate when certain procedural steps should be taken – for example, procedures for filing an appeal or the limitations for submitting new evidence. Such procedural differentiations not only delimit the applicant, they can also circumscribe the power of the state. One can think of the maximum amount of time the government may take to come to a decision, or the maximum amount of time detention may take.

More complex, however, are differentiations based on acceleration and deceleration of procedure. Such differentiation is a clear example of temporal governance, as Marcelle Reneman and I have earlier contended elsewhere.[49] Governments frequently use the speed, and therewith the duration, of the procedure to distinguish between wanted and unwanted forms of mobility. The starkest example is the differentiation between mobility of EU citizens within the EU and the attempts of asylum seekers to reside in Europe.[50] The former can freely move and reside in Europe almost without any procedural temporalizations, the latter often has to wait years for a first decision on their asylum application. Waiting should, as Ruben Anderson argues, in such politics, not so much be perceived as a

[48] ECHR September 20, 2011, *A. A.* v. *the United Kingdom*, 8000/08, paragraph 67.
[49] Reneman and Stronks, "What Are They Waiting For?"
[50] Shachar, *The Shifting Border*; T. P. Spijkerboer, "The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control," *European Journal of Migration and Law* 20, no. 4 (2018).

by-product of state institutions and bureaucratic regulations but rather as a tactic, a management technique to control the inclusion and exclusion of migrants on a territory.[51] Or, as Pierre Bourdieu writes in his *Pascalian Meditations*, "[t]he all-powerful is he who does not wait but who makes others wait."[52] And indeed, the prerogative to let others wait seems an ultimate form of temporal governance; waiting implies a sort of submission, as Bourdieu claims. It can be argued that in European law, there is ample opportunity to prolong such waiting.[53]

Yet, to be accurate, one should add that the "all-powerful" is not just the one who makes others wait but the one who can determine the pace and therewith the duration of the procedures altogether. Making others wait might be an obvious example of temporal governance, yet suddenly accelerating procedures is clearly the other side of the same relationship between power and time. Such "frenzied time," as Melanie Griffiths calls it, is time that is experienced to accelerate quickly and rush out of control. Deportations and removals almost always entail such an accelerated sense of time,[54] as a consequence of which, effective legal remedies can become obsolete.

A good example of such frenzied time is the case of *De Souza Ribeiro* v. *France* before the ECtHR. Mr. De Souza Ribeiro was a man of Brazilian descent living with his family in French Guiana, a French overseas *département* in South America. He arrived in Guiana at the age of four in 1992, from 1996 to 2004 he attended primary and secondary school there, without having legal permission to reside in the territory. Whereas his family members lawfully resided in Guiana, he lacked a residence permit. In 2007, on February 25, to be precise, he was arrested at a road stop because he was unable to provide proof that his residence on French soil was legal. The same day, at 10 a.m., an administrative removal order and an administrative detention order were issued against him. On January 26, so the day after, at 3.11 p.m., De Souza Ribeiro sent two faxes to the Cayenne Administrative Court, one applying for judicial review of his removal in light of his personal and family life under Article 8 ECHR, the other an immediate suspension of the enforcement of the removal order. Only forty-nine minutes later, January 26, 2007 at 4 p.m., he was removed to Belim in Brazil. On the same day, the urgent application judge declared that the urgent application for suspension of the removal order to be devoid of purpose as De Souza Ribeiro had already been removed. This case shows how the sovereign's omnipotence not only becomes apparent in cases of waiting but just as well in cases of sudden acceleration.

Yet, this case can equally serve as an example of how acceleration can serve as a technique to regulate access to the law in the first place. It is precisely because of the sudden acceleration, the sudden enforcement of the law, that the migrant was withheld the

[51] Anderson, "Time and the Migrant Other."

[52] P. Bourdieu, *Pascalian Meditations*, trans. R. Nice (Stanford, CA: Stanford University Press, 2000), p. 228.

[53] Marcelle Reneman and I have argued that the Netherlands has used temporal governance to differentiate between asylum seekers with high chances of success and those with lower chances. The former have to wait a very long time, often longer than legally allowed, while the proceedings of the latter are prioritized and accelerated. We argue that law always leaves room for "temporal discretion," the possibility to take more time within the boundaries of the rules or simply to remain inactive, Reneman and Stronks, "What Are They Waiting For?" pp. 319–25.

[54] Griffiths, "Out of Time," p. 1999.

possibility to claim an effective legal remedy against the expulsion decision. For this reason, the ECtHR held

> [w]hile the urgent proceedings could in theory have been an opportunity for the court to examine the applicant's arguments and, if necessary, to stay the execution of the removal order, any possibility of that actually happening was extinguished because of the excessively short time between his application to the court and the execution of the removal order. In fact, the urgent-applications judge was powerless to do anything but declare the application devoid of purpose. So, the applicant was deported solely on the basis of the decision of the administrative authority. Consequently, in the circumstances of the present case the Court considers that the haste with which the removal order was executed had the effect of rendering the available remedies ineffective in practice and therefore inaccessible. While the Court is aware of the importance of swift access to a remedy, speed should not go so far as to constitute an obstacle or unjustified hindrance to making use of it, or take priority over its practical effectiveness.[55]

Extremely short procedures, in other words, can, just as excessively long procedures, serve as an obstruction to effective access to legal remedies. The relationship between time and power that Bourdieu puts to the fore in the figure of waiting, which indeed should be complemented with techniques of acceleration and haste, can, as we have just seen in the case of De Souze Ribeiro, be pinpointed in legal doctrine in the tenet of effective remedy and access to justice. I will return to this issue in Chapter 3 when I further discuss "waiting time."

Conclusion: Is There No End to the Manipulability of Time in Law?

Manipulation means, according to the Merriam-Webster dictionary, both to manage or utilize skilfully *and* to play unfairly or insidiously to one's own advantage. Etymologically, it stems from the Latin word *manus*, which means "hand." Manipulation could thus be defined as putting a situation to one's hand (as a Dutch saying has it) to utilize skillfully, no matter to what purpose. In other words, to grasp time in order to make it work for a certain policy aim. We have seen from the examples in this chapter that in migration law time is certainly skillfully used. The focus on the functioning of time in migration law revealed a multitude of possibilities to differentiate, categorize, and calculate human life by means of time. We have seen the intricate play between two complementing *and* contradicting forms of time: human time and clock time.

The success of clock time in law can be related to its objective character, which allows for quantification and calculation. It is this quantification that provides a clarity and logic to processes that are otherwise rather intangible. Since these processes happen in time, they can be referred to in clock time, whilst this reference obviously is based on an abstraction. It is precisely because clock time transforms what it supposedly measures that it is so successful: it is the transformation from an individual process of human time into quantifiable, calculable chunks of clock time that enables the simple, general application in law. An extra value of this generality is its visibility, it is easy to demonstrate that a certain policy has changed based on clock time. If one changes the period for naturalization from five to seven years, it becomes immediately apparent that it has become more difficult for migrants to

[55] ECHR December 13, 2012, *De Souza Ribeiro* v. *France*, 22689/07, paragraph 95.

become a national. With a simple change of terms, the policy change can be made visible and understandable.

However, legal time cannot be equated with clock time, the reference to time in law is always the time of someone, and therefore it is characterized by temporality. This temporality can be seen in every legal decision that creates a present, with a fixed past and a prospected future. The most obvious example of this role of human time in migration law is the categorization of certain forms of residence as "temporary" and others as "nontemporary" or "permanent." This implies a qualification of the future of the migrant at a certain moment, a qualification that always risks becoming outdated in the very future of that migrant.

We have witnessed the interplay of human time and clock time in several temporal differentiations that are at work in migration law: differentiation based on temporality, deadlines, qualification of time, antedating, and procedural differentiation. All of these forms of temporal governance have their own rationale and use the interplay between clock time and human time differently. Differentiations based on temporality seem to focus solely on human time, they fixate a categorization of different types of mobility on the moment of the decision about the residence permit. At that moment, they fix the past and the future in order to come to a legal decision. Hence, temporality can be used to qualify the enduring presence within a territory by qualifying it as either temporary or permanent residence. The case of the Ghanaian mother with which this book commenced puts this sort of differentiation to its extreme by raising the question of how long such temporary residence can endure. The locus of this sorts of differentiation is therefore the process of presence within a certain territory. It is this process that is being qualified as being temporary, and since this qualification is prospective, only residence that endures can legally be qualified as temporary. Residence that has been temporary, either because the migrant has left the territory or because the residence has become permanent, has not much legal value nor meaning. Yet, temporality can also be used to differentiate between sorts of behavior, as has been exemplified by the discussion of the "actual danger" criterion within the case-law of the CJEU in public order cases. In such cases, the pivotal question is whether it is likely that the migrant will in the same way in the future. This requires an analysis of the question of whether such a "propensity" can be witnessed in the migrant at the moment of the legal decision. Therefore, the evaluation of their behavior since the criminal offense is crucial for the question of whether there still exists such an actual danger. Temporality is used to make an estimation of the future on the basis of the behavior of the migrant in the (recent) past. Crucial to the usage of temporality is the fixation of a legally relevant moment on which the past and future are being evaluated. As we will see in the following chapters, such fixation can be observed not to relate well to lapse of time, or to the problem of extension, to put it more philosophically.

Deadlines and procedural differentiations, on the other hand, honor clock time, they use the calendar to attach certain legal consequences to moments on the calendar. Of course, human time is presumed, it is not just that after six months of clock time alien detention becomes (generally) unlawful, it is six months of the time of the specific migrant. Again, the process of presence within the territory is being used to differentiate. Countdown deadlines stipulate that after a certain period of time, a legal effect occurs, and because of their generality, they can be repeated. It is precisely in this repetitive character that the difference between clock and human time comes to the fore, as we will further discuss in the next chapter. Often countdown deadlines are accompanied by a form of qualification, almost

never mere lapse of human time qualifies for a certain legal effect to occur, it will imply sorts of qualified time (lawful, uninterrupted, married, not precarious, nontemporary). In the qualification of time, differentiation is made in the presence of migrants over time by distinguishing between allowed and unwanted sorts of presence. In the qualification of time, human time and clock time firmly work together, for it is not about the mere ticking of the clock but about what happened in the life of the migrant as time went by. Next to countdown deadlines we have seen examples of recurrent deadlines (countdown deadlines that repeat themselves) and single-moment deadlines.

All of these forms of differentiation exemplify the ability to skillfully utilize time for the control of the enduring presence of migrants in a certain territory. The crucial question this book sets itself to answer is, however, precisely *when* this skillful management of time insidiously turns into unjust manipulation. Instead of focussing on the virtues of time, in the next chapter, I highlight the vices of time in law. Based on the work of philosophers such as Henri Bergson and Martin Heidegger, I will introduce three interrelated problems for the use of time in law. The problem of extension or lapse of time, the formal/material problem, and the finitude of human time.