Grasping Legal Time

A Legal and Philosophical Analysis of the Role of Time in European Migration Law

VRIJE UNIVERSITEIT

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A Legal and Philosophical Analysis of the Role of Time in European Migration Law

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Preface

Time was when I always passed the Haarlemmermeerstation in the morning. It was on the regular track from home to the Vrije Universiteit in Buitenveldert, which is on the outskirts of Amsterdam-South. Every day I took the large roundabout on the square before the station, finding my way through the hectic Amsterdam traffic.

The Haarlemmermeer station was built in 1915 and was known till 1933 as Station Willemspark. It functioned as a head station of the railway tracks from Aalsmeer to Amsterdam. In the 1950's the passenger traffic by train on this track came to an end. Nowadays it is a bus station, and the former second-class waiting room is now a fancy restaurant. My nephew celebrated his marriage there, a few days after Hans had deceased. Yet, the building preserves more memories; for years my mother-in-law took the bus every week to this station, thereby following the original railroad, to take care of our children, while Kartica and I were working.

From the Haarlemmermeerstation, there are two ways to get to university: the Marathonweg or the Amstelveenseweg. By taking the Marathonweg, one passes one of the Vrije Scholen in Amsterdam, which often makes me think of my father, Marion and my brothers and sisters. The Marathonweg ends at the Stadionweg, were I used to live in earlier years, and where I have many old memories of my mother, Hans, Harm and Rinse. From this point it is only a couple of minutes to the VU. The Amstelveenseweg is less loaded with memories, although I will probably never forget the awful incident at the sandwich store at the corner of the Haarlemmermeerstation, where someone was murdered (decapitated!) allegedly only a couple hours before I took my daily route.

I think that I have almost always taken the route via the Marathonweg. Only when my colleagues Nadia and Ted suggested that the Amstelveenseweg would possibly be shorter, did I test the alternative route a couple of times. In truth, they were wrong about it being shorter, although the change of the bicycle stand at the VU made it a little bit more attractive. Yet, even if they were to be right, I would not have taken the alternative route, for I had become attached to my own.

I started to pass the Haarlemmermeer station somewhere in 2004 when I lived with my friend Coen in Bos & Lommer and biked to the Vrije Universiteit on a daily basis to pursue my studies in law and philosophy. It must have been at this time that I first experienced the intense traffic on this square. Every morning cars coming from the Zeilweg and Amstelveenseweg formed a long queue, sometimes all the way to the Overtoomsesluis. This had to do with the trams that crossed the roundabout, but most prominently it was due to bikers like me, who without exception made use of their privileges. The traffic rules prescribe that cyclists on a roundabout have the right of way to all the other traffic. Given the amount of bikes in the morning traffic in Amsterdam, and the habit of an Amsterdam biker not to hesitate a single moment to get on such a roundabout, one can imagine the traffic congestion in rush hour.

However, it was not just the problem of this roundabout, the ride from the Overtoomsesluis to the square was also quite an experience. From this bridge, bikers rushed over a hopelessly small cycle track on the Amstelveenseweg, passing each other at high speed and with growing impatience for slowcoaches. Practically every day I witnessed near-collisions at the point where bikers from the Vondelpark cross the road. Right after this point the cycle path becomes even narrower between the parking lots and the pavement with plenty of houses and stores. I recently was struck by a little shop, just after one bypasses the Vondelpark, with the name 'Roots'. Apparently the fancy place sells all kinds of strange juices of spinach, kurkuma, ginder and other trendy stuff.

After taking the traffic lights at the Zeilweg, and passing one of those Ice cream shops that typify the worrying growth of the tourist industry in Amsterdam, one gets to the Haarlemmermeerstation the moment one passes the Sint-Agneskerk. This Catholic Church was built only a few years after the rise of the Haarlemmermeerstation, but they have apparently never managed to install a proper clock. In fact the clock of the church had certain fame in the neighbourhood for *not* showing the right time.

Yet it is important to understand that, from this point of my itinerary, I almost without exception got on the roundabout without the slightest delay. The tour on the square itself was quite long, the bicycle path was at the outside of it, in the inner circles were the cars and tram and the nucleus formed a large field of grass with some old trees on it. In fact this field of grass turned in Spring into one of the most spectacular flowery sceneries Amsterdam harbours. For years now I have looked forward to this ecstatic field of crocuses and daffodils at the Haarlemmermeerstation as a definite sign that the winter months would come to an end.

There has been one particular part of my routine on this square that I remember vividly, possibly because it constituted a daily frustration. In order to understand my irritation one has to know that, if on the roundabout, the first turn is the Amstelveenseweg, the second junction is the road with the traffic coming from the other side of the Amstelveensweg and only the third exit is the Marathonweg. It takes some navigational skills not to bump into other bikers on the first part of the traffic circle but from that moment onwards it is possible to accelerate and pass desperately waiting cars and busses with reasonable speed in order to leave the circle smoothly at high pace at the third exit.

Although I do not pity people who are stupid enough to take a car in the early morning to get out of a city within easy reach by public transport, I somehow every morning felt the urge to pull the weight of the traffic as well as I could by strictly obeying the traffic rules. Immediately after the second junction, I would clearly extended my right arm to indicate my intention to turn right. All cars behind me would immediately see that I was about to take the turn to the Marathonweg, so that a car could also get off the roundabout with me, without having to break. That would not solve the

general traffic jam, but for one individual it could have been be a timely respite from the dreaded wait.

Despite my daily efforts to alleviate the traffic jam at the Haarlemmermeerstation I have, in all those years, *never* succeeded to entice a single car off the roundabout without stopping. Obviously most of the time plenty of other bikers were right behind me, either not taking the same turn or simply not obeying the traffic rules that prescribe that *one has* to give directions with one's arms to indicate the turn. In both cases the cars stopped and had to wait longer, because soon the next bikers would block their way out.

Yet, there have been in all those years three or four instances, when there were no bikers right behind me, while a car was driving next to me. It is possible that I have once failed myself, by not pointing the direction, but I am absolutely certain that in three cases I did everything right: I raised my right hand, even long before the Marathonweg, I might have even driven more slowly, I looked back to show my intention to the driver, but time and again they stopped and waited till I had long taken the turn.

Understanding how the law relates to temporal experiences in human identity, is the most central theme of this book.

Introduction

The longer migrants are present in the territory of a state, the stronger their legal residence entitlements will generally become. That is the central hypothesis with which I commence this research. This alleged general inclination of contemporary European migration law will function as the starting point for the analysis of the relationship between time, migration law and the migrant. The verification of this hypothesis will prove to be rather unproblematic, it is rather the question *why* migrants receive stronger rights over time that will appear to be the pivotal point of this book.

Before searching the rationale behind it, it is necessary to commence this research with a close scrutiny of certain paradigmatic areas of European migration law, in which it will be tested whether this 'time hypothesis' can be endorsed and what it actually implies. In this inquiry the precise scope and substance of this supposed general tendency of migration law will become apparent. Does everyone receive stronger rights after lapse of time? If so, what kind of rights and when does one receive them? Who is precluded; when, and why? And, importantly, can this function of time be altered by policy? The latter seems intuitively conceivable: it must be possible to grant someone stronger rights only after ten years instead of five, or to provide less rights after three years of residence. Why can time-criteria be altered so seemingly easy, isn't there a necessary relation between lapse of time and stronger rights? These are all questions that will be addressed in the first, legal part of this research.

It will be revealed that law has a seemingly endless capacity for regulating the time of migrants, while their time can never be fully grasped. The philosophical part of this research seeks to clarify this problematic relation between time, migration law and the migrant's identity.

1.

Compiling a Composite Sketch of the Time Hypothesis

The above questions and observations illustrate that in order to find what one seeks, one first has to have a sense of what one is searching for. It seems, therefore, necessary to roughly sketch the contours of – what I will keep calling – the *time hypothesis*[1]; as if compiling a composite sketch on the basis of the fragments of knowledge we already have of the suspect, before seriously engaging with the investigation. The time hypothesis – the hypothesis that migrants receive stronger entitlements the longer they stay in the territory – can be delimited roughly along four axes: *who, where, what* and *when*. I will elaborately discuss these different axes in this legal part of the research, yet even at this early stage , drawing some first distinguishing lines point is inevitable.

1.1 Who?

The principal subjects of the time hypothesis are migrants. The analysis of the time hypothesis will, therefore, in the first place consist of a scrutiny of rules regulating three major subjects of migration law: the family member (chapter 4); the refugee (chapter 5); and the economic migrant (chapter 6).

That said, also the national will be part of the analysis in this book. In the first place because the migrant's naturalisation will turn out to conclude the time hypothesis. When the migrant becomes a national, he falls outside the scope of the time hypothesis. If a migrant can become a national over time, this begs the question how this national precisely relates to time. Moreover, the analysis of the relation between the migrant and the national is implied in the definition of migrant, since the latter is usually a person who resides in a country other than that of his nationality.[2]

Within European migration law this relation between nationality and migration comes in three "flavours": the first country national; the second country national and the third country national. The third country national is anyone who has not the nationality of one of the Member States of the European Union. First and second country nationals are Union citizens, meaning anyone having the nationality of a Member State. The difference between first and second country nationals is one of migration: a second country nationals is a Union citizen who resides in another Member State of the Union, while a first country national is anyone who resides in the country of his nationality. The latter situation is called a purely internal situation and generally, in such cases, European

1 I will use these words in the entire research to refer to the assumption that migrants receive stronger rights over time, even after the reader might have been convinced that this 'hypothesis' holds true. That is, in itself a temporal issue – even leaving aside the temporal difference between the reader and the author, for the latter already knows while writing the introduction that it does not serve as a hypothesis but as a maxim. The reasons for this is, however, pragmatic, 'time hypothesis' functions in this research as a shortcut, a quick and short reference to the 'maxim' that migrants receive stronger rights over time while residing on a certain territory.

2 Or someone *without* nationality, yet statelessness is left out of the scope of this book.

Union migration law does not apply (there is one exception, which I will discuss in chapter 6). Yet the focus in this book will be on third-country nationals and second-country nationals.

The final subject is the unlawfully present migrant. This will generally speaking be a third-country national who has no entitlement to stay or reside in the territory.

This leads to the conclusion that the present study is about *all migrants (including those formerly known as migrants)* present on European territory, although the special rules regulating children have not been analysed separately. Yet, the analysis consists of European nationals in and outside their country of nationality and non-European nationals (either lawfully or unlawfully residing) on the European territory.

A final remark on the who-question of the time hypothesis is about the relationship between the national and the citizen. Roughly, I can say that 'citizen' is often used in political and social theory and has no clear and univocal legal meaning.[3] European migration law primarily focuses on 'nationals' and although it mentions the European Citizen, this subject is defined as any person having the *nationality* of one of the Member States. In chapter 7, I will address the relationship between time and naturalisation, while chapter 9 is a scrutiny of the citizenship debate in political theory in order to relate it to the questions stemming from my analysis of the time hypothesis. This might lead to a confusion of tongues and, for this reason, I use in this book 'national' and 'citizen' as synonyms. The citizenship debate is for current purposes only interesting as far as it provides an insight in the transformation over time of the migrant (the traditional non-citizen) into the national (the classical citizen).

1.2 Where?

The time hypothesis is scrutinized for its application within the territory of the European Union. It is important to observe from the outset that it is about the territory of the European Union, a simple observation that conceals the difficult relationship between the European Union and its Member States. I will elaborately discuss the time-related aspects of this relationship in this research, albeit only from a European perspective. European Union law is therefore the primary source of analysis, while national law is left out of the equation. Only in exceptional instances do I analyse rules that do not belong to the (classical) core of *European Union* law, regulating migration.

3 L. Bosniak, *The Citizen and the Alien* (Princeton University Press 2006), p.20. In this book Bosniak critically analyses the notion of citizenship and precisely points at the problem of equating the citizen with the national. See further chapter 9 where I analyse the citizenship debate.

The clearest example of this is the analysis of article 8 of the European Convention of Human Rights,[4] scrutinized under the umbrella of verification of the time hypothesis (chapter 3). One could argue that this implies a methodological problem, for every law student knows that EU-law and the European Convention of Human Rights are clearly separated legal orders with entirely different background, objectives, Courts, case law, legal tradition and so on. The point is, however, that the objective of this book is not so much a comprehensive analysis of EU-law regulating migration as such. The analysis in this books attempts to elucidate the relation between subject, territory, rights and most notably time (who, where, what, when) in the entire *European migration law* regulating the residence entitlements of migrants. From this perspective both European systems (EU-law and the European Convention on Human Rights) qualify as object of scrutiny. After all, the European Convention on Human Rights also applies to the territory of the European Union, because every member of the EU must be a member of the Council of Europe (not the other way around). Therefore, there is no principal, methodological problem in analysing case law of the European Court of Human Rights (whereas there are good reasons for including an analysis of such case law, as we will see in chapter 3).

There is, however, certainly a problem in the demarcation of which Convention rights are to be analysed and which are left out of the equation. If the objective is to analyse all the major rules of European migration law regarding the interrelation of subject, territory, rights and time, I may not simply pick and choose from the case law of the European Court of Human Rights without proper justification. Alongside an analysis of article 8 of the Convention, article 3 would be the most obvious candidate for scrutiny. The reason that the latter has been excluded from the scope of analysis is that the entire topic of 'subsidiary protection' has been left out of the study. This is a form of protection for migrants who are unable to claim refugee status, yet run a real risk of serious danger upon return to their home country. The justification for leaving out this topic is that it would not add much to the analysis of risk in refugee protection, as it relates to the analysis of time.

The case law on article 14 of the Convention has been scrutinized, yet does not lead to a separate analysis. The reasons for this is that research of the time hypothesis is restricted to entitlements to stay in the territory, while other rights are left out of the equation (see paragraph 1.3). The case law on the prohibition of discrimination of

4 For reasons of readability and aesthetics as little abbreviations as possible will be used in this book. Only when it is absolutely unavoidable – *for example* when in a certain paragraph both the European Court of Human Rights and the European Court of Justice are discussed – have I used the contracted form to discern the two (*e.g.* ECtHR and ECJ). The same goes for the application of abbreviations as ECHR (the European Convention on Human Rights) which should not be mistaken with ECtHR (the European Court of Human Rights). 'Convention' will normally refer to the European Convention on Human Rights (except in paragraphs where also the European Convention on Nationality is mentioned).

article 14 is very limited since it relates to residence entitlements and does not relate to time. Only some minor relevant observations stemming from case-law have been included in the footnotes of chapter 3.

1.3 What?

I will restrict my analysis to the *legal entitlements to stay* for migrants under the time hypothesis. This means that I will focus on the *right to enter*, *the right to stay during the procedure (asylum seekers)*, *the right to reside*, *the right to permanent residence* and eventually the *right of naturalisation*. This implies that I do not examine other entitlements such as the right to education, employment, social benefits, equal treatment and so on. Only if these rights have a clear relationship with residence entitlements (e.g. social assistance for Union citizens who thereby become a burden of the state and lose their residence entitlement) will they be dealt with.

The different legal phases will be analysed on the basis of the most important sources of European migration law, i.e. EU-Directives, EU-Regulations, the European Convention on Human Rights and the case law of both the EU Court of Justice and the European Court of Human Rights. [5]

It is important to make clear from the outset the difference between the notions of 'presence', 'stay', 'short stay', 'residence', 'permanent residence' and 'settlement'. All these notions refer to *presence* in the territory over time, presence in the territory therefore signifies the most basic common denominator and serves as a vantage point to observe the temporal differences. It refers to physical presence in the territory, unlawful and lawful. All other terms are temporal qualification of presence, the subject of which is one of the key issues of this research. Consequently, the term presence can be used for all different categories. As has become clear already in the description of the 'who' of the

5 The analysis consists of separate studies of the following areas of European Migration Law: The Long-term Residence Directive (2003/109; 2011/51); the Family Reunification Directive (2003/86); the Qualification Directive (2004/83; 2011/95); the Procedure Directive (2013/32); the Temporary Protection Directive (2001/55); the Citizenship Directive (2004/38) the Returns Directive (2008/115) and the case law on article 8 of the European Convention of Human Rights. No separate analysis has been made of the Blue Card Directive (2009/50), the Student Directive (2004/114), the Schengen Borders Code (Regulation 562/2006); the Visa Code (810/2009); the Dublin Regulation (Regulation 604/2013); the Association Treaty with Turkey and the Additional Protocol (OJ 1977 L361/2); the Intra-Company Transfer Directive (2014/66) and the Employers Sanctions Directive (2009/52). Despite that these latter rules have not been discussed separately, this does not preclude (occasional) references to them. The argumentative account of the choice of which rules have been analysed is to be found at the beginning of each chapter of this legal part.

time hypothesis, the analysis in this book is about every migrant *present* on the European territory. [6]

1.4 When?

Time is the most widely used noun in the English language.[7] Just as in our everyday communication the references to it in migration law are numerous. The time limit for an application, appeal or a judicial decision, *ex nunc/tunc* judgements, 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 in which 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, *etc.* In her study, *Timewatch. The social analysis of time,* Barbara Adam stresses that in our normal usage of time we constantly shift between all these 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 we could discern a 'when time', the time of timing and temporal location of social activities and natural phenomena, e.g. when the working days starts, when my daughter was born, when we were young, when my son has to go to bed *etc.*. 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 arisen; a child may be born too early in terms of typical gestation; the scheduling of a train may equally be governed by seasonal variations or peak hours, *etc.*. Moreover, we might think of the past, present and future by reference to events, processes and social relations. The invention of the art of printing, the declaration of independence, but also less historical events, such as the moment a colleague heard she was terminally

6 These observations could just as well be situated under 'where' for they relate to the presence in the territory, or 'when' for they make temporal distinctions to the presence, yet they are situated here to emphasize that the different legal entitlements imply different qualifications of presence.

7 B. Adam, *Timewatch. The Social Analysis of Time* (Polity Press 1995), 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, *etcetera*, 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 *etcetera*.

8 Ibid, p. 20, emphasis in original.

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 time in the analysis of the time hypothesis as not merely being governed by the clock and the calendar. After all, it is the when of time that is at stake in the analysis of the time hypothesis: *when* do migrants receive stronger rights? The answer as to why migrants receive stronger rights at a certain moment might not entirely be determined by the clock and the calendar. It is in this respect that I ask for *the implicit time in law*: which sense of time is implied alongside the common understanding of the clock and the calendar? Which assumptions inform the *legal time* of migration law? This will lead us eventually, in the second part of this research, to a philosophical analysis of the relationship between time and human identity and a subsequent scrutiny of the relationship between time and enforcement in migration law.

Such a disruption of our intimate understanding of time in migration law is one of the central objects of this research. In order to fully appreciate the interrelation between time and the growth of entitlements for migrants in migration law it is inevitable that we should first analyse what we mean with time in migration law. I will argue that while time in (migration) law is commonly understood to refer merely to *clock and calendar time*, hidden remains the reference to *human time*, the temporal experience of the passage of time in human affairs. These two forms of time will be central in my analysis of time in European migration law, every reference to time (as related to the time hypothesis) will be analysed from this double perspective.

Let me first try to entangle these different time perceptions in the following paragraphs.

1.4.1 Can One Think of Time, Independent from Human Perception?

It important to emphasise from the outset that time is not purely a human invention. Let me call 'cosmic time' the time that relates to the seemingly infinite age of the cosmos and its celestial bodies. Such time seems to signify an endless anonymous time, characterised by motion, measure and serial order. At least that it is the representation

9 Ibid, p.21.

of it in science where it is constituted merely by relations of simultaneity and succession between abstract 'instants' demarcated by 'before' and 'after'.[10]

Characteristic for this perception of time is its impersonal character: it is the time which is not dependent on a human observer,[11] or 'at least whose endless passage is above and beyond any one person's ability to generate or destroy', as Mark Muldoon has succinctly described.[12] It is the form of time that would also exist without the presence of human beings (at least that is what we assume).

An important feature of this cosmic time is that it is considered to follow a certain direction, the arrow of time. This can be explained by the example of a cup on a table falling into pieces on the floor. If you would see a film of this, you would immediately recognise when this film would have been played backwards, i.e. when the pieces would gather themselves and suddenly jump back to form a whole cup on the table. You would recognise this as running backwards, because you never observe this in ordinary life. The explanation for this is that it is forbidden by the second law of thermodynamics, which holds that in any closed system disorder, or entropy, always increase with time.[13] Time consequently has a clear direction, it is more likely that the system will be in an disordered state after lapse of time, simply because there are more disordered states.

We will encounter in the following that also human time has an arrow (from birth to death), yet I will not dive into the difficult relationship between the two arrows. Most of the efforts in this book will be devoted to the relation between clock time, calendar time and human time; cosmic time has no autonomous role to play in this research. It is only used to explain in the following paragraphs what is to be understood with human time and clock and calendar time.

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10 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' (1991) 35 Philosophy Today 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* (The University of Chicago Press 1988) and P. Ricoeur, *Memory, History, Forgetting* (The University of Chicago Press 2004). I will elaborately discuss this 'homogenous' perception of time in chapter 10. See for a very readable introduction to this 'cosmic time', S. Hawking, *A Brief History of Time* (Bantam books 1995).

11 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 simultanitéité* (Alcan 1923), 61.

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

13 Hawking, *A Brief History of Time*, p. 148-149.

1.4.2 Human Time

The time of the cosmos is to be distinguished from human time in the *first place because human beings are mortal* which makes that their time necessarily punctuates the (seemingly) endless cosmic time. 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 characterised by *temporality*: the need for a *temporal present*, that implies *a past and a future.*

Such a temporal present is, as Muldoon rightly puts forward, 'always the product of some principle of unity in the midst of change that draws upon the operation of perception, discrimination, memory and anticipation'.[14] The present constitutes a unity that in the mere anonymous cosmic time does not exist. The very function of such 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, let me briefly discuss the best known and oldest example of such a principle, 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 every time 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.' We see here that the anonymous passage of cosmic time does not easily fit the human frame of time as past, present and future.[15]

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 a continuity, stresses Augustine, through which what is present may become absent in the past. 'Therefore, future time, which is non-existent, 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

14 In the course of this book, I elaborately discuss at least two of such unifying principles: durational consciousness of Bergson and narrative identity of Ricoeur. 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.

15 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' (1908) 17 Mind: A Quarterly Review of Psychology and Philosophy 456.

memory of the past." ' Augustine's solution is a rigorous limitation of time to the mere present of the conscious mind. I will leave it to others to examine the strength of Augustine's argumentation, or to compare it to other philosophers who have provided a solution to these problems of time. For us Augustine's 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.[16] In cosmic time there is no past, present and 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, because of his mortality. And clearly human time has a direction, an arrow of time, it goes from birth to death.

The words 'temporal' and 'temporality' in this book consequently refer to human time. As we will see in chapter 10, however, human relation with time is more complex then I have sketched in this short paragraph. With the help of Bergson I will discern two different and mutually exclusive aspects of human time, which I will call a temporal understanding and a temporal experience. Roughly speaking, in a temporal understanding, time is perceived as a moment in which a future and a past can be perceived. The problem of such an understanding is that it lacks succession, it cannot address lapse of time, since it fixates time to a moment by transcending its flux. The temporal experience of duration, on the contrary, addresses precisely the flux of time, its streaming character, yet, thereby loses the ability to grasp it, since understanding it in terms of moments would change its streaming character. I will elaborately address this difference in chapter 10; for now, it is important to see that 'temporal' and 'temporality' always refer to human time in the remainder of this book. In fact, 'temporal' in the legal part always refers to a temporal understanding, to a moment in which a future and past can be perceived. In fact, one of the central problems I encounter is that it is difficult to address lapse of time in legal time. When I discuss the relation between time and identity in chapter 10, I encounter the aspect that human beings do take lapse of time into account, in what I call temporal experience. Where I use 'temporal experience' I aim to address Bergson's 'succession of conscious states that constantly permeate each other' and cannot be 'understood' for that would fixate the flux of it.

16 See for a readable, critical and more elaborate discussion of Augustine's *distentio animi*, P. Ricoeur, *Time and Narrative. Volume 1* (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* (The MIT Press 2009).

1.4.3 Clock Time and Calendar Time

Although the clock and calendar are human inventions, they both differ to a great extent from human time. Before the invention of the mechanical clock, time would be measured on the basis of the sun, the moon or the stars, or even running water or the sand in a sandglass. In the reference to 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, making the Italian noon to begin around 18 hours after the start of the day.[17]

Most notably the electric telegraph and the railways increased the need for a universal standardized time. The speed with which long distances could be travelled made it increasingly problematic to work with all different kinds of local times. The standardized clock time, which was determined in Washington on the International Meridian Conference in 1884, made that everywhere on the globe one hour of clock time would be the same. The standardized time replaced the variable 'hours' that changed with the seasons and the continuum of 'local time'.

This standardization of time, however, begs the question what such clock time refers to after all. The measure of a clock is designed to the principle of invariance, every time-unit is measured every time again exactly the same, 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 that which it measures.[18]

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 Henri Bergson argues in his *Time and Free Will,*[19] which was originally published as *Essai sur les données immédiates*

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

18 Adam, *Timewatch. The Social Analysis of Time*, p. 24-25.

19 H. Bergson, *Time and Free Will. An Essay on the Immediate Data of Consciousness* (Dover Publications 2001).

de la conscience in 1889.[20] 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. In addition to this homogenous understanding of the time of the clock, Bergson argues that for a proper *temporal understanding,* a heterogeneous time of duration should be incorporated. Such a duration cannot be put on 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 contrary, sought for an understanding of time that is not based on space, thereby taking up the problem of extension where Augustine left it. For a reader unfamiliar with the work of Bergson, this position might at this point be difficult to grasp but is elaborately discussed in chapter 10, here, it only serves to point out a difference between clock time and human time (as put forward by Bergson).

Whereas clock time and calendar time might often be taken together, they have a different meaning and history. 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 (thereby enabling history) are, according to Ricoeur, the 'succession of generations' and 'archives, documents and traces'[21] The short time-span of mortal human beings is situated on a calendar and in this sense 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 of the individuals in a society. Calendars are constituted by a founding moment (Christ, Buddha, the beginning of a reign of a monarch, *etc.*), determined by a set of units of measurement and resultingly, it is possible to traverse time in two directions, from the past to the present and from the present towards the past.[22] For this reason it becomes possible to relate different events, experiences and lives to each other by reference to a common standard of time.

Both calendar and cosmic time are constituted as a uniform, infinite continuum that is segmentable at will. It is, however, important to see that 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 and that inaugurates a course of events entirely different from what preceded it. We need a sense of memory and expectation to be able to *traverse* time since we need to have a sense of the present moment to be able discern this from earlier and later moments in time.

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20 For reasons of readability I will use the English translation of Dutch, French or German books, only when I was unable to find the English translation, I cite from the original source.

21 Ricoeur, *Time and Narrative. Volume 3*, p. 109 a.f.

22 Ibid, p. 105 a.f.

Calendar time is, therefore, based on both human time *and* the time of the cosmos. From the latter it follows that events can be related to the infinite succession of things that have happened. By reference to an axial moment, for example the founding moment of the calendar, it is possible to determine the position in time of a certain event. Moreover, it is this reference to the founding moment that enables traversing time in two directions: from the past toward the present and from the present towards the past.[23] Probably the best known example of this is the *Back to the future*-trilogy, in which the protagonist Marty McFly travels through time to his past and future. This science fiction is only conceivable because we relate his present (1985) to the past (1955) and his future (2015). We constantly know that we are situated in the past or future, because the 'real moment' is situated in 1985. Thus, it is impossible on the basis of a certain calendar date, taken by itself, to determine whether it is past, present or future. This has to do with the simple fact that such a temporal understanding presupposes a human perspective, a human who discerns what is the present. After all, it is perfectly conceivable that a certain date e.g.1 September 2016, constitutes the past *and* the future. For example, for the author of this text it is the future, for the reader of this text it is the past.

The difference between clock time and calendar time will not be central in the remainder of this research. In the analysis of European migration law they will be clumped together, just as in ordinary parlance we usually refer to both times together. For reasons of readability I will just refer to clock time (albeit that often the calendar is at stake). It is their rationalized and homogenous character that is important for my analysis.
Another important clarifying note is that when I refer to 'lapse of time', 'passage of time', 'progress of time' or 'the course of time', the passage of clock time is meant. It simply denotes that time has lapsed, as is the case between 31 October 2010 and 22 December 2015, or 13:22 and 15:15. This does not serve to say that the lapse of time is a prerogative of clock time; in chapter 10 I will discuss Bergson's notion of duration as heterogeneous form of passage of time. For reasons of clarity and structure, however, 'passage of time' will in the legal part just refer to clock time. What is at stake in such references is change, or the increase of entropy if you wish, everything changes over time and law has to deal with it.[24]

The intricate relation between clock and human time is at the heart of this research. It is inevitable that I will further elucidate their interrelation as we proceed with the subsequent analysis. This complexity will become apparent when discussing the relation between temporary, non-temporary and permanent time in chapter 2 and 3, and elaborately in the philosophical part of this research.

23 Ibid, p. 106.

24 I extensively discuss the relation between change and sameness over time in chapter 10.

1.4.4 Historical Time

The previous remarks on the relation between the time of the cosmos, human time, clock time and calendar time, are meant to show their intricate entanglement. Such a clear demarcation of time conceptions is required to reach one of the objectives of this book: to disrupt our intimate understanding of time in migration law in order to argue that while time in (migration) law is commonly understood to refer merely to *clock and calendar time*, the reference to *human time* and the *experience* of the passage of time in human affairs remains hidden.

What has been said about cosmic time and calendar time might bring to the fore yet another conception of time: historical time. As mentioned, Ricoeur puts forward that historical time is possible because of the attempt to bridge the gap between human time and the time of the cosmos, by means of calendar time, but also the succession of generations, archives and traces.[25] Yet, it is important to see how this historical time precisely relates to the time of individual human beings, as encompassed in the notion of human time (being the finite time of someone with a past, present and future). The relation between time and human identity has, according to Ricoeur, a narrative character, as we will see in chapter 10. Also, as Ricoeur has elaborately argued in his seminal work *Time and Narrative,* the relationship between time and history is marked by narrativity.[26] There is, therefore, a clear overlap between the two, or to put it more precisely, human identity and history are firmly entangled. As will be later revealed, self-knowledge implies for Ricoeur an interpretation, whilst this interpretation is mediated by narrative. In other words, human identity exists in stories of one-self, stories of others, and larger histories. According to Ricoeur the self is not a hidden human core that can be found via introspection, rather the self is *in Geschichten verstrickt*, as Ricoeur quotes Wilhelm Schapp, he is entangled in histories.

The relation between identity and history is also apparent if one considers that a life-story can never be recounted by oneself in its entirety. Even if one writes an auto-biography, one is always dependant on others as it comes to the beginning of one's life, as well as to one's end. In this sense one's life is always already entangled with history, and one's self-understanding necessarily mediated by the stories of others.

As we will see in chapter 10 ,history, in the above meaning, plays a significant role in my analysis of the relation between time and identity. However, a more restricted

25 Ricoeur, *Time and Narrative. Volume 3*, p. 109 a.f. Ricoeur uses different terms; he uses cosmic time, physical time, universal time, phenomenological time and lived time, without clearly clarifying their interrelation. I leave the issue of the delineation of these terms aside here and focus on the aforementioned interrelation between calendar time, human time and time of the cosmos.

26 See most notably Ricoeur, *Time and Narrative. Volume 1*, part II of volume 1, it falls outside the scope of this book to elaborate on the precise relation between history and narrative.

conception of history, as the history of the meaning and role of the notion of time in European migration law, has a less important role to play in this book. This book does not consist of an analysis of the historical development of the time hypothesis in the post-war European legal framework. For studies of the changed perception and regulation of family migration, guest workers, refugees, illegal migrants and so on, other studies must be consulted.[27] This might be surprising for an analysis of time in which the question of lapse of time plays such a significant role. The point is, however, that I analyse the role of time in European migration law at a certain historical moment in time: this manuscript has been finalized 31 August 2016, no developments after this date have been taken into account.

I take the rules regulating residence entitlements in European migration law as a frozen system, from this particular moment in time. In a rapidly changing area as migration law, this means that this study might be out-dated within days or weeks after the final words have been written. However, this research aims to put forward some general or philosophical conclusions as to the relation between time and (the growth of) residence entitlements and time and (migration) law. These conclusions will not depend on the specific migratory regulations of the particular historical moment and are hopefully more durable.

The same methodological remark holds true for the philosophical analysis. This book does not contain a *historical* analysis of the development or understanding of the problematic relationship between clock and calendar time, human time and the experience of passage of time in the history of philosophy. Only Bergson, Derrida and Ricoeur will be discussed; the argumentation for this choice is to be found in paragraph 1.6.1 and in chapter 10.

1.4.5 Legal Time and Lawful Time

Another clarification of the usage of time in this book is that *legal time* does not equal *lawful time*. The former is a very broad term and refers to the entire usage of time within (migration) law. Lawful time, however, has a very specific meaning 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 permission. Both lawful and unlawful time are part of the analysis of the role of legal time in the time hypothesis.

27 See for such studies e.g. S.K. Van Walsum, *The Family and the Nation. Dutch Family Migration Policies in the Context of Changing Family Norms* (Cambridge Scholars Publishing 2008); H. Battjes, *De ontwikkeling van het begrip bescherming in het asielrecht* (Migration Law Series, 2012); P. Minderhoud and E. Guild, *The First Decade of EU Migration and Asylum Law* (Martinus Nijhoff Publishers 2011); A. Terlouw and K. Zwaan, *Tijd en asiel. 60 jaar vluchtelingenverdrag* (Kluwer 2011).

1.4.6 The Analysis of Time in the Scholarly Debate

In the contemporary academic debate on the rights of migrants in relation to time some scholars have also dealt with time distinctions, yet the difference between human time and clock time is not explicitly mentioned. This, however, does not imply that their analysis is entirely unrelated to mine; I will elaborately discuss this in chapter 9. At this point already, it is useful to introduce two scholars that do point out problems of time that are related to my perspective.

Motomura has referred to the problematic of two mutually exclusive perspectives of time: retrospective and prospective.[28] He suggests that a retrospective sense of time is at work in what is called a *jus soli* principle of citizenship,[29] a citizenship that depends on the place of birth, irrespective of the nationality of the child's parents. In such a principle, the law takes time into account by acknowledging and giving legal meaning to what has already occurred (the birth of the child on the soil).

The alternative to a retrospective recognition of ties is a prospective sense of time that focuses on the migrant's future life in the host country. Motomura puts forward that the family is one of the important means for integration in a country. He clearly defends the stance that living with one's family helps the integration of a migrant. Stronger rights (such as living with one's family) can be the means for integration, yet integration can also be perceived as the condition for these very rights. I elaborately discuss the relationship between time and integration in paragraph 2.3, at this point it is enough to observe that this argument is prospective for it assumes that the grant of this right will foster the integration of migrants in the future. The distinction between retrospective and prospective sense of time is familiar with the observation that *human time* presumes temporality, a moment on which a past and a future can be perceived. The determination of the relevant legal moment is clearly crucial for the outcome of the assessment, for the point in time determines what is seen as retrospectively or prospectively.

Rainer Bauböck has also discussed time-problems which, according to him, come to the fore in practically every analysis of the legal status of temporary migrants.[30] Bauböck argues that in the discussion about the status of temporary migrants, some normative problems remain invisible if one does not first 'unpack' the notion of temporariness. Bauböck also distinguishes between a prospective and retrospective perception of temporariness of residence. He observes that retrospectively speaking 'temporary' means

28 H. Motomura, 'We Asked for Workers but Families Came: Time, law and the Family in Immigration and Citizenship' (2006) Virginia Journal of Social Policy & the Law , p. 250.

29 Citizenship and nationality are being used in this book as synonyms.

30 R. Bauböck, 'Temporary migrants, partial citizenship and hypermigration' (2011) 14 Critical Review of International Social and Political Philosophpy 665.

that someone has been residing temporary in the country ('demographically objective'). The objective character presumes that the residence has ended, and is therefore perceived retrospectively. The other understandings of temporary residence Bauböck discerns are prospective and consequently relate to the future. They can refer to the migrants intention ('subjectively intended'), or to the expectation of the residence population that migrants will stay temporarily ('collectively expected'). These expectations can obviously change over time. The last two categories he distinguishes relate to the limitation of the stay by legal or moral norms ('legally prescribed and morally justified').

Bauböck argues that many conflicts about migrants are the result of mismatches between these conceptual distinctions. 'Subjective intentions of migrants about the length of their stay frequently change over time and can then conflict with non-corresponding expectations in the wider society about their departure. Non-renewable temporary residence permits as a condition for legal admission may conflict with a *moral principle of consolidation of residence according to which the right to stay grows stronger with the duration of stay.* This conflict between legal and moral norms will turn into a political one, when there is also a growing mismatch between public policy and demographic reality.'[31]

Whereas Bauböck does not elaborate further on this moral principle of consolidation of residence, I also start from the presumption that many if not all the debates on the status of (irregular) migrants is blurred by a confusion of mismatch of time distinctions. After all, one of the central objectives of this book is to unravel the different time perceptions in European migration law, which are being used without giving much thought to their differences. In chapter two I analyse the meaning of temporary stay in the Long-term residence directive in a fashion that is closely related to Bauböck's stance. As we can see in the following scrutiny of European migration law, the analysis of Motomura and Bauböck is related to my perspective, the difference between retrospective and prospective will also play a role in my analysis, yet their arguments do not coincide with mine. I will focus on the momentaneous character of the legal decision and the question of expectation, that both reveal the temporal perspective (past present and future as perceived on a moment) of human time at work in law. Besides this I will suggest that lapse of time as provided by clock time is at odds with this momentaneous aspect of human time.

31 Ibid, p. 670.

1.5 Central Research Question

The foregoing preliminary remarks lead us to the following central question of this research: *What is the meaning of time in the allegedly incremental system of residence entitlements in European migration law?*

The time hypothesis sketched above, is the preliminary answer to this question since it holds that it is because of time that migrants gain stronger rights. The first step (and aim) is to prove that the time hypothesis is indeed at work in contemporary European migration law (chapter 2 and 3). Subsequently (second aim), I will analyse how it functions for different categories of migrants (chapter 4, 5, 6) and when it ends or does not begin in the first place (chapter 7 and 8). Furthermore, (third aim) I will endeavour to find the rationale behind the time hypothesis and the relation between time and control (chapter 10 and 11). Finally this must lead to a better understanding of the meaning of time in migration law, by mapping the implicit reference to human time and clock time (fourth aim).

It will appear , however, that the legal analysis in the first part of this research does not lead to a convincing answer to the central research question. Not only will the legal analysis fail to provide a convincing rationale behind the time hypothesis, moreover the analysis will bring to the fore the difficult relationship between time and law. In the philosophical part of this research I address these two issues. After an analysis of the existing academic debate on stronger rights of migrants over time (chapter 9), I endeavour to propose a philosophical argument for the time hypothesis by an analysis of the relationship between time and identity (chapter 10). In the final substantial chapter (chapter 11) of this research I give a philosophical account of the problematic relation between time and (migration) law.

1.6 (Further) Methodological Remarks

The focus in this research is on time (so much has become clear thus far). In the legal analysis in the first part of this research I bring forward certain recurrent problems of legal time in European migration law by analysing time from the two conflicting angles of human time and clock time. In the previous paragraphs of this first chapter I have described *what* I will be looking for (i.e. the time hypothesis) and I have already sketched its contours. In so doing, I have touched upon questions as to *how* I will undertake the proposed analysis. After all, I have suggested that I will merely be analysing legal documents (I will not interview stakeholders, count migrants, analyse parliamentary debate *etcetera*) and specifically focus on the role of time. Moreover, I have put forward a distinction in the analysis of time (human time vs. clock time) that will be leading in my analysis of the role of time in the growth of residence rights for migrants over time.

Eventually, I realise that with the legal analysis alone, it will not be possible to answer the central research question as to the meaning of time in the allegedly incremental system of residence rights for migrants.

Therefore, I seek an answer for the research question in philosophy. I endeavour to understand *how* a migrant's identity relates to time and *how* the law deals with time. The combination of these two questions, that are respectively dealt with in chapter 10 and 11, will enable us to answer the research question in the final conclusions. The following two paragraphs justify the sought after philosophical approach to deal with these issues. These questions *how* (a migrant's identity relates to time and how the law deals with time) hint at larger philosophical conundrums, the relation between time, experience and identity (chapter 10) and the relation between time and (enforcement of) law (chapter 11). In the following paragraph it will be clarified why a philosophical analysis of these problems is promising for our purposes.

1.6.1 Time as the Common Denominator of the Philosophical Analysis

The philosophical analysis of this research is based on the work of three philosophers: Henri Bergson, Paul Ricoeur and Jacques Derrida. Despite their common ground of being French, dead, white males, there seem to be, on first sight, more differences than similarities between the three.[32]

Instead of focussing on the differences, however, it is worthwhile to elaborate on what brings the three together in this book. I argue that they deal with the 'same' problem: all stemming from the problematic character of time. The description at this point of their interrelation necessarily requires that I have to anticipate what is, in the order of this book, still to come. For a reader who is not familiar with the substance of these philosophies the following description might at this point be a bit puzzling, hopefully the promise of a more elaborate and illuminating description in the future, will lead to some settlement already *at this moment*. The point here, is just to see their relation as it comes to the question of time.

First, I will encounter the Bergsonian double time perception, which I distinguish from each other as a *temporal experience* and a *temporal understanding*. The latter enables *temporality* which requires a spatialised perception and is qualitatively different from temporal experience. This temporal understanding makes it possible to control time, yet this form of time lacks succession. The temporal experience, on the

32 See as to their differences and similarities for example E. Pirovolakis, *Reading Derrida and Ricoeur. Improbable Encounters between Deconstruction and Hermeneutics* (Suny Press 2010); D. Alipaz, 'Bergson and Derrida. A Question of Writing Time as Philosophy"s Other' (2011) Journal of French and Francophone Philosophy | Revue de la philosophie française et de langue française ; Muldoon, 'Time, Self, and Meaning in the Works of Henri Bergson, Maurice Merleau-Ponty, and Paul Ricoeur'.

other hand, has succession, yet cannot be *grasped* since it lacks the essential exteriority to put it in distinguishable words or moments.

On the level of language, I encounter that in a word or linguistic reference something similar is at stake. The *singularity* to which a general word refers (tree), is lost in the very utterance, for the generality of the word (tree) is a simplification of endless complexity of the singular plane (its form, colour, smell, *etc.*). Yet, at the same time this simplification is the *conditio sine qua non* for every successful communication. If one attempted to do justice to every singular aspect of reality, every time again, one would never finish a proper sentence. Derrida argues that a certain 'restance' of meaning is the prerequisite for a meaningful interaction, while this 'restance' has an utterly fragile character.

In addition, also in human identity I encounter a comparable issue: the narrative identity is an attempt to reconcile the *ipse* and *idem* aspect of identity through time. Nevertheless, narrative identity might have a presence at a certain moment, where, to be precise, the identity of a person rises out of a web of stories. This identity is always momentaneous and determined by the specific context and environment. It has a fragile character and depends on both the author, the listener and other yet existing stories.However, such a momentaneous identity suffers from the same problems: it is a simplification of the life of the person it refers to *and* it lacks succession.

Again and again we will see the following problem: one rescues what one loses in the same gesture. This was clearly the problem of any linguistic utterance, being a simplification of the singular situation and context it nevertheless referred to. In this sense it rescued this singular context from oblivion, while at the same time betraying it dearly. The same goes for the temporal understanding of reality that enables us to have a present on which we expect the future and remember the past. Such an understanding is clearly inevitable for our rationalised perception of the world and our usage of clock time is fully dependant on it, yet we lose the streaming perception of it, argues Bergson. Also, in Ricoeur's narrative identity, I argue, the reference to the life of a human being is a simplification, while it makes possible the very identity in the first place. This slipping away is, as we will see, however, an elementary characteristic of time.

So, I argue that the three philosophers share a similar understanding of time in their analysis of different problems (i.e. the experience of time, signification and identity). In chapter 10 I endeavour to relate the three perspectives to each other in order to deal with the question of the migrant's identity and its relation to time. Bergson will be insightful for his analysis of time, Derrida for his scrutiny of time and language, Ricoeur for his thoughts on time and narrative. I will try to situate Bergson' temporal *experience* and Derrida's reiteration and *restance* in the heart of Ricoeurs narrative identity. This attempt must lead to an understanding of the durable identity of a migrant through time.

Derrida will furthermore be useful for the relation between time and law. As we will see, it is one thing to understand what happens with a migrant's identity through time but is yet another question why and how the law should acknowledge this changed identity. It will appear that legal control presumes fixation of the subjects and circumstances, because the general plane of the rules cannot automatically be transposed to the singular plane of the subject. And also for the restoration of control after the repeated attempt to remove unlawful migrants from the territory, Derrida will turn out to be helpful.

1.6.2 Non-normative analysis

Before engaging with the philosophical scrutiny in chapter 10 and 11, as sketched above, in chapter 9, I analyse the contemporary scholarly debate on stronger rights for migrants over time. We note that many of the conclusions I draw in the analysis of European migration law can also be found in scholarly debate, especially as it comes to analysis of what happens over time with the migrant. The most promising argument is put forward by Shachar who situates the *actual experience* of the migrant at the heart of her plea for their legal inclusion. I will take up the argument where Shachar has left it in order to further the precise relation between this actual experience and time (chapter 10). This is not a criticism of her argument, my focus on the question of time forces me to further the time aspect of the argument. We will see that the other arguments put forward in the scholarly debate will not address the time aspect of my question, although they might be convincing in their own right.

There is yet another aspect which distinguishes the present analysis from scholarly debate on this issue. The above described methodology of bringing to the surface the implicit time references in legal time, implies that the used method is *not normative*. In this research one will not find a stance as to whether it is good to include migrants after time spent in the territory, or whether certain legal temporal practices are morally or legally wrong for some reason. The current system of European migration law is taken for granted, and critical remarks or suggestions for change are not included in this analysis. I will analyse certain legal documents and search for the time hypothesis and its rationale in there. This rather strict non-normative methodology enables us to focus solely on the role of time in European migration law. I will merely illuminate certain contradictory aspects of European migration law and argue that these are the result of the ambiguity of (legal) time. To be sure, migration law itself is, of course, normative, just as in every other legal field it reflects certain normative choices and policies. These policies could have well been otherwise; this analysis, however, does not engage in discussions as to how the law should be framed differently. It takes European migration law is at is *now*. As mentioned earlier, this analysis therefore risks being

outdated before it is properly printed, yet because of the abstract analysis of time, it does not purely rests on the particularities of the moment and a more durable scrutiny of time in European migration law is sought for.

As we will see in chapter 9, the scholarly debate on time and stronger rights for (unlawfully residing) migrants is certainly normative and consequently, distinct from my approach. Participants in debates on irregular migration often have (quite openly) a certain agenda – they argue for regularization of certain irregular migrants after lapse of time, open borders, naturalisation of lawful migrants, or the opposite: closed borders, the effective return of unlawful migrants, *etc.*. In other words, they criticise the legal status quo, because this should in their view be changed. In criticising they appeal to certain more or less implicit assumptions of the legal system or to principles outside the legal realm which should also be taken into account in their view (*e.g.* universal justice, laws may not have inhuman or cruel effect, sovereignty of the nation state or the original people, *etc.*). The discussion of this debate is certainly important for the analysis of the time hypothesis, because one of the main arguments in these discussions is time.

Yet, the problem of such a normative approach for the present study would be that an answer would be based on various norms and values that cannot be found in the legal documents I analyse, or arguments in which the relationship with the law is rather unclear. That might, as such, not be a problem for such arguments – they might be convincing or not – it would certainly be a problem for my enterprise. The attention would then gradually shift from an analysis of the notion of time in European migration law, to a scrutiny of the relation between, for example, stronger rights in liberal democracies, citizenship and migration, time and global justice *etc.*. If an author would, for example, claim that it is necessary to provide irregular migrants legal entitlements after lapse of time, because this is implied in a certain conception of liberal democracy, the concept of liberal democracy is silently brought into the equation. This opens up an entire library of discussions about the precise content of liberalism, democracy and its obligations and rights. Such discussions may be fruitful but imply that my project drifts away from its initial premises (time and migration law). Moreover, an argument that focusses purely on the role of time is in this discussion still lacking, which might in itself be a reason to pursue such a trajectory.

Besides arguments of pragmatics, efficiency, consistency and rigour, such a 'slim approach' solely focusing on time, could also be defended with a methodological argument known as 'Ockham's razor', a principle attributed to the 14th century logician and Franciscan friar William of Ockham (while it is more probable that it has been invented by a later scholar). The most common understanding of the principle is that when there are two competing theories that make exactly the same predictions, the simpler one is the better. In other words, the theory that takes into account lesser assumptions to come to the same conclusion, is stronger. This theory has arguably been

important in physics,[33] while it has also been disputed as justification for simplicity.[34] For what it is worth, Ockham's razor phrased in terms of this project: if I can find a rationale for the time hypothesis by solely focussing on time and without relying on extra-legal or other notions, such an argument is preferable.

33 Hawking, *A Brief History of Time*, p. 57.

34 See e.g. the lemma in the Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/simplicity/#PriJusSim

Part One: Time in European Migration Law

'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, tidely 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!

Thomas Mann, Magic Mountain, p. 315

This first, legal part of the research is structured as follows. I will commence my inquiry by analysing the Long-term residence Directive of the European Union. This Directive provides stronger rights for certain non-EU migrants (third country nationals) who have lawfully resided in Europe for a period of five years and seems therefore a rather obvious starting point for analysis. In this chapter the question whether the time hypothesis is at the basis of European migration law will be thoroughly investigated. The Long-term residence directive clearly shows the existence of the time hypothesis in contemporary migration law. Moreover it will lead to some first insights as to the relation between time and law. In using notions as 'temporary', 'non-temporary', 'permanent', 'continuous' and 'non-continuous' time, different time-regimes apply to different categories of migrants. The time-criteria in the time hypothesis can be manipulated with in order to differentiate between migrants. Whereas the reference to time in European migration law seems on first sight merely based on clock time, it will turn out in this chapter that it is also indebted to human time. It is the focus on the temporal experience of a mortal human being that will become visible in the analysis of the qualifications of time as (non)-temporary, permanent and continuous.

In the following chapter 3 the time hypothesis will be scrutinized from a different angle: by means of a close-scrutiny of the case law of article 8 of the European Convention on Human Rights. This will reveal that a focus on the individual circumstances of the case, brings a different time perspective to the fore. This individual, material time is to be contrasted with the formal and general time in the Long-term Residence Directive. In the intermezzo after these two chapters it will be possible to draw some general conclusions about the time hypothesis and its reference to both clock and human time.

After these first two chapters it will be clear that the time hypothesis is at the basis of residence entitlement in European migration law. Moreover we will have a clear vision of the meaning and role of human time in the legal time of European migration law. The subsequent chapters will therefore not so much focus on the existence of the time hypothesis as such, nor on the relation between clock and human time therein, yet more attention will be paid to differences between the functioning of the time hypothesis for the three major subjects of migration law: the family member, the refugee and the economic migrant. The chapters 4-6 will consists of an analysis of the rules regulating the major subjects of European migration law.

We will commence in chapter 4 with the family member, the migrant who, as Sarah van Walsum has argued, severely problematizes the classic picture of migration law. The family member shows that migration law is often not so much a question of a single migrant opposed to a powerful state: often the migrant knocks at a door behind which a family member is already present. We will see that this problematizes the question of

time, because there appears to be a complex interrelation between the time of the family member and the time of the sponsor already present in the territory.

In chapter 5 we will scrutinize the situation of the refugee. The peculiar status of this migrant is based on the prohibition of *refoulement* of refugees. If someone falls under the refugee definition he may not be send back to his country of origin where he risks persecution. This prohibition goes as far that *potential* refugees that have arrived in the territory may not be send back during their procedure in which their refugee status is to be determined. The refugee is the only migrant who is allowed to enter *before* it is established that he has a right to reside (we will see that the situation of the Union citizen is slightly different). The analysis of the refugee, and his temporal predecessor the asylum seeker, will be revealing for it will show how a prohibition of something *potential* (that which still lies in the future) takes a legal form. In fact this begs the question what the relation is between legal protection and time, for it seems that there is in refugee protection a puzzling relation between permanence and temporariness at stake. Moreover it will turn out that the refugee eventually will be treated like other migrants as it comes to the time hypothesis (while his temporary status during the procedure is clearly out of joint).

In chapter 6 we will analyse the third major subject of migration law, i.e. the economic migrant. The analysis thereof will entail a close reading of the Citizenship Directive, which might come for those protagonists of full-fledged European Citizenship as a bit of a surprising starting point for an analysis of the economic migrant. After all, European Citizenship is often perceived as a way to promote 'a European identity around common cultural values and political symbols that parallel and could possibly supersede the national identities of citizens.'[35] We will happily leave that complex discussion aside, since we only focus on the Union citizen in his capacity as migrant. From that perspective we will encounter that this form of migration is a matter of money. Those Union citizens that do not become a burden of the state can easily migrate within Europe, while those less fortunate citizens have little opportunities to settle in other European countries. This leads to some important insights as to the relation between the European internal market and the national territory. It will appear that only if time is

35 R. Bellamy, 'Evaluating Union Citizenship: Belonging, Rights and Participation within the EU' (2008) 12 Citizenship Studies , p. 2. Bellamy discusses different perceptions of European Citizenship, and discerns two main trends, one contending that European citizenship develops an affective relationship among Union citizens towards the EU and their fellow EU citizens similar to that felt by co-nationals towards each other and their state (therewith upholding the system of national states) and the other arguing that European Citizenship should form a component of 'some kind of post-national cosmopolitan citizenship grounded in the moral entitlements we have as human beings and the obligations we owe each other to secure them in an increasingly interconnected world.' See further for an concise overview of these discussions and more references e.g. D. Chalmers, Davies, G., Monti, G., *European Union Law* (Cambridge 2015), p. 468-475 and for a critical analysis E. Balibar, *We the People of Europe: Reflections on Transnational Citizenship* (Princeton University Press 2004).

spend on the latter the time hypothesis will start to function (after which the time spent in the internal market can retrospectively be taken into account). In other words, time in the time hypothesis is national time, while the criteria for the migration of European citizens are purely economic.

In the intermezzo that concludes the chapters on the subject of migration law, we will be able to conclude that law can differentiate by means of time-regimes between subjects of migration. Time is one of the (most important) means of control over the presence of people in the territory.

After the scrutiny of the time hypothesis in general (chapter 2 and 3) and its particular manifestation in relation to the three major subjects of migration law (chapter 4-6) we will in the next cluster of chapters address the end of the time hypothesis (chapter 7-8). As mentioned in the introduction time in the time hypothesis seems to presume a certain direction, it is an incremental process of rights over time, with a clear starting point (entry) and certain subsequent steps (stay, residence and permanent residence). This raises the question where this growth of rights ends, or in other words, *when* a migrant ceases to be a migrant. One obvious answer is the situation in which the migrant naturalises or returns.

In chapter 7 the relation between time and naturalisation will be scrutinized by a reading of the European Convention on Nationality. This analysis has a peculiar status in this research, the regulation of nationality is after all a question of national law for it entails one of the most basic aspects of the sovereignty of a state. In the present book there is room (nor time) for an examination of national regulations of naturalization, so therefore we have to restrict ourselves to the few European rules that can be found in the European Convention on Nationality. This scrutiny will nevertheless lead to some interesting results for the analysis of the time hypothesis. It will turn out that the national is both *at the end* of the time hypothesis, as well as *outside it*.

In chapter 8 the end of the time hypothesis will be perceived from an entirely different angle, i.e. from the perspective of those who did not lawfully stay or whose entitlements have been withdrawn. In the former situation the time in the time hypothesis would not have started to tick (in this sense it would properly speaking entail a *not-beginning* of the time hypothesis), in the latter situation a given residence entitlement would be withdrawn at a certain moment, which would clearly end the time hypothesis. The similarity between the two is that they are both under an obligation to leave the territory. But what if they stay? By a scrutiny of the Returns Directive we will analyse what enforcement measures are available, how these relate to time, what 'tolerated presence' legally signifies and what the temporal status is of the unlawful present.

Verifying the Time Hypothesis

(chapters 2-3)

2.

The Time Hypothesis in Optima Forma

The Long-term Residence Directive (2003/109; 2011/51)

Finding the time hypothesis – Construction of legal expectation – Temporary/non-temporary/permanent and continuous time – Legal temporality stems from human time – Calculation with clock time – Construction of the legal present – Rationale behind the time hypothesis

The Directive on the Status of Third-Country Nationals who are Long-Term Residents ('Long-term Residence Directive')[36] was adopted in November 2003. This Directive is aimed at third-country nationals or, in other words, any person who is not a citizen of the Union.[37] As early as the Tampere meeting of the European Council in 1999 it was stated that the legal status of these third-country nationals should be approximated to that of Member States' nationals. The Council declared that a person who has resided legally in a Member State for a significant period of time and who holds a long-term residence permit should be granted a set of uniform rights in that Member State that are as near as possible to those enjoyed by citizens of the European Union. The Long-term Residence Directive is the result of this promise. Its clear objective is to provide stronger rights for third-country nationals who reside in EU territory for a significant period of time.[38] According to Recital 4, integration of these migrants is a key element in promoting economic and social cohesion, which is a fundamental objective of the European Community as a whole.

So here we find the time hypothesis fully endorsed before I have even started any genuine analysis of the time hypothesis. Third-country nationals should receive stronger rights over the course of time. There may not be a better opportunity to observe the time hypothesis in such an unobstructed manner than in this Directive. So how does it work?

The key rule of the Directive can be found in Article 4, paragraph 1, which *provides that long-term resident status shall be granted to third-country nationals who have resided legally and continuously within the territory of a Member State for five years immediately prior to the submission of the relevant application.* This implies that these migrants receive a secure residence status after five years of continuous legal residence, and that there are only a limited number of grounds on which this can be withheld or withdrawn. A residence permit can be withheld or withdrawn if there is an actual and sufficiently serious threat to public policy or public security (Article 9, paragraph 1(b), and Article 12), if the migrant has been absent from the territory of the Union for a

36 Directive 2003/109/EC of 25 November 2003, OJ 2004, L 16/44.
37 An EU citizen within the meaning of Article 17 EU Treaty.
38 Recital 2 of Directive 2003/109.

long period (Article 9, paragraph 1(c)) or if the acquisition of long-term resident status appears to have been fraudulent (Article 9, paragraph 1(a)). The permit cannot, however, be withheld or withdrawn for economic reasons, such as lack of income (Article 12, paragraph 2).

The stronger residence status includes equal treatment with nationals on a number of issues, such as employment, education, social security, tax benefits and freedom of movement within the Member State (Article 11). Furthermore, long-term resident status implies that a person may also look for employment, work and live in other EU Member States (Chapter III, Articles 14-23).

At first sight, this all seems perfectly clear. After five years the long-term resident migrant can apply for a stronger residence status, which can be withheld or withdrawn on only a limited number of grounds. The reference to clock time (five years) suggests that the notion of time used in this provision is rather straightforward. Closer scrutiny reveals, however, that time in the Long-term Residence Directive is rather different from simple clock time. Legal time in the Directive is *qualified* clock time. The analysis in the following sections is guided by the seemingly simple question: what is the meaning and role of time in the granting of long-term resident status?

This analysis is divided into two parts. The first relates to the acquisition of long-term resident status (section 2.1), and specifically how time is assessed *before* long-term residence status is achieved. The second concerns the situation *after* the status is granted (section 2.2). Dividing the analysis in this way should enable me to conclude how the role of time changes when long-term residence status has been granted, and how certain crucial terms in the Long-term Residence Directive relate to each other.

2.1 Before: Acquiring Long-term Resident Status

Long-term resident status is not automatically granted after a certain period of time. Instead, it must be applied for from the competent authorities of the Member State in which the migrant is residing (Article 7).[39] These authorities will decide on the matter within six months after the application has been lodged. This time limit may be extended only in exceptional circumstances (Article 7, paragraph 2).

It is clear from the outset that the duration of residence is the most important criterion for acquiring long-term resident status. This is clearly stipulated in Recital 6, which states that 'The main criterion for acquiring the status of long-term resident should be the duration of residence in the territory of a Member State. Residence should be both legal and continuous in order to show that the person has put down roots in the country. Provision should be made for a degree of flexibility so that account can be taken

39 ECJ 8 November 2012, *Iida,* C-40/11, para. 47.

of circumstances in which a person might have to leave the territory on a temporary basis.'[40] This was also stated by the European Court of Justice in *Tahir,*[41] where it was held that the residence requirement is an essential condition for the granting of long-term resident status. The Court held that time in the territory is the main criterion for acquiring the status as this serves as proof that the migrant has put down roots in the country 'and *therefore* that that person is a long-term resident'.[42]

Yet not all clock time counts for acquiring the said status. In the following I analyse how time is qualified as legal time. The first important limitation is that 'temporary time' cannot be taken into account (section 2.1.1). Only 'non-temporary time', and then only some of that 'non-temporary time', counts. In other words, non-temporary time is limited to *legal* and *continuous* time *immediately prior to* the application (section 2.1.2). Alongside these time criteria, the Directive leaves open the possibility of two other criteria: money and identity (section 2.1.3), both of which are also related to time.

2.1.1 What Is Temporary and Non-Temporary Time?

Migrants residing in the territory on temporary grounds are excluded from the application of the Directive (Article 3, paragraph 2). Those excluded in this way can be divided into three groups. The first consists of migrants specifically residing in the territory for temporary purposes, such as those doing studies or vocational training (2(a)), au pairs, seasonal workers and cross-border workers (2(e)) and diplomats (2(f)). The second group comprises 'non-voluntary migrants' with temporary protection (2(b)). The third group consists of 'non-voluntary migrants' who are awaiting a decision on their application for protection (2(b), (c) and (d)).[43]

The Court has explained why such residence falls outside the scope of the Long-term Residence Directive. While their residence 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.'[44] If a migrant resides in the territory for temporary purposes, such residence does not in itself express any

40 This is reiterated in ECJ 17 July 2014, *Tahir*, C-469/13, para. 30 '[the] residence requirement is an essential condition for the grant *[sic]* of long-term resident status.'

41 ECJ 17 July 2014, *Tahir*, C-469/13, paras 30-34.

42 *Idem*, para. 33, emphasis added. Moreover it should be lawful, which I will address in 2.1.2.

43 I will discuss these latter two groups in detail in Chapter 5.

44 ECJ 18 October 2012, *Mangat Singh*, C-502/10, paras 47-48.

intention by the migrant to settle on a long-term basis in the host country, the Court argues. Yet, the Court hastens to add, it neither precludes continuous residence. This is puzzling because it is perfectly conceivable that someone could reside in the territory on a temporary status for five years, but be unable to apply for long-term resident status, while that residence may even continue after that period.

In reality, it is even more complicated because a migrant could reside in the territory on the basis of a non-temporary residence permit for more than five years without applying for long-term status, or without this status being granted to him (because, for example, he does not fulfil an integration requirement). This is because a national residence permit is granted for a fixed period, after which it can be renewed. It is consequently perfectly conceivable for a migrant to reside in the territory long-term on the basis of a renewable national residence permit. Clearly, therefore, what is deemed to be long-term under the Long-term Residence Directive cannot simply be equated to a certain amount of clock time. I will return to the question of what long-term and permanent mean under the Directive in section 2.2.1.

At this point it can already be observed that the adjective 'temporary' does not relate to clock time. As mentioned in the introduction (section 1.4.3), clock time is standardised, which has the advantage that it serves as an objective standard. It can be applied to a migrant in order objectively to establish when exactly he arrived (in clock time) and the subsequent length of his residence. Whether, however, the residence is temporary cannot be established purely on the basis of clock time. The migrant's residence can certainly be objectively established as temporary if he leaves the territory and thus proves that his residence *was* temporary. The point, however, is that even such an objective perspective of temporary residence presumes human time. This is because it presumes *a moment* in time *of someone* whose presence in the territory has become part of *his past*, given that he no longer resides in that territory. Temporary is therefore primarily a question of the *temporality of human time*, with its past, present and future as perceived at a certain moment.

Yet can the presence of a migrant be qualified as temporary *before* he leaves? It is clear from the above example that residence can retrospectively be deemed temporary, but is this also possible prospectively and relating to the future? This is an urgent question since the law uses 'temporary' as a distinguishing category for migrants present in the territory. These categories would be inoperable if we had to wait until the migrant *actually* migrates to another country. After all, if certain categories of migrants *currently* residing in the territory are to be excluded from the time hypothesis because their stay is deemed to be temporary, there needs to be a *prospective* understanding of time (excluding people from the time hypothesis when it is already apparent – because they have already left – that their presence was temporary *post facto* is unproblematic). *I therefore seek a usage of 'temporary residence' that relates to the future, not to the past.* Such

a prospective understanding of temporary cannot be objectified in the same way as retrospective temporariness.

The important question then is what determines whether some residence is deemed to be temporary, while other residence is deemed non-temporary, *in the future*? As mentioned in the introduction, Bauböck argued that different meanings of temporary should be identified. He identifies several prospective understandings of temporary, with the most important for my purposes being subjectively intended, objectively expected and legally prescribed.[45] I will demonstrate that there is a complex interplay between these three understandings at stake in the meaning of temporary.

The temporary character of time in the territory relates firstly to *the intention of the residence*. It should be noted that this intention does not refer exclusively to the intention of the *migrant*. Of course the latter's intention plays a role as the migrant chooses to migrate to the country and to apply for a particular residence permit (whether for work, asylum, family reunification, study or au pair purposes, for example). Moreover, what *actually* happens in the future depends very much on the intention of the migrant. Yet whatever is intended at a particular moment may change in the future because the migrant may change his initial plans. It is perfectly conceivable that a migrant who has gained a strong residence permit may decide after a few years to migrate again and to settle somewhere else. Just like someone with a temporary permit (for studies, for example) may decide to settle and find a job despite initially intending to leave after completing his studies. The subjective intention of the migrant is therefore not a very useful proxy for predicting the temporary nature of the residence: what is subjectively intended to be non-temporary can turn out to be temporary, and what is intended to be temporary can become non-temporary over time. *Therefore law bases its construction of the temporary character of presence on the basis of a reasonable expectation of the future, instead of merely the subjective intention of the migrant.* This, in fact, is what we see in the above case of *Mangat Singh,* in which the Court stated that the residence of migrants who reside 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'.[46] It is a legal attempt to construct a reasonable expectation, based on the *objective* of

45 Bauböck also discerns 'morally justified', which falls outside the scope of my analysis. 'Demographically objective' is the retrospective variant I have just described; see Bauböck, 'Temporary migrants, partial citizenship and hypermigration', p. 670.

46 Strictly speaking, however, this is not the same. Bauböck refers to 'collectively expected' in a more sociological or historical sense. In the case, for example, of Turkish labour migrants in Western Europe in the 1960s and 70s it was collectively expected that their residence would be temporary. Here, I do not refer to any sociological intention or expectation, but instead to a more general, objectified *legal* expectation.

the visit. If such a goal is temporary, and so 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 the territory 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 exempt from the time hypothesis under the long-term resident permit.

Yet what does Bauböck's interpretation of temporary as 'legally prescribed' mean? It could be argued that 'temporary' merely signifies that the residence is 'legally prescribed' to be temporary and that this bears no relationship to any subjective intention or objective expectation. After all, a residence permit based on a temporary objective categorises the residence as temporary and thus prescribes what is allowed (and what is not). The matter, however, is certainly more complicated, as the earlier quote from the Court of Justice exemplifies. The Court stated that the temporary residence 'does not *prima facie* reflect any intention on the part of such nationals to settle on a long-term basis'. In other words, the intention of the migrant is of importance for the question of whether the migrant will stay long-term. The Court also stresses that in cases of 'third-country nationals whose residence is based solely on temporary grounds, (…) it is clear that that temporary nature does not *permit* the long-term residence of the third-country national concerned'.[47] In the question of continuity of residence – as discussed in the next section – we can also see hints that the distinction between temporary and non-temporary involves a collective expectation of the future of the migrant in the territory.

On the basis of this formulation it seems possible to provide an initial outline of the relationship between subjective intention, collectively expected and legally prescribed. The 'prima facie' formulation shows that, at first sight, the temporary residence of the migrant seems not to reflect any *subjective* intention to reside long-term. This, at least, is what is collectively expected at first sight, based on the categorisation of the residence as temporary. Categorisation of the residence as temporary does not subsequently *permit* long-term residence. So here we see an interplay between three notions of temporary: it is *objectively expected* that someone who applies for a temporary residence permit does not *intend* to stay long-term and, because of this, is not *allowed* to stay long-term. It would seem to boil down to the question of whether someone has settled or not, with such settlement being an indication that the migrant will reside long-term.

There is certainly more to say about this complicated point. I will return to the question of what temporary and non-temporary time precisely signify in section 2.2.1, when I discuss how 'permanent time' relates to these concepts of time. At this point I can conclude that only non-temporary time counts for the purposes of the Long-term Residence Directive, and that this implies a qualification of time based on the construction of a reasonable expectation of the future. Such an expectation is needed as

47 ECJ 18 October 2012, *Mangat Singh*, C-502/10, para. 50; emphasis added.

it is not just time in the territory that matters, it is the time of *someone* in the territory. Mere clock time does not suffice for presence to be qualified as temporary or non-temporary, given that it implies a *temporal* understanding of the migrant's time. The qualification refers to the future of the migrant, thus reflecting a complicated interplay between objectively expected, subjectively intended and legally prescribed.

2.1.2 Which Time Counts?

After five years, migrants who stay *non-temporarily* can acquire long-term resident status upon application. Let us recall the general rule of the Directive: Article 4 stipulates that a Member State will grant long-term resident status to third-country nationals who have *legally* and *continuously* resided within its territory for five years *immediately prior to* the submission of the relevant application. I will discuss these different qualifications of time below.

Lawful Time

The time spent in the territory must have been *lawful*, which implies that the third-country national must have legal permission to reside there.[48] Directive 2003/109 does not lay down the conditions that these migrants must satisfy for them to be regarded as legally resident in the territory of a Member State. It follows, therefore, that these conditions are governed by national law.[49] It is clear from the system of the Long-term Residence Directive that this implies the situation in which migrants have been granted a residence permit and that mere lawful stay does not count (as already seen in section 2.1.1). After all, those still awaiting a decision on their application for a residence permit (asylum, subsidiary protection or temporary protection) do not fall within the scope of the Directive (Article 3, paragraphs 2(b), (c) and (d)).[50] We will see in the remainder of this section that not every form of legally authorised residence counts as lawful time. However, unlawful time (i.e. time without any form of permission to stay) does not in any case count for the purposes of acquiring long-term resident status.

Continuous Time

A highly interesting qualification of time is that time of lawful presence in the territory must be *continuous*. Article 4, paragraph 1, stipulates as a general rule that the period of five years must not be interrupted. This is a clear qualification of time; it is not merely the total number of years spent in the territory that count for the Long-term Residence

48 The Court has stressed that it is the five-year duration of the lawful and continuous residence that shows that the migrant has put down roots in the country, ECJ 17 July 2014, *Tahir,* C-469/13, para. 33.

49 ECJ 8 November 2012, *Iida*, C-40/11, para. 36.

50 The asylum seeker's time in the procedure is discussed in detail in chapter 5.

Directive as those years must also have been consecutive. The question remains, however, as to what continuity of time spent in the territory precisely means. Indeed, what is continuity?

Based on the wording of this provision, one would think that continuous residence in the territory does not leave room for any interruption in the form of presence outside the territory. If the criterion of continuity merely referred to clock time, it would be straightforward. However, the legal meaning of continuity appears to be a bit more complicated. Article 4, paragraph 3, stipulates that periods outside the territory shorter than six consecutive months, and not exceeding a total of ten months, do not interrupt the period of five years within the meaning of Article 4, paragraph 1. A migrant can thus spend time outside the territory (for holidays, visits, work etc.), without this implying that the clock will start ticking all over again regarding his application for a long-term resident permit. Continuous time in the territory is thus defined as *not or not interrupted for too long*.

How then should these non-interruptions of continuous time be measured for the purposes of Article 4, paragraph 1? If a migrant leaves the territory for a four-week holiday, do these weeks count towards the five years? Interestingly enough, the time of these non-intervals does count, according to Article 4, paragraph 3. *This means we have to discern the answer to the question of interruption or non-interruption from a calculation. Some time on the outside does not interrupt time on the inside, and such non-interrupting 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 then the clock start ticking all over again.

Matters now, however, become more complicated. While the general rule of continuous time implies a form of 'not often interrupted time', and these non-intervals count towards the period of five years, there can be exceptions to this. In very exceptional circumstances of a temporary nature, Member States may accept that longer periods of absence of the territory *shall 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 *shall not be taken into account in calculating* the five-year period.

So far, therefore, three forms of continuous time have been identified: firstly, non-interrupted time without intervals of absence from the territory; secondly, non-interrupted time with short intervals of absence from the territory, with these intervals counting as time spent inside the territory; and, thirdly, non-interrupted time with longer intervals of absence from the territory, with these intervals not counting as time inside the territory. What is at stake here?

For a better understanding of the varieties it is important to see them in the light of the distinction between temporary and non-temporary as this distinction seems

essential in terms of qualifying for long-term resident status. The purpose of the Directive is to grant stronger rights to migrants who reside in the territory on a non-temporary basis. If a migrant leaves the territory *temporarily* (even if, in exceptional cases, this temporariness is relatively long), this is not a problem as it does not interrupt the non-temporary character of his residence in the territory. In other words, the migrant is expected to return because he is presumed to be residing in the territory of the Member State for a longer period (thus meaning that his presence outside the territory is only temporary).[51] The question of continuity is closely linked, therefore, to the distinction between temporary and non-temporary time, albeit that the question has a retrospective character as far as counting towards the five-year period is concerned. This counting serves to establish the prospective qualification of the time as non-temporary. If the migrant spends a period shorter than six consecutive months outside the territory, this period is qualified as temporary residence outside the territory and does not, therefore, interrupt the non-temporary residence. Longer periods, however, are regarded as interrupting this period.

Immediately Prior To

The third qualification of time is that the period must *be immediately prior to* the submission of the relevant application for stronger status. Only the last five years count as relevant time; time in a previous past is not relevant. In this we can distinguish the same relationship between time and presence in the territory as in the question of continuity. After all, time not immediately prior to the application must have been interrupted in the sense of the Directive as there is at least an interruption between the most recent moment of presence in the territory and the application.

Time Calculation

Lastly there are some other interesting features in *time calculation*. I already established that certain non-interrupting intervals of longer duration do not count, whereas some short ones do. In addition, the six months (or longer) during which the authorities have to take the decision, as stipulated in Article 7, paragraph 2, do not count for the required duration of the resident status. Article 4, paragraph 1, stipulates that the relevant moment for calculating the duration of residence is the *submission* date of the relevant application. The time is measured *ex tunc*, which implies a time gap between the

51 This question of continuity is also important with regard to the concepts of 'ordinary resident' or 'habitual resident', which are often used in national and international social security and tax law, as well as in private international law. See C.H. Slingenberg, *The Reception of Asylum Seekers Under International Law. Between Sovereignty and Equality.* (Hart Publishers 2014), p. 142-146. Slingenberg proposes that 'Generally, the concept of "ordinary residence" should be distinguished from mere temporary or occasional residence and requires the establishment of durable ties between the individual and the territory' (p. 143).

date of submitting the application and the legal decision taken on the application. This time after the application has been filed does not count towards the five-year period.

Another fascinating time calculation variant relates to migrants who gain a residence title that will enable them to be granted a long-term resident status *after* a period of studies or vocational training. In those cases they will already have resided in the territory for a certain period of time, while during that time this period was regarded as being temporary (under Article 3, paragraph 2.a) and they consequently did not fall within the scope of the Directive. If this temporary residence later turns out to be non-temporary because the migrants acquire a non-temporary 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 or vocational training *does count*, *although only half of the period* can be taken into account.

The same goes for refugees who also fall under the Long-term Residence Directive since the amendment of Directive 2011/51.[52] Under Article 4, paragraph 2, at least half of the period between the date of lodging the application for international protection and the date on which the residence permit is granted will be taken into account for persons to whom international protection has been granted. And if the application procedure exceeds eighteen months, the entire period will count. I will discuss the rationale behind this remarkable clause in chapter 5. At this point it remains rather puzzling how these ways of calculating and manipulating time in the territory relate to the observation that, over the course of time, the migrant has put down roots in the country and has therefore become a long-term resident. It seems that only legally relevant time (lawful, continuous and immediately prior) can create roots on which to base the expectation that the migrant will reside in the territory long-term.

It has become clear, however, that the very use of clock time enables legal calculation. It is the objective character of this form of time that makes it possible to differentiate on the basis of general, standardised time criteria. The question of temporary and non-temporary presence may be pivotal for understanding time in the Long-term Residence Directive. This may be a clear expression of human time; indeed, it is the reference to clock time that enables these forms of legal differentiation. These standard rules of time can be easily adjusted, however, depending on the desired policy objective.

52 11 May 2011, Directive 2011/51 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection.

2.1.3 Is it Just Lapse of Time?

Whereas the duration of residence is the main criterion for acquiring long-term resident status, it is not the sole criterion. Two additional criteria – money and identity – can be distinguished, and both of these can be related to time.

Firstly, the migrant must prove that he has stable and regular resources sufficient to maintain himself and the members of his family and that he has sickness insurance (Article 5, paragraph 1). This will necessarily have both a retrospective and prospective character. Proof must be based on the past (e.g. a secure and regular job),[53] and this must be stable enough to provide a certain assurance that it will continue in the future. The point is obviously that authorities want to grant a strong status only to those migrants who are not a burden on the social welfare system. The duration of residence is thus qualified; the migrant must have proved to have sufficient income during his residence. He must be able to earn a living, without becoming a burden on the state.[54] In determining whether income is sufficient, Member States may evaluate resources by taking account of their nature and degree of regularity, and the level of minimum wages and pensions in the country.[55]

Secondly, the migrant must behave as a good migrant. He must have integrated into society and behave properly. Under Article 5, paragraph 2, Member States may require third-country nationals to comply with national integration conditions, such as knowledge of the language and a certain understanding of national history and culture.[56]

This criterion of identity is also clearly reflected in the rule that Member States may refuse to grant long-term residence status on grounds of public policy or public security (Article 6). In such cases, the severity or type of offence against public policy or public security, or the danger that emanates from the person concerned, must be balanced against the duration of residence and the links with the country of residence. In practice, a decision not to grant long-term residence status because of such a risk will also entail withdrawal of the previous residence permit. This assessment of whether the request for long-term resident status must be refused on grounds of public policy or security will be discussed in section 2.2.2, when I look into the withdrawal or loss of previously granted long-term resident status. For now it is enough to observe that time criteria alone do not regulate the acquisition of long-term resident status; a migrant can be required to have behaved in a decent manner, to be integrated into society and not to be expected to become a financial burden on the state.

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53 Employment is *prima facie* evidence of 'stable and regular resources which are sufficient to maintain himself and sickness insurance in respect of all risks normally covered', ECJ 8 November 2012, *Iida*, C-40/11, para. 42.

54 I will discuss the question of becoming a burden to the state in more detail in chapter 6, where I examine the situation of the Union citizen.

55 P. Boeles and others, *European Migration Law* (Intersentia 2014), p. 182.

56 I will discuss the relationship between time and integration more elaborately in section 2.3.

2.2 After: Possessing Long-term Resident Status

When a migrant fulfils all the criteria and has received long-term resident status, his residence status will become *permanent* (Article 8, paragraph 1). What does this mean? In the analysis of the acquisition of long-term resident status, the focus on the role of time was very much on the *amount* and *temporal character* of time spent in the territory. The temporary or non-temporary aspect reflected the temporality of human time as it related to the future of the migrant at a certain moment. The amount of time clearly related to clock time, and specifically a period of five years in the territory. Yet the qualification of this time as continuous was again an expression of the temporality of human time, and closely related to the question of its non-temporary character. It was used to establish a reasonable expectation of the future. Yet what do the qualifications 'long-term' and 'permanent' signify?

2.2.1 What is the Difference Between Non-Temporary and Permanent Time?

I have already observed that, in general, only non-temporary time is included when calculating the period required for gaining long-term resident status. So far, however, I have focused only on what *temporary* time could signify, and not on its counterpart. I suggested that temporary should be understood to refer to a complex interrelationship between three different meanings: subjectively intended, collectively expected and legally prescribed. *The law constructs an expectation on the basis of the alleged subjective intention of the migrant to settle (or not to settle), and thus legally prescribes the future residence to be temporary (or non-temporary).* Yet, there is more to say about this interrelationship as it is not entirely clear how this collective expectation is constructed. Why does the law expect the migrant to stay long-term? Let me start my further inquiry with the seemingly simple question: What is the opposite of temporary?

So far I have used the term 'non-temporary' to describe time that qualifies under the Long-term Residence Directive. Just like temporary time, non-temporary time does not reflect merely clock time. Instead, it reflects human time, and must be related to the objective or intention of the period of residence. If the objective of the status is temporary, the migrant cannot obtain the stronger status. Settling, in the sense of not expecting to migrate any further, appears to be a prerequisite for gaining stronger status. *The term 'non-temporary' does not itself signify actual lapse of time; it merely states that at a certain moment the residence is deemed to be non-temporary*. At the moment of the decision it must not be foreseeable that the migrant will leave (or not leave) in the future. What if the migrant resides in the territory for a certain period of clock time after receiving his residence permit? We have seen that five years of residence is

enough to apply for a long-term residence permit. Do those five years of residence change anything in the *qualification* of time? In other words, does non-temporary time become permanent time after lapse of clock time?

In order to unravel the complex relationship between temporary, non-temporary and permanent time it is helpful to scrutinise the meaning of permanence within the Directive. Again, expectation is crucial in understanding what permanence means in the Long-term Residence Directive. Permanence does not mean that nothing *will change in the future*. Nor does it mean that the status will always remain the same or cannot be revoked. Article 8 stipulates that long-term resident status 'shall be permanent, subject to Article 9'. This latter Article defines the circumstances under which the status will be withdrawn or lost. This puzzling statement therefore begs the question as to what 'permanent' means if such status can be withdrawn or lost in the future?

Permanence in the Long-term Residence Directive is a temporal term as it relates to the assessment of a certain moment of the past and future, not to what will actually happen in the future. Migrants possessing long-term resident status do not necessarily reside for the rest of their lives in the territory as they may migrate and settle elsewhere. Nevertheless, the notion of permanence says something about the future and is thus necessarily an expectation (and not a description). Permanence is, to use the dictionary definition, '[c]ontinuing or designed to continue indefinitely without change. Opposed to *temporary*'.[57] Long-term resident status is 'continuing or designed to continue indefinitely without change', which does not mean that the migrant will indeed stay permanently in the territory. Nor does it say that a national residence permit that is not long-term cannot continue over a long period of time. After all, such permits can normally be extended time and again.

From this I have to conclude that 'temporary', 'non-temporary' and 'permanent' are qualifications of time on the basis of expectation *at a certain moment.* This again clearly reveals the *temporal* character of these qualifications, and thus the reference to *human time.* Moreover they have a prospective character because they qualify the future residence. Yet what is the precise relationship with clock time, subjective intention, collective expectation and legal prescription when it comes to these temporal qualifications?

It is clear that the 'permanent' character of long-term resident status is in the first place a legal prescription. It is legally prescribed that the migrant may reside permanently in the territory (as long as none of the grounds in Article 9 applies, as we will see in the next section). On the basis of this status, the migrant is *allowed* to stay long-term. As such, however, this does not say anything about whether the migrant is *expected* or *intends* to stay in the territory in the future.

57 The Compact Oxford English Dictionary, Oxford: Oxford University Press 2000 [emphasis added].

It seems that there must be at least some subjective intention involved to stay long-term as otherwise the migrant would not make the effort to apply for such a status in the first place. After all, migrants can stay for longer than five years in the territory on the basis of a normal and renewable national residence permit. The main advantage of long-term resident status is that it is more difficult for it to be withdrawn or lost in the future. Someone with this status is therefore more likely to be able to reside in the territory long-term. It seems, therefore, that applying for such status requires at least some subjective intention to reside long-term.

However, subjective intention does not play a significant role in determining residence as long-term and permanent. After all, it is a very unreliable proxy for expressing an expectation of the future. As stressed earlier, a migrant may intend to stay indefinitely today, but leave tomorrow, either because circumstances change or because the migrant is not legally allowed to stay any longer. It is certainly equally conceivable that a migrant may intend to leave in the future, but simply remain in the territory (without this changing his intention). The legal prescription of the residence is clearly not based primarily on the migrant's subjective intention, but what about the collective expectation? What is expected when long-term resident status is granted?

It is useful here to reiterate Recital 6 of the Directive, which states (in a helpful paraphrasing of the Court) that 'it is the duration of the legal and continuous residence of 5 years which shows that the person concerned has put down roots in the country and therefore the long-term residence of that person.'[58] A period of five years of residence thus qualifies as long-term if it has been non-temporary, legal, continuous and immediately prior to the application for long-term resident status. The opposite, therefore, is also true: a period of five years of temporary, illegal or interrupted time does *not* qualify as long-term. The combination of the non-temporary and continuous aspect of time in particular, serving as proof that migrants have put down roots during the period of residence, *seems to show* that those migrants who *are expected to stay long-term* are selected by the law for a permanent residence status. In other words, those migrants who are expected to be non-temporary have resided most of the time in the territory, have put down roots and are *therefore* expected to stay in the territory in the future.

I will return to this question of legitimate expectation in the next chapter, and extensively in chapter 10, as legally allowed permanence would seem at this point to be based on a form of collective expectation. It remains to be determined, however, why becoming rooted can constitute a basis for such an expectation.

58 ECJ 18 October 2012, *Mangat Singh*, C-502/10, para. 46.

2.2.2 How Does Permanence End?

The principal benefit for the migrant of having long-term resident status is that, from then onwards, he is allowed to reside permanently in the territory. Yet the migrant can obviously choose to leave if his (subjective) intentions change. Moreover, Article 9 states that long-term resident status can be lost if it has been acquired fraudulently, if the migrant constitutes an actual and sufficiently serious threat to public policy or public security or if the migrant has been absent from the territory.

The first scenario applies if a migrant has fraudulently acquired long-term resident status by, for example, providing fake proof of his period of lawful residence or by concealing a period of residence outside the territory. In such a case, the migrant retrospectively did not qualify for the status in the first place. This implies that, in retrospect, an expectation that the future residence would be permanent should never have been assumed. This should be discerned from the situation in which the expectation of the future, turns out to be wrong (in the future). This points to a difference in time since it implies an understanding of the notion of expectation at a certain moment. This expectation can be wrong because it was based on an incorrect assessment of the circumstances and facts available at the time of the expectation. Alternatively, it can also be wrong because facts and circumstances have changed since the moment of the expectation. In other words, the expectation can be wrong at different moments, either at the moment of the decision or later. This research focuses on the latter problem as the former is mostly a question of evidence.

The second scenario in which long-term resident status can be withdrawn is if the migrant constitutes an *actual and sufficiently serious* threat to public security or policy Article 12). Such a decision must not be founded on economic considerations (Article 12, paragraph 2). Before taking a decision to expel a long-term resident, a Member State must also take into account the duration of the residence in the territory, the age of the person concerned, the consequences for the person concerned and his family members, and links with both the person's country of residence and country of origin.[59] These latter criteria, stipulated in paragraph 3 of Article 12, overlap with the case law of the European Court of Human Rights under Article 8, which I discuss in chapter 3.

It seems, on first sight, that two different tests come to the fore here. The first determines whether there is *an actual and sufficiently serious threat* (Article 12, paragraph 1), whereas the second concerns whether the migrant can be expelled for the breach of public order, taking into account the time he has spent in the territory and his links with his family, the country of residence and his country of origin (Article 12, paragraph 3). The first test focuses on the question of whether there is an actual

59 Boeles and others, *European Migration Law*, p. 187.

and serious threat *at the moment of the decision*. In this case, it does not matter whether there has been a threat in the past and which has now ceased to exist. It is simply an assessment of the threat *now*. The contrary is the case in the second test, where the focus is on the migrant's *past* in the territory. The threat to public order must be assessed in light of the time the migrant has spent in the territory. I will discuss this latter test, and its implication for the understanding of time, in more detail in chapter 3.

In practice these tests can be at odds: a migrant constituting an actual and sufficiently serious threat may not be able to be expelled because of his long residence in the territory. On the other hand, a breach of public order may outweigh the ties the migrant has established since the offence, but the migrant may no longer *currently* constitute an actual danger. Article 9, paragraph 7, stipulates that Member States will authorise a person in such a situation to stay in the territory if he fulfils the conditions provided for in national legislation. It is thus possible that someone may lose his long-term resident status, while being authorised to remain in the territory. I will postpone the temporal aspects of the question of threats and risk assessment until the discussion of Article 8 in the next chapter and the discussion of the situation of refugees in chapter 5.

What does the possibility to withdraw the residence permit imply for the meaning of long-term residence? It shows that even though the migrant is allowed to stay permanently and that his corresponding status consists of a stronger residence entitlement, this does not entail *unconditional permission to stay*. Despite the permitted permanence, it is still a residence permit conditioning the duration of the migrant's residence. A migrant who contravenes the conditions of his stay by committing a crime risks losing his status.

At this point, the picture remains the same. The long-term resident status merely means that migrants are permitted to reside in the territory permanently, providing they do not commit any sufficiently serious crime. In the previous section I stated that I suspected that the selection of those migrants granted the said status is based on the expectation that they will stay in the territory long-term. Yet it was not possible to show why becoming rooted in five years of non-temporary, continuous time would lead to a reasonable (collective) expectation that the migrant will reside long-term or permanently in the future. I promised that the relationship between expectation and rootedness would be the focus of attention in the philosophical part of the analysis. At this point, however, I can already shed new light on the qualification of time spent in the territory and the expectation of the future at the moment of the status being granted. This can be done by analysing the third situation in which the long-term resident status can be withdrawn: namely in the event of the migrant's absence from EU territory.

When a migrant decides to leave – because his intention has changed (or his intention was never to stay permanently) – the constructed intention can turn out to be wrong. We have seen in the analysis of the acquisition of long-term resident status

that the question of *where* time has to be spent is inextricably linked to the question of *how much* time (continuous and legal) is required. We have also seen that, from the moment of long-term resident status being acquired, permanence is assumed, and continuous residence in the territory is no longer required to be proven. Nevertheless, if the migrant is absent from EU territory for a period of 12 consecutive months, he is no longer entitled, under Article 9, paragraph 1(c), to retain long-term resident status (albeit that Member States may derogate from this rule for longer periods in exceptional circumstances). Interestingly, absence from the territory of the Member State that granted long-term resident status only leads to withdrawal or loss in the event of a period of absence of more than six years.[60] How should we interpret this?

If the long-term residence permit merely *allowed* for future residence, without any expectation that the migrant would actually reside in the territory in the future, there would clearly be no room for this provision. If we understand long-term resident status as purely the granting of legal permission for prolonged residence, this would mean that the law would not differentiate between those migrants intending or expected to reside in the territory in the future and those that do not intend to settle. This would clearly be the case if the only criterion for such a status were to be a period of five years of residence, without any need for this residence to be non-temporary or continuous. Long-term resident status would then be granted to anyone who stayed for a certain period of time in the territory. Yet that is not the case, and this becomes most apparent in the criterion of continuity of residence *after* the status is granted.

When is permanence interrupted? At first sight, this would seem to be a simple case of a retrospective understanding of temporariness: the migrant demonstrates that his residence in the territory was temporary as soon as he leaves the territory to reside elsewhere. That is the same as in the 'continuity of residence' discussed in section 2.1.2. For the *acquisition* of long-term resident status, the time in the territory must have been continuous or, in other words, not interrupted often. We now see that such continuous presence also remains an important criterion for *maintaining* the status. However, the situation has shifted since the granting of long-term resident status: now, continuous residence in the territory can only be interrupted by an interval longer than 12 consecutive months. If the migrant resides for 11 months outside the territory and subsequently a short period within the territory, the migrant retains long-term resident status.

60 Here we see the first signs of the complex relationship between the territory of the EU and that of the individual Member States. Absence from the territory of the Member State must be very long before it disrupts the permanence of the stay, while only 12 months is needed in the case of absence from the territory of the EU. This seems to suggest that the expected permanence relates to residence in the EU, given that time spent outside the Union will interrupt the permanence relatively quickly, while time spent within the Union will only slowly lead to interruption. I will discuss the relationship between time, the territory of the Union and the territory of the Member State for Union citizens in more detail in chapter 6.

From this, we can clearly conclude that continuity of residence in the territory is also a criterion for migrants *after* the status has been granted. There is, however, a difference between this situation and the situation *before* long-term resident status has been granted. In the latter situation, a period of 11 months outside the territory constitutes proof of the assumption that the migrant does not intend to remain in the territory permanently. If, therefore, the migrant leaves the territory before obtaining long-term resident status, the clock starts ticking again and it will therefore be another five years before the migrant can apply for long-term resident status. After the migrant acquires this status, however, a period of 11 months spent outside the territory is qualified radically differently. Now it is no longer proof of his changed intention, and he is still expected to remain permanently in the territory. In other words, the same amount of clock time has an entirely different meaning, depending of which of these two regimes applies. This is another example of how legal time can only be understood with reference to both clock time and human time.

This continuity of residence adds to the supposition that the expectation that the migrant will reside in the territory for a longer period is also of importance at the moment the migrant requests long-term resident status, with non-temporary and continuous residence in the first five years being seen as proof of the expectation that the migrant will stay long-term, and his being rooted in the territory serving to feed this expectation. The grounds justifying this changed expectation that someone has settled and will stay long-term remain, however, is still to be determined.

2.3 What Is the Rationale Behind the Time Hypothesis?

I suggested above that granting long-term resident status changes the expectation of the future. This expectation shows the temporal character of legal time (it refers to the future of the migrant at a certain moment), while its attempt to objectify it (five years of residence) ties in with the rationalised conception of clock time. I also suggested that the law constructs an expectation of the future by requiring a non-temporary, continuous period of five years of residence if a migrant is to qualify for a long-term or permanent residence permit.

This legal expectation, however, serves only as a starting point for examining *why* migrants receive stronger rights, but does not answer this question sufficiently. After all, this initial question can be rephrased as: Why is the migrant *expected* to reside longer in the territory after a certain lapse of time? This reformulation, in turn, gives rise to other complex questions. Firstly, on what is this expectation based? Secondly, what is the precise relationship between expectation and clock time? When is it enough? Is a period of five consecutive years necessary, or could it also be a different period of time? And, finally, if the migrant can rightfully be expected to reside longer in the territory, what is

the nexus with the granting of stronger rights? Or, in other words, what is ultimately the rationale behind granting stronger rights to migrants expected to reside permanently in the territory? Although I have touched on several of these questions above, most notably by referring to the question of roots, I have certainly not exhausted the subject.

As we will see, many of these questions cannot be answered merely by analysing the Long-term Residence Directive. However, the Directive does provide some interesting, yet puzzling clues as to why migrants receive stronger rights after the lapse of clock time. An analysis of the Long-term Residence Directive shows there to be at least three distinct reasons for granting such stronger rights to migrants: equal treatment, integration and roots. The latter has already been touched on, while equal treatment and integration have been referred to only briefly.

Reference to the integration conditions are most prominently to be found in Article 5, paragraph 2, while Article 11 provides for the right to equal treatment. Together they can be found in Recital 12, which states that 'In order to constitute a genuine instrument for the *integration* of *long-term residents* into society in which they live, long-term residents should enjoy *equality of treatment* with citizens of the Member State in a wide range of economic and social matters, under the relevant conditions defined by this Directive'. Let me first discuss these two arguments and ask: What is the assumed relationship between equality, integration and time?

The integration argument leaves open the possibility of a juxtaposed reading. First it must be observed that this argument can be roughly divided into two major categories:[61] the residence permit is granted *because* the migrant is integrated, or the residence permit will *enable* the migrant to integrate better. In the former situation, the residence status is an effect of integration over time, whereas in the latter it is the cause (or one of the causes) of integration. A historical analysis of the notion of integration in Western migration policy may show that in some periods the former understanding of integration has been dominant, while at other times the latter has prevailed.[62] For the purposes of this research, it is enough to observe that it is apparently possible to interpret the role of integration in the granting of stronger rights over time in such a contradictory manner (cause – effect).

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61 Groenendijk discerns three different interpretations of the role of integration in policy: a secure residence status will enhance the integration of the migrant; a secure residence status is the remuneration for a completed integration; and the lack of integration or the assumed unfitness to integrate are grounds for refusal of admission to the country, C.A. Groenendijk, 'Legal Concepts of Integration in EU Migration Law' (2004) 6 European Journal of Migration and Law 111, p.113. I will not discuss the latter since this falls outside the scope of this analysis (as no time has been spent in the territory).

62 See, for example, R. Van Oers, E. Ersboll and D. Kostakopoulou, *A Re-definition of Belonging* (Martinus Nijhoff 2009); E. Guild, C.A. Groenendijk and S. Carrera, *Illiberal Liberal States* (Ashgate 2009); K.M. De Vries, *Integration at the Border. The Dutch Act on Integration Abroad and International Immigration Law* (Hart Publishers 2013).

The same goes for equality. As phrased in Recital 12, the question of equal treatment would seem to be a means to promote the integration of long-term residents. In this sense, it could be understood as a form of positive discrimination: since such migrants do not yet have the same position in society, their equal treatment should enable them to gain a position similar to that of citizens over time. An opposite reading, however, is also possible, whereby long-term residents enjoy equal treatment with nationals because, over the course of time, the two group have become the same and should therefore have corresponding rights. The point then is that the only difference between a long-term resident and a national is their different legal entitlements.

Both the equality argument and the integration argument fail, therefore, to explain why migrants receive stronger rights *over time*. Admittedly they provide arguments as to why stronger rights should be provided to migrants *who are equal to citizens at a certain moment*, or to those migrants who have been integrated or must integrate. Yet what this has to do with *lapse of time*, or even which form of time is at stake here, remains unclear. On the basis of these arguments it is equally possible to grant a migrant stronger rights on the first day of his residence (either because he is already similar to a citizen or because this will help him integrate), or never to grant migrants any stronger rights (either because they remain different or do not integrate at all).

Why this persistent assumption that migrants become equal or integrate over time holds true remains entirely underexposed. As does the question of *when* such assumption holds true. This proves the point made in the introduction (section 1.4) that the *when* of time seems to suggest a mere reference to clock time, while other conceptions of time are at work implicitly. Upon closer scrutiny, it becomes clear that these rationales (i.e. equality and integration) are based both on clock *and* human time. After all, this time is the time of someone who at a certain moment (his present) is either integrated or equal, or will become integrated or equal in the near future. The *when* of time reveals an expectation of someone's future or an assessment of his past. Yet it is precisely the relationship with clock time that is puzzling here, given that it is the link with the lapse of clock time (five years) that constitutes the problem. Because how does this general, objective lapse of clock time relate to human time with regard to the time hypothesis? This is not only a *general* question of how the temporal aspect of human time relates to clock time, but also raises the question of how the time of an *individual* human being interacts with these five years of general, standardised clock time. These questions point to a larger philosophical problem, which is dealt with in part 2 of this book. This is that it is one thing to *be equal or integrated* at a certain moment, but how one *becomes equal or integrated* is an entirely different question.

The third argument has already been briefly discussed. As the previously cited Recital 6 states, the residence must be 'legal and continuous *in order to show that the*

person has put down roots in the country.[63] It is important to recall that this same recital states that the duration of residence is the main criterion for acquiring the status of long-term resident. If this period of residence is legal and continuous, the person is deemed, it appears, to have 'become rooted' in the country. This is a rather puzzling statement; legal and continuous residence proves the existence of roots in the country, which is an argument for granting stronger rights. Yet what is the precise relationship between roots and legal, continuous time? We have observed earlier that this qualification of time as legal and continuous serves to determine whether the residence is non-temporal and eventually serves as a basis for the collective expectation. Does the notion of roots provide us with an argument for answering the question of why a certain legal and continuous lapse of time leads to the presumption that a migrant will remain in the territory? The answer would be that the migrant puts down roots over the course of time. These make him 'rooted' in the country, which is why we could expect that he is likely to remain here.

However interesting this may sound, it can again only serve as a starting point for further analysis. This is because two problems – the one legal and the other philosophical – keep recurring. And both of them are marked by clock time becoming entangled with human time. The first of these problems is the persistent matter of legal qualification. How should this phenomenon of rootedness over time be *legally qualified*? This question gives rise to a whole series of sub-questions, all of which we have now encountered on several occasions. *When* has the migrant become rooted enough for it to be expected that he will reside longer? *Which* time counts? *Who* qualifies? And does the *migrant's behaviour* make a difference? Several of the issues encountered above relate to these questions. Does only legal and continuous time lead to roots? Is someone who commits a crime not rooted? Do the roots of someone who intends to leave still develop over time?

These questions all presume that, over time, something happens with the migrant, and that this must subsequently be qualified as leading to a different residence status. However, exactly what changes over time is not addressed, and that is precisely the *philosophical* problem that keeps returning. What and who is *becoming* rooted over time? When does the process finish? And how *precisely* does this relate to progress of clock time? These are all recurring questions related to this philosophical perspective of the problem.

63 Emphasis added.

2.4 Conclusions: The Time Hypothesis in Full Sight

Closer scrutiny of the Long-term Residence Directive provided a good opportunity to identify the use of time in the Directive. It was relatively easy to identify the time hypothesis since this was found to underlie the entire Directive. The time hypothesis also proved to be one of the fundamentals underlying European migration law, as already expressed at the Tampere meeting in 1999. The focus of the analysis therefore quickly shifted to the specific significance of time within the Long-term Residence Directive, and I found that not just any time qualifies for stronger residence status.

Time must first of all be *legal, continuous* and *immediately prior to* the submission of the relevant application. The question of continuity in particular struck my attention since the way it is used here differed somehow from the common understanding of the notion, where continuous is taken to mean 'not interrupted'. I encountered three forms of continuous time: non-interrupted time without intervals of absence from the territory; non-interrupted time with short intervals of absence outside the territory and which intervals *count* as time inside the territory; and non-interrupted time with long intervals of absence outside the territory and which intervals *do not count* as time inside the territory. This leads to two important conclusions: time must be linked to residence *inside* the territory, while what counts as time inside the territory can be very different from a straightforward understanding of what constitutes time inside a territory (time inside the territory = time inside the territory). This latter divergence in meaning is very much linked to the observation that time can be *manipulated* and *calculated* in complex ways within the meaning of the Directive. The most interesting example of this is time spent in the territory for study or vocational training prior to residence with a more permanent status, given that only half of such time counts as continuous time. This manipulation of time criteria stems from the use of clock time in legal time. It is the standardised and general character of clock time that makes it easy to adjust the time criteria to suit the desired policy goal.

The question of continuity is very much linked to the *temporary, non-temporary* or relatively *permanent* character of time spent in the territory. In order for a migrant to be eligible for long-term resident status, time must be non-temporary, while long-term resident status itself has a permanent character. Just like the question of continuity, questions of temporary or non-temporary and permanent time were also found to be qualifications of time, and not mere descriptions of actual time spent by a migrant in the territory. Such a description of time implies a *post facto* analysis, which would be useless for the purposes of defining categories for granting residence permits (no one would receive a permit because no residence would be permanent). After all, the idea is that the migrants who receive a residence permit are those who will reside longer in the territory in the future, and not those migrants who have just resided for a long period

in the past, but who migrate tomorrow. I therefore sought to establish a future-oriented understanding of permanence.

I concluded that this future-oriented understanding implied a legal construction of intention, on which an expectation of the future was based. Such a constructed intention could not simply be equated to the migrant's subjective intention since such intention could easily change in the future (the migrant can decide to emigrate tomorrow). Just as intended permanence can change into temporary residence, so, too, can a temporary stay become permanent residence. These categories thus have to signify something more than mere subjective intention.

These notions of the temporary, non-temporary and permanent character of time clearly refer to the *human time* hidden in migration law. It is the presence of *someone* in the territory that cannot be grasped merely in terms of clock time as this presence is grounded on *the person's future*. Such a distinction is not possible on the basis of mere clock time as we would then only be able to determine the period of time (i.e. five years) in the territory. The same applies to the criterion of continuity, which also clearly refers to *temporal* and, therefore, *human time*. This, too, was shown to be merely a matter of expectation. After all, the question of continuity boils down to the assessment of whether someone has stayed elsewhere long enough for it to be expected that he will reside there in the *future* (or at least not settle here). Yet it is the *combination* of *clock* and *human time* that is at stake in *legal time*.

Although law deals with *human time*, it certainly endeavours to objectify the expectation of the migrant's future in order not to rely merely on his subjective intention (whether alleged or otherwise). Legal time attempts to compose a more reliable expectation of the future. Non-temporary time is constructed on the basis of the objective of the residence, which is linked to the permit for which the migrant applies. A migrant who intends to stay in the territory for study purposes will apply for a study permit. This is deemed to be temporary because the end of the stay is foreseen in the objective (i.e. graduation). If, however, the migrant applies for family reunification, his time is regarded as non-temporary since the objective of such residence is to remain in the territory with his family. Permanent time is non-temporary time, substantiated with evidence that a certain amount of clock time has been spent in the territory (at least five years, depending on the question of continuity). This period of time in the territory serves as proof of the expectation that the migrant's stay will be non-temporary. It is in this sense that permanent signifies *expected* and substantiated non-temporary time, based on continuous long-term residence in the territory. The intention to stay permanently in the territory changes from something still to be proved over the course of a certain period of time into an expectation that the migrant will remain settled in the territory in the near future, substantiated by five years of time in the territory. This is one of the important reasons why the migrant can apply for stronger rights: he is expected to reside permanently in the territory after a certain period of residence.

A next important conclusion relates to the *moment of the legal decision.* As we have just seen with the notions of temporary or non-temporary and permanent residence, these qualifications can only be used at a *moment* when the situation that is qualified has not yet come to an end. It requires an expectation, which has to be objectified and thus distinguished from the mere subjective expectation of the migrant. Yet it is not only the expectation that has to be objectified; the legal moment, too, is different from the migrant's present. Although law makes use of the temporal aspect of human time (i.e. the past and future at a certain moment in the present), it does not coincide with it because it fixates and objectifies a specific *legal present*: the moment of the legal decision. I will discuss this aspect in more depth later on, given that it is the gap between this legal present and the present of human time that gives rise to endless problems.

We have seen the first signs of such problems in this chapter. Because the legal decision is fixated at a certain moment, the temporal qualification of the residence is necessarily a qualification of an expected future. And this expected future can change in that future. Just like the migrant's subjective intention can change (and he may decide to leave the territory), and the residence permit can come to an end because the circumstances change: if, for example, the migrant now forms a threat to public security and policy, or if the migrant fraudulently acquired the permit in the first place. The qualification of time is, therefore, momentaneous; it necessarily reflects a certain expectation at a certain moment. Like every expectation, however, it always risks being falsified after lapse of time. The law borrows temporality from human time and creates a legal present from which the future and past are perceived. How this temporality of human time relates to lapse of time, however, remains unclear. This is because temporality seems to imply a moment, while clock time implies succession. At this point we can only observe this difference, and the problems it generates in law. A more in-depth philosophical analysis of the issue will follow in part 2.

This construction of expectation does not, however, answer the question of the rationale behind the time hypothesis. Instead, it shifts the focus to the question of expectation: why is it reasonable to expect, after lapse of time, that the migrant will settle in the territory? Although the Directive provides three answers to this question, all fail to convince as none of them (i.e. the equality argument, the question of integration and the notion of roots) addresses the time aspects of the time hypothesis. It therefore remains entirely unclear how roots, equality and integration relate to lapse of time. Are they necessary consequences of time (and so applying to everyone)? Are they general consequences (with some individual exceptions)? Or is there no causal relationship whatsoever? And if there is a relationship with time, how much time must be spent before stronger rights are granted?

These questions show the difficult entanglement of clock and human time, and hint at the larger philosophical conundrum that I will touch on in the philosophical part of this research. That these problems are entangled with clear-cut legal issues must be

evident by now. In the remainder of this book I will consequently argue that a proper understanding of the philosophical problems related to the time hypothesis is essential for a better comprehension of the legal questions at stake, given that legal time refers not only to clock time, but also to human time. This philosophical analysis further scrutinises human time and its relationship to the progress of time. Before engaging in the philosophical analysis, I will examine several other domains of contemporary European migration law in order to establish the actual scope of the time hypothesis. First, however, I will analyse Article 8 of the European Convention on Human Rights as this will be revealing for the relationship between the time hypothesis, as embodied in general laws, and the application of general rules in specific cases in case law.

3.

The Time Hypothesis and the Individual

Article 8 of the European Convention on Human Rights

Character of individual time – Legal present and the human present – Ties or time – Temporality based on identity – Expectation of crime and identity – Tolerated illegal time

In the previous chapter I analysed the time hypothesis in its most prominent appearance in European migration law. Third-country nationals can be granted a long-term resident permit after a period of five years because, by then, it is expected that they will reside permanently in the territory. The Long-term Residence Directive, in which I identified the time hypothesis, is a legal act within the meaning of Article 288 Treaty on the Functioning of the European Union (TFEU). It is binding as to the results to be achieved, while it is up to the national authorities of each Member State to choose the form and methods to be used to attain these results. Most of the case law on the Directive is national owing to the fact that individuals cannot seek direct recourse to the Court of Justice of the European Union on the basis of EU law in individual cases.[64] Relevant case law on the meaning and scope of provisions in directives is either, therefore, the result of a preliminary question by a national court (Article 267 TFEU) or the result of an infringement procedure (Article 258 TFEU). Because of these restrictions there is not much Court of Justice case law on European migration law, while the case law that is to be found does not deal with the specific circumstances of individual cases since that is up to the national authorities.

The above analysis of the Long-term Residence Directive inevitably, therefore, was of a general character because of being restricted to the text of the Directive (and cases on the meaning of certain provisions in the Directive). Like all legislation, the Directive contains general rules that are applicable to an open group of actors. This is in contrast to a decision that applies to a closed group of actors only,[65] and also case law, where general rules are applied to the specific circumstances of a case. This general character of the analysis necessarily has consequences for the meaning of time.

The focus in the previous chapter was on the rule in Article 4 of the Long-term Residence Directive, which stipulates that migrants who have resided legally and continuously in the territory for five years will be granted long-term resident status. It has become clear that the period of five years has a general and objective character. It is a formal time criterion; anyone wanting to apply for the said status must have resided in the territory for this period of time. There is no scope to assess the specific circumstances

64 Chalmers, *European Union Law*, p. 444 et seq.
65 See ibid, p. 448 et seq.

of the case, except for qualifying the time as legal, non-temporary, continuous and immediately prior.

Rather than focusing on such a formal understanding of time in the time hypothesis, this chapter examines a field of law characterised by yet another usage of time. For this I will analyse the case law of the European Court of Human Rights, specifically relating to Article 8 of the European Convention of Human Rights ('the Convention'). Even before starting such an analysis I can predict that this will lead to a more detailed understanding of time, given that case law's application of the general rule takes account of all the specific circumstances of the case. A more detailed, or more elaborate, and more material understanding of time can therefore be expected. I will dub this 'individual time' so as to contrast it with the 'formal time' of the Long-term Residence Directive.

Such individual time should be distinguished from human time because it is implied in, but does not coincide with human time. As mentioned in the introduction, human time is the time of *someone* (i.e. a *mortal human being*) and is characterised by *temporality* (i.e. the need for a temporal *present*, entailing a *past* and a *future*). I see human time as the experience of the passage of time in human affairs. This definition of human time is, therefore, abstract and an anthropological account of how time is part of the human condition. This contrasts with the time of a specific individual, given that time in the *life* of a single individual is unique. It is this latter *individual time, the lived time of this singular life,* that is the focus of the analysis in this chapter. If we focus on the endless details and particularities of a life, the life of every individual is obviously endlessly complex and unique. In case law, however, there are some criteria circulating that qualify individual time in a general manner. As I will show, the level of generality differs from that in an formal time conception.

There are two reasons, therefore, to include an analysis of Article 8 of the Convention in this research. First and foremost, the case law, most notably that on private life, clearly contains the time hypothesis. We will see that the general rule under Article 8 is clear: over time migrants generally receive stronger rights. The case law on Article 8 focuses to a large extent on the relationship with the amount of time spent in the territory by the migrant. What is particularly interesting, however, is that the way the time hypothesis functions here is entirely different from in the Long-term Residence Directive.

The second, more pragmatic reason for scrutinising this case law is that it is the only relevant *case law* available at a European level (and, therefore, the only opportunity to analyse 'individual time'). As mentioned earlier, individuals cannot bring their individual cases on residence entitlements before the Court of Justice as the application of EU law in individual cases is a responsibility of national authorities. Since this research does not extend to national law, and EU law contains few examples of cases in which the individual circumstances of the case play a role, there is little case law that qualifies for

analysis. Article 8 of the Convention, however, plays a significant role in cases relating to residence entitlements and also qualifies on the above-mentioned grounds that it clearly reflects the time hypothesis.

A final preliminary remark on the analysis of Article 8 of the Convention is that the provision's meaning for migration law has become apparent in the vast case law of the Court. The Court has elaborately dealt with the question of whether migrants can successfully invoke a claim under Article 8. The impact of this provision has been the object of plenty of in-depth analysis, which will not be reproduced here.[66] Such traditional scrutiny often analyses the Court's case law on Article 8 along two binaries: family/private life and positive/negative obligations. Yet the Court has stressed that the applicable principles are the same, irrespective of these questions.[67] That is not, however, the reason that I will not be discussing these dogmatic matters relating to the case law of the Court.

Although the analysis of my reading of Article 8 will focus on time, it will differ from the analysis in chapter 4 on family reunification. This current chapter largely disregards the relationship between family members and time as this topic is dealt with extensively in chapter 4. Whereas the question of family life does play an important role in the case law on Article 8, it does not add very much to my analysis based on the Family Reunification Directive. The focus of the discussion of family life in this current chapter, along with that of private life, will therefore be on the relationship between time and ties. This will highlight the specific *individual* character of time in the case law on Article 8, while also endorsing the previous chapter's conclusions on the rationale behind the time hypothesis and the legal construction of expectation. Finally I will draw some further conclusions on the meaning of human time, hidden as it is in the legal time of European migration law.

66 See, for example, E. Hilbrink, *Adjudicating the Public Interest in Denying Residence to Foreign Nationals. An Empirical Legal Analysis of Strasbourg and Luxembourg Case Law* (2017 (forthcoming)); Boeles and others, *European Migration Law*, B. De Hart, 'Love thy Neighbour, Family Reunification and the Rights of Insiders' (2009) European Journal of Migration and Law 235; S.K. Van Walsum, 'Against All Odds. How Single and Divorced Migrant Mothers were Eventually able to Claim their Right to Respect for Family Life' (2009) European Journal of Migration and Law C. Smith, 'The Best Interests of the Child in the Expulsion and First-entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle? ' (2015) 17 European Journal of Migration and Law 70.

67 See, for the first time, ECHR 19 February 1996, *Gül v.* Switzerland, 23218/94, para. 38.

3.1 Who Qualifies for Protection Under Article 8?

Article 8 of the Convention states that 'Everyone has the right to respect for his private and family life, his home and his correspondence.' However, this formulation does not convey the full importance of this provision in contemporary European migration law, with the European Court of Human Rights having provided certain important rights to migrants who reside in the territory of a Member State of the Council of Europe. Even a family member of someone who resides in one of the Member States can, for example, derive certain entitlements from this provision under certain circumstances, even while the family member lives outside the territory.

Migrants who reside in the territory of a Member State of the Council of Europe can receive protection under Article 8. Under certain circumstances, the withdrawal of a granted permit may breach Article 8 (negative obligation). It is even possible, under exceptional circumstances, for the state to be obliged to grant a residence entitlement on the basis of this provision (positive obligation). With regard to the amount of time to be spent in the territory, Article 8 is similar to the Long-term Residence Directive in that they both protect long-term residing migrants. In Üner v. *The Netherlands,*[68] the Court for the first time elaborately discussed the situation of 'settled migrants' whose residence permits were being revoked because of their conviction for criminal offences. Whereas the Court in this case did not define this notion of 'settled migrants' in any great detail, it seems to have equated them with long-term migrants (paras 55-56).[69] It would appear to be beyond discussion that if a migrant resides in the territory of the state for a long period, it becomes more difficult to withdraw his residence permit.

In a later judgment, however, the Court broadened the meaning of 'settled migrants'. This was in *Jeunesse v. The Netherlands*, when it defined settled migrants as 'persons who have already been granted formally a right of residence in a host country'.[70] In this sense, 'settled migrants' is used merely to distinguish between the situation in which the migrant unlawfully stays in the territory and the situation in which he has been granted a right of residence (an important distinction in the Court's case law, as we will see in section 3.5).

These settled migrants – in the meaning of Üner or *Jeunesse* – are not on a par with long-term residents in the Long-term Residence Directive (and nor the other way around). The Court in the *Üner* judgment does not explicitly mention the Long-

68 ECHR 18 October 2006, Üner v. The Netherlands, 46410/99.

69 Interestingly enough, the notion of 'settled *im*migrants' was used in case law before the *Üner* judgment. This seems, however, to have been used in a similar vein as in *Üner*; in other words, to refer to migrants who had lawfully spent time in the country and 'achieved settled status'. Such a 'settlement permit' implied a stronger status than the later 'formal right of stay' (ECHR 3 October 2014, *Jeunesse v. The Netherlands,* 12738/10, para. 104). See, for example, ECHR 19 February 1996, *Gül v. Switzerland,* 23218/94, paras 13-15.

70 *Jeunesse v. The Netherlands,* ECHR 3 October 2014, 12738/10, para. 104.

term Resident Directive, while we will also see that the meaning of long-term residing migrants in the Court's entire case law differs in some major respects. In the *Üner* judgment,[71] the Court refers to recommendations by the Parliamentary Assembly of the Council of Europe on the non-expulsion of long-term immigrants.[72] Yet it does not adopt these recommendations to provide an absolute right for long-residing migrants, and nor does it implement the clear-cut timeframe proposed. The Court refrains from such measures because of the state's sovereign right to control the entry and residence of migrants in its territory.[73]

It is this difference with the Long-term Residence Directive that makes this case law particularly interesting. After all, the European Court of Human Rights could also have created a formal, five-year clock time criterion in its case law. The fact that the Court uses other criteria consequently makes it interesting to analyse the differences with legal time as used in the Long-term Residence Directive.

3.2 Must Time Again Be Continuous, Immediately Prior and Legal?

In endeavouring to demonstrate a different conception of time at work in the case law of the Court, I will start by comparing legal time in Article 8 with legal time in the Long-term Residence Directive. It is only by contrasting them in this way that the differences will become clear. The previous chapter found that to qualify for long-term resident status, a migrant must have spent five years of legal, continuous, immediately prior and non-temporary time in the territory. Are similar criteria to be found in the case law of the Court?

Continuous Time

Let us start with the question of continuous time since this gave much food for thought in the discussion in the previous chapter. The first important observation is that the question of continuity does not play a significant role in the Court's case law as it is not one of the explicit criteria applied in seeking to balance the interests of the state against those of the migrant.[74]

There are some cases, however, where the question of continuity is discussed, albeit without playing a decisive role. In *Osman v. Denmark*, for instance, the Court had to assess whether the Danish authorities were obliged to reinstate the minor's residence

71 ECHR 18 October 2006, *Üner v. The Netherlands*, 46410/99, paras 55-56.

72 Recommendation 1504 (2001), Parliamentary Assembly, Council of Europe, text adopted by the Standing Committee on behalf of the Assembly on 14 March 2001.

73 ECHR 18 October 2006, *Üner v. The Netherlands*, 46410/99, para. 56.

74 Compare the criteria in ECHR 23 June 2008, *Maslov v. Austria,* 1638/03. I will briefly discuss these criteria in sections 3.3 and 3.4.

permit after she had been residing in Kenya for more than two years.[75] Her parents had sent the young girl to Kenya – against her will – to stay with her grandmother in a refugee camp. Under Danish regulations, such a period of residence outside the territory would result in the residence permit being lost. The Court stated, however, that withdrawal of this status would breach Article 8. Whereas the question of residence outside the territory certainly played a role in the discussion, this was framed in terms of the child's ties with her country of origin and country of desired residence. The child had ties with both her country of birth (Somalia), where she had spent the first four years of her life, and Kenya, where she had lived till the age of seven. From the age of seven to fifteen she had lived in Denmark, where she received education. She spoke Danish, as well as Somali. Instead of focusing on how the period outside the territory related to these ties, or where she had resided immediately prior to requesting re-admittance to Denmark, the Court underscored the importance of the formative years she spent in Denmark.

A same lack of interest in the formal question of continuity can be distilled from the case of *Gezginci v. Switzerland,*[76] in which the Court held that the expulsion of a migrant who had resided in the territory for more than 30 years constituted an interference with his right to a private life, as protected under Article 8. The fact that the migrant had resided outside the territory on several occasions during this period of 30 years did not make any difference. Eventually, however, the Court concluded that this interference was justified and that Article 8 was consequently not breached.

Continuity is clearly not an independent and formal criterion for the assessment under Article 8, although it may play a role in assessing the ties with the country.[77]

Immediately Prior To

Must the time spent be immediately prior? This instantly gives rise to another question: immediately prior to what? The Long-term Residence Directive is neatly divided into two separate domains: the situation before long-term resident status is granted, and the situation afterwards. The first domain is the *conditio sine qua non* for the second, and the residence in the territory has to be immediately prior to it. And if long-term resident status is to be withdrawn, the *actual* risk simply has to be assessed. Obviously the past can be taken into account when assessing whether there is an actual risk. However, a previous risk is not enough in itself to justify withdrawal of the permit; in other words, the risk must not have ceased to exist.

Such a neat division between the acquisition and withdrawal of a residence permit does not exist in the Court's case law as the latter deals merely with the question of

75 ECHR 14 June 2011, *Osman v. Denmark*, 38058/09.
76 ECHR 9 December 2010, *Gezginci v. Switzerland*, 16327/05.
77 I will discuss this matter in detail in section 3.3.

whether an *expulsion* can amount to a violation of Article 8.[78] The criterion 'immediately prior to' is indeed, therefore, difficult to compare here. Analytically speaking, there would seem to be two options for interpreting what these words mean: immediately prior to the decision of the national authorities to withdraw (or not grant) the residence permit, *or* immediately prior to the decision of the court responsible for deciding whether an expulsion amounts to a breach of Article 8. The former is referred to as a 'judgment *ex tunc*', while the latter is a 'judgment *ex nunc*'.

The Court's ruling on this matter in the case of *A.A. v. United Kingdom* was clear. While referring to its expulsion case law under Article 3 of the Convention, it stated that 'The Court sees no reason to take a different approach to the assessment of the proportionality of a deportation under Article 8 of the Convention and points out in this regard that its task is to assess the compatibility with the Convention of the applicant's *actual expulsion* and not of the final expulsion order. (…) Any other approach would render the protection of the Convention theoretical and illusory by allowing Contracting States to expel applicants months, even years, after a final order had been made notwithstanding the fact that such expulsion would be disproportionate having regard to *subsequent developments*.'[79]

Consequently the relevant time in cases of withdrawal of a residence permit is not the time immediately prior to the decision to withdraw. The Court requires an *ex nunc* judgment on the question of whether an expulsion can constitute a breach of Article 8. This implies that all the time that has lapsed since the challenged decision must be taken into account.

As already outlined in section 2.2.2, however, the difference between the situation under the Directive and Article 8 is somewhat more complicated because of the difference between the application for and the withdrawal of a permit. The *withdrawal* of long-term resident status also requires an *ex nunc* judgment, albeit a slightly different one. This assessment has to determine whether there is *an actual and sufficiently serious threat* to public order, implying that merely a risk in the past does not meet this test. This *ex nunc* judgment takes account only of the threat to public order now, while the judgment under Article 8 balances any breach of public order against the ties the person has with his country of residence (and country of origin). It could be said that the assessment under Article 8 implies a balancing of the migrant's entire criminal history against the ties that he has developed over time during his presence in the territory. The

78 We will see that, under exceptional circumstances, the state can be under a positive obligation to grant a residence entitlement to those who stay in the territory without authorisation. Yet even in such cases the Court states only that the expulsion would amount to a violation (implying that the state should provide a residence entitlement).

79 ECHR 20 September 2011, *A.A. v. United Kingdom*, 8000/08, para. 67, emphasis added. The Court refers here to *Maslov v. Austria*, 23 June 2008, 1638/03, para. 93.

focus in both will be on the present moment: a recent criminal conviction will weigh more heavily than a sentence long ago, just as ties that are still strong in the present are more important than ties that have become weaker.

The matter of *ex nunc* and *ex tunc* assessments of the facts adds a new dimension to the relationship between *legal time, human time* and *clock time*. As we saw in the discussion of permanence in the previous chapter, the law constructs an expectation of the future at a certain moment. Now, however, we see that the law also creates an image of the past by determining the relevant moment of the decision. Just like the question of continuity, we see that what counts as *legal time* depends on a qualification. The *legal past is not merely the time till the present of the human observer; instead, it is the previous lapse of time till the 'legally relevant now'*. Again we see how the construction of the *legal moment* reflects temporality by implying both a future and a past, albeit that this moment does not necessarily coincide with the present moment of human time.

Lawful Time

As obvious as the answer to the question of lawful time was under the Long-term Resident Directive, as complicated this same criterion is under Article 8. It became apparent in the previous discussion that cases in which migrants legally spend time in the territory of a state after their residence permit has been withdrawn fall within the scope of Article 8. In this sense, Article 8 and the Long-term Residence Directive overlap: they can deal with the same migrants (and Article 8 is consequently reflected in the wording of the Directive with regard to the withdrawal of a given status). Article 8, however, has a wider scope than the Long-term Residence Directive because it is *not restricted* to cases of legal residence. Instead, Article 8 is also relevant for migrants who have spent time in the territory while their residence was unlawful.

The first time the Court held that Article 8 was breached in a case of a migrant who had unlawfully spent time in the territory of a Member State was in *Rodrigues da Silva and Hoogkamer v. The Netherlands.*[80] Previously it had left open the possibility that cases of illegal stay could breach Article 8, but all appeals in this respect had been declared inadmissible.[81] Before the case of *Rodrigues da Silva,* the Court had given ample weight to the consideration that a migrant who resided in the territory of a state unlawfully, without complying with the regulations in force, confronted the authorities with a *fait accompli.*[82] Under such circumstances, the migrant had no entitlement to expect that any right of residence would be conferred upon him. According to the Court, however,

80 ECHR 31 January 2006, Rodrigues da Silva and Hoogkamer v. The Netherlands, 50435/99.

81 See ECHR 19 February 1996, *Gül v. Switzerland,* 23218/94; ECHR 28 November 1996, *Ahmut v. The Netherlands*, 21702/93; ECHR 22 June 1999, *Ajayi and Others v. United Kingdom*, 276334/95 (decision); ECHR 5 September 2000, *Solomon v. The Netherlands*, 44328/98 (decision);ECHR 13 May 2003, *Chandra and Others v. The Netherlands*, 53102/99; ECHR 5 April 2005 *Benamar v. The Netherlands*, 43786/04 (decision).

82 ECHR 13 May 2003, Chandra and Others v. The Netherlands, 53102/99.

the case of *Rodrigues da Silva* 'should be distinguished from those in which the Court considered that the persons concerned could not at any time have reasonably expected to be able to continue family life in the host country'.[83] Given the specific circumstances of the case (including the fact that the mother would have to leave her young daughter behind with her father and grandparents, while she played an important role in the life of her child, and the father did not), the interest of the state did not outweigh the interest of the migrant, and a breach of Article 8 was consequently found. What is important for my understanding of the case law at this point is not so much the specific circumstances of the case, but *rather the way the Court seems to define the question of illegality: as a matter of expectation.*

Under normal circumstances, migrants who have no reason to expect that their family or private life can be continued in the particular country have not much to gain under Article 8. The mere fact of their presence over time in a territory does not create an obligation for the state to protect their family or private life. The Court already ruled in *Abdulaziz* that Article 8 does not contain a general obligation on the part of the state to respect a married couple's choice of the country of their matrimonial residence, and the Court has since consistently reiterated this.[84] The sovereign right of a state to regulate the entry and stay of migrants in a territory implies that migrants cannot derive an absolute right to residence under Article 8. It is in this sense that the question of legality plays a paramount role in the case law of the Court. However, it is not a *conditio sine qua non*, as in the Long-term Residence Directive. In the latter, the legality of residence is a *necessary* condition, whereas in the former it is merely an *important* condition. Under Article 8, the question of legality is used to determine whether a migrant can expect entitlements under Article 8. If the alleged entitlements were 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',[85] there is little, legally speaking, that the migrant can expect. Nevertheless it is still possible, under such circumstances, to derive entitlements under Article 8, as discussed in section 3.5.

If, as we have just encountered, time need not necessarily be continuous, immediately prior or legal, which time then qualifies for stronger entitlements under Article 8? I argue below that the Court's migration case law on Article 8 is structured around two pivotal interrelated elements: identity and time. Scrutinising the case law along these lines will enable a better appreciation of how exactly the time hypothesis functions in this area of European migration law. I will also show the ways in which

83 ECHR 31 January 2006, Rodrigues da Silva and Hoogkamer v. The Netherlands, 50435/99, para. 43.

84 In the recent case of *Jeunesse v. The Netherlands,* ECHR 3 October 2014, 12738/10, para. 107.

85 ECHR 31 January 2006, Rodrigues da Silva and Hoogkamer v. The Netherlands, 50435/99, para. 39.

time is legally qualified. This scrutiny will enable me to draw some conclusions on the rationale behind the time hypothesis and the meaning of human time at work in this legal time.

3.3 Time and Ties

The Court has stipulated in a series of pivotal cases which criteria must be taken into account in deciding whether a settled migrant's residence permit can be withdrawn without breaching Article 8.[86] For my purposes, the most revealing criterion in the case law on Article 8 is '*the solidity of social, cultural and family ties with the host country and with the country of destination.*' The Court explicitly formulated this criterion for the first time in the case of Üner, while also linking it to the time criterion specified earlier in the *Boultif* case: 'Indeed, the rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account *lies in the assumption that the longer a person has been residing in a particular country, the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be*.'[87] The Court's wording here is reminiscent of the recital in the Long-term Residence Directive that requires residence to be 'legal and continuous in order to show that the person has put down roots in the country.' The similarity is that time is taken as a proxy for something else, which apparently changes over time. Migrants put down deeper roots over time and will have stronger ties with the country in which they have resided for such a time, or at least that is the assumption. Simultaneously, their ties with the country of origin will become weaker. It is in the development of ties in the host country that we can best recognise the time hypothesis.

The Court has stressed on several occasion that it is precisely this relationship between time and ties that Article 8 protects: 'Article 8 also protects the right to establish and develop relationships with other human beings and the outside world (…) and can sometimes embrace aspects of an individual's social identity (…), it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitute part of the concept of "private life" within the meaning of Article 8.'[88]

Yet also the notion of 'family life' under Article 8 can best be understood as a question of ties, albeit in a slightly more complex manner. In fact the question comprises two parts: firstly, the ties the applicant has with his family must be assessed and whether these ties are strong enough; subsequently, the ties the family members have with the

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

87 ECHR 18 October 2006, Üner v. The Netherlands, 46410/99, para. 58.

88 ECHR 18 October 2006, Üner v. The Netherlands, 46410/99, para. 59.

host country and the migrant's country of origin must be scrutinised. The first step is already rather difficult. The Court has held that splitting up a well-functioning family unit constitutes an infringement of a serious nature. This weighs heavily if such a well-functioning family subsequently develops strong ties with the country.[89] In quite a few cases, however, the family situation is much more difficult, such as if the applicant is an adult who argues that his family life with his parents, grandparents or brothers and sisters will be breached by expelling him. In such cases the Court has held that family life is infringed only if there is an element of dependency between the adult and the other members of the family.[90] Yet when family life is indeed seen as being infringed, the important second question is: does anything prevent the family from pursuing its right to family life in the country of origin? That particular question is precisely the same question as that relating to private life: can links with the host country be identified that keep the family members there, or can links be found with the country of origin that create possibilities to practise family life there? One of the most important aspects of the assessment under Article 8, therefore, is a question of ties.[91] Ties with the host country and ties with the country of origin, whether directly or through the family.

Meanwhile it is important to see the relationship between time and ties. In fact, time is qualified by relating it to ties. It is not mere lapse of time that plays a role in the Court's assessment. This is just 'one of the criteria' and, moreover, it is only *assumed* that the migrant gains stronger ties with the country after lapse of time. This is vital for understanding Article 8: it is assumed that, after lapse of time, the migrant has ties with the country, but this has still *to be proved.* Here we see a crucial difference between time

89 ECHR 31 January 2006, *Sezen v. The Netherlands*, 50252/99, para. 49. See also ECHR 10 April 2003, *Mehemi v. France (No. 2),* 53470/99, para. 45. This does not mean that such a situation always constitutes a breach of Article 8; see, for example, ECHR 24 March 2009, *Mbengeh v. Finland*, 43761/06. These references have been taken from S.K. Van Walsum, 'Jurisprudentie over migratierecht en gezinsleven. Deel II artikel 8 EVRM.' (2010) 1 Asiel&Migrantenrecht 520, p. 526.

90 ECHR 9 October 2003, *Slivenko v. Latvia*, 48321/99, para. 97.

91 It is in any case not a question of equality, 'for the Court would reiterate that Article 14 of the Convention safeguards individuals placed in similar situations from any discriminatory differences of treatment in the enjoyment of the rights and freedoms recognised in the Convention and its Protocols (…) In the instant case the applicant cannot be compared to Belgian juvenile delinquents. The latter have a right of abode in their own country and cannot be expelled from it', ECHR 18 February 1991, *Moustaquim v. Belgium*, 12313/86, para. 49. In a later judgment the Court stressed that immigration status *can* amount to a distinction for the purposes of Article 14 'since it is a legal status rather than a personal status. The Court has previously found that a person's place of residence constitutes an aspect of personal status within the scope of Article 14 (…), in spite of the fact that a person can choose their place of residence, meaning that it is not an immutable personal characteristic. Similarly, immigration status where it does not entail, for example, refugee status, involves an element of choice, in that it frequently applies to a person who has chosen to reside in a country of which they are not a national', ECHR 27 September 2011, *Bah v. The United Kingdom*, 56328/07, para. 45. Since the Court does not elaborate further on what immutable personal characteristics would look like, especially in relation to time, I have left this aspect out of the analysis.

in the Long-term Residence Directive and time under Article 8. Under the former, it is *assumed* that, over time, migrants *generally* put down deep roots in the country and, after the lapse of five years, this assumption is enough for stronger entitlements to be obtained by every individual (who meets the relevant criteria). Under Article 8, however, the assumption of time must be substantiated: it must be argued that the migrant does indeed have strong ties with the country. *This proves that time under Article 8 has an individual significance* (the alleged ties that develop over time must be substantiated in every individual case), while *time under the Long-term Residence Directive has a general meaning* (the general assumption is enough for every individual).

What does such an individual substantiation imply? Time under Article 8 is individualised by an actual assessment of the migrant's ties with both the host country and the country of origin. All the circumstances of the case must be assessed. The question of whether he speaks the language of the host country,[92] and that of the country of origin,[93] is relevant, as is the question of whether he has work,[94] has had primary education[95] or studied,[96] or whether he is a member of a church community.[97] Interestingly enough, the material assessment of these ties is often also expressed simply in terms of time, with the length of the period of residence in the country,[98] the length of residence in the country of origin,[99] the number of times he returned to his country of origin,[100] the age at which the migrant came to the country,[101] whether the residence represents a 'considerable length of time in a person's life',[102] whether the migrant is still of an 'adaptable age'[103] and the question of where he has spent his 'formative years'[104] all being important considerations.

Family ties, too, are often expressed in terms of time. An important indication of, for example, the effectiveness of the marriage is its duration.[105] Also important is the question of whether there are any children of the marriage and, if so, their age.[106] As to the relationship between the parent(s) and children, whether the migrant has a caring

92 See, for example, ECHR 4 December 2012, *Butt v. Norway*, 47017/09, para. 58.
93 See, for example, ECHR 8 January 2009, *Joseph Grant v. The United Kingdom*, 10606/07, para. 41.
94 See, for example, ECHR 9 October 2003, *Slivenko v. Austria,* 48321/99, para. 123.
95 See, for example, ECHR 23 June 2008, *Maslov v. Austria*, 1638/03, para. 96.
96 See, for example, ECHR 20 September 2011, *A.A. v. The United Kingdom,* 8000/08, para. 66.
97 See, for example, ECHR 20 September 2011, *A.A. v. The United Kingdom,* 8000/08, para. 64.
98 See, for example, ECHR 9 December 2010, *Gezginci v. Switzerland*, 16372/05, paras 69-70.
99 See, for example, ECHR 19 February 1998, *Dahlia v. France*, 154/1996/773/974, para. 53.
100 See, for example, ECHR 17 February 2009, *Onur v. United Kingdom,* 27319/07, para. 57.
101 See, for example, ECHR 14 June 2011, *Osman v. Denmark*, 38058/09, para. 68.
102 See, for example, ECHR 16 April 2013, Udeh v. Switzerland, 12020/09, para. 48.
103 See, for example, ECHR 22 June 1999, *Ajayi v. United Kingdom*, 27663/95 (decision).
104 See, for example, ECHR 24 November 2009, *Omojudi v. The United Kingdom*, 1820/08, para. 45.
105 See, for example, ECHR 2 November 2001, *Boultif v. Switzerland*, 54273/00, para. 48; ECHR 26 March 1992, *Beldjoudi v. France*, 12083/86, para. 76.
106 See, for example, ECHR 2 November 2001, *Boultif v. Switzerland*, 54273/00, para. 48.

role and the children are dependent on him or her,[107] and whether they actually live together, are important.[108] If the child is an adult, the question of whether he himself has started a family is important.[109] Many of the above aspects are also relevant for the children: at what age did they arrive in the country? Have they spent their formative years there? How long have they lived in or been to the parent's country of origin? Where have they been educated? Do they speak the language (of the host country and the parent's country of origin)? And do they have the nationality of the host country?[110]

From this brief overview of the relevant criteria in the balancing required under Article 8 we can see that a description of the ties that can develop after lapse of time is endless. As soon as one starts to provide a material description of what happened to the migrant over time, any generality seems to fade away. Moreover, it becomes difficult to discern the precise relationship between these ties and time. At first sight, time seems to be expressed in terms of ties, while such ties are often articulated in terms of time. As we have seen in the previous discussion, the arguments merely comprise descriptions of ties (education, work, language, etc) *or* merely sum up elements of time (such as the moment the migrant arrived, the length of residence or the length of marriage). Obviously many arguments have both a meaning related to time and a material meaning. 'Formative years', education, language, work and so on all gain a particular weight from their length expressed in time. Unfortunately both the material aspect (What is the precise relationship between substance and time?) and the time aspect (When are these formative years precisely? How long do they last? And how does it relate to the concept of 'adaptable age' etc) remain fairly vague. And if the relationship between time and ties is already puzzling in the case of an individual, it would seem completely impossible to draw any general conclusions on the relationship between time and ties. As the previous material list of relevant ties does not lend itself to generalisation, *it remains unclear as to whether anything general can be said about the relationship between time and ties.* And that is a problem, specifically because the time hypothesis, of which after all we are seeking a better understanding, is phrased in general terms.

Yet the advantage is that whereas the relationship between time and ties has not become clearer, it has become evident that the rationale behind the time hypothesis is related in some way to the intricate relationship between time and ties. This adds to the observation in the previous chapter concerning roots being put down over time, given that roots and ties would seem to relate to the same phenomenon. Both suggest that putting down roots or developing ties constitute grounds for granting stronger rights. It remains unclear, however, what the precise relationship is between the development of

107 See, for example, ECHR 8 January 2009, *Joseph Grant v. The United Kingdom*, 10606/07, para. 40.
108 See, for example, ECHR 17 February 2009, *Onur v. The United Kingdom*, 27319/07, para. 58.
109 See, for example, ECHR 23 September 2010, *Bousarra v. France*, 25672/07, paras 38-39.
110 See, for example, ECHR 20 December 2011, *A.H. Khan v. The United Kingdom*, 6222/10, para. 39.

ties or the putting down of roots over time. If, therefore, we want to appreciate how ties and roots can form the rationale behind the time hypothesis, we need to understand their relationship with lapse of time. We will see that the answer to this enigma can be found in the relationship between time and *identity*. In the next section, I will consequently examine the crucial role of identity in the case law on Article 8.

3.4 Time and Identity

Many of the migration law cases under Article 8 actually have one other important aspect in common: the migrant has committed a crime. It is the assessment of this crime that is of utmost importance under Article 8 as this counterbalances ties that have developed over time. A fair balance must be struck between, on the one hand, the state's interest in maintaining public order, controlling the entry and residence of aliens, and preventing disorder and crime[111] and, on the other hand, the right of the migrant to a family and private life.

The more serious the infringement of public order, the greater the state's interest in withdrawing the status. If, for example, the offence is of a violent nature, such as in *Boultif* and Üner (in the first case robbery, and in the second case manslaughter and assault committed by an adult), this weighs heavily in the assessment.[112] A non-violent offence, however, is of less weight, while the state has a major interest in combating drug-related crimes,[113] especially the distribution of drugs.[114] The seriousness of the offence must be assessed on the basis of all the circumstances of the case.

The assessment of the crime, however, is not merely an assessment of the previous infringement of the public order. The Court held that 'It has to be born in mind that where (…) the interference with the applicant's rights under Article 8 pursues, as a legitimate aim, the "prevention of disorder or crime" (…), the above criteria ultimately are designed to help evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities.'[115] It is not so much the infringement of public order itself that is important in the assessment, but the future risk that can be derived from it. This is reminiscent of the EU law criterion for the

111 ECHR 20 September 2011, *A.A. v. The United Kingdom,* 8000/08, para. 54.

112 ECHR 23 June 2008, *Maslov v. Austria*, 1638/03, para. 81.

113 Drugs consumption counts as a lesser infringement of public order than drugs distribution; see ECHR 13 February 2001, *Ezzoudi v. France*, 47160/99, para. 34.

114 ECHR 19 February 2008, *Dalia v. France*, 154/1996/773/974, para. 54. 'In view of the devastating effects of drugs on people's lives, the Court understands why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge. Irrespective of the sentence passed on her, the fact that Mrs Dalia took part in such trafficking still weighs as heavily in the balance.'

115 ECHR 23 June 2008, *Maslov v. Austria*, 1638/03, para. 70.

withdrawal of residence permits as discussed in sections 2.2.2 and 3.3. We observed that this entails an assessment of whether the migrant constitutes an 'actual and sufficiently serious risk' to public order. It is important to see that, just as in the EU assessment, the Article 8 assessment boils down to a question of expectation. In the following I will argue that such an expectation of the risk – either in EU law or Article 8 – is based on an assessment of the migrant's identity.

This becomes clearly visible from a case in which the Court did not find a breach of Article 8, notwithstanding the very serious crime committed by the migrant. In *A.A. v. The United Kingdom*, for example, the migrant had been convicted at the age of 15 of raping a 13-year-old girl. The Court stressed that 'There can be no doubt that the applicant's offence was a serious one and the Court considers the comments of the sentencing judge as to the applicant's conduct and the effect of the attack on the victim to be relevant factors to be taken into account'.[116] Nevertheless, the Court found that an expulsion of the migrant would breach Article 8. Several arguments were guiding here. Firstly, the migrant had committed only one crime and had not reoffended after being sentenced (para. 55). Moreover, the migrant was a minor when he committed the offence (para. 60) and the Court had previously held that 'The fact that the applicant was a minor at the time the offence was committed is a relevant consideration in assessing the proportionality of a deportation'.[117] These arguments colour the migrant's identity: he once made a serious mistake, for which he had been punished, but essentially he was seen as a good guy who had changed his life.

This stance was further substantiated by a material assessment of the time he had resided in the country since his offence. While in detention he took advantage of the educational opportunities available and obtained a number of secondary school qualifications (para. 62). Since his release his conduct had been exemplary; he had gained an undergraduate and subsequently postgraduate degree, after which he had found stable employment.

The approach described in *A.A. v. the United Kingdom* was in fact initiated in *Boultif* v. *Switzerland,* when the Court held that 'The time elapsed since the commission *[sic]* of the offence[s] and the applicant's conduct during that period' is significant for assessing the risk the migrant poses to society.[118] In this sense, a migrant's 'exemplary conduct in prison and his employment thereafter mitigate the fears that he constituted a danger to public order and security'.[119] Indeed, the contrary is actually often visible in the Court's case law: migrants persist in criminal behaviour and have a long history of

116 ECHR 20 September 2011, *A.A. v. The United Kingdom,* 8000/08, para. 60.
117 ECHR 23 June 2008, *Maslov v. Austria*, 1638/03, para. 72.
118 ECHR 2 November 2001, *Boultif v. Switzerland*, 54273/00, para. 48.
119 ECHR 23 June 2008, *Maslov v. Austria*, 1638/03, para. 89; see also, for example, ECHR 12 January 2010, *A.W. Khan v. The United Kingdom*, 47486/06.

breaches of public order.[120] The point in such cases is that the criminal behaviour forms an indispensable part of the migrant's identity, and he is therefore expected to persist in such behaviour in the future.

The ties the migrant has with the host country in cases of crimes are ultimately balanced against the future risk of a new breach of public order. This assessment of the future risk is based on an assessment of the migrant's history. *This implies scrutiny of the migrant's identity: if the criminal behaviour has become settled in the migrant's identity, it can be seen as part of his character or as a lasting characteristic, and the migrant can be expected to remain a risk for public order.* In that case, this will weigh heavily in the balancing under Article 8, and the Court will not easily find this provision to have been breached in expulsion cases. If, on the other hand, the criminal behaviour was only an incident and the migrant subsequently changed his life and proved to be a person who behaves correctly, the crime will be less significant in the assessment.

It is important here to see the relationship between time and crime. It is not only an assessment of the future based on an extrapolation of the past (that, after all, is the fate of every assessment of the future). Of more significance is the observation that the future is predicted based on an assessment of the migrant's identity. This identity is constructed on the basis of elements from the past, with some of these elements being assumed to be characteristic of the migrant's identity. The lasting elements of the migrant's identity are the basis on which the migrant's expected future behaviour is grounded.

It is now easy to see that the same is going on as in the relationship between ties and time, as the growth of ties with the host country changed the identity of the migrant. He has become tied to the country because these ties have become an important part of his identity, while the ties with his former country have become less important. Just as we can see how future risk is based on an assessment of the durable parts of the migrant's identity, we can now start to imagine the crucial role of identity in the rationale behind the time hypothesis. We grant stronger rights to a migrant because the ties with the 'others and the outside world' have become a durable part of his identity.

This supports the earlier conclusions on the relationship between human time and legal time. It reflects the attempt to create a reliable future image of the migrant; in other words, a legally relevant expectation *based on the lasting aspects of the migrant's identity*. A temporal understanding (human time), qualified as objective (legal time) and based on the constructed identity of the migrant. It remains puzzling, however, how certain aspects of the migrant's identity become lasting over time for the purposes of identifying the future risk on the basis of these character traits. I will elaborate on this relationship between time and identity in more detail in chapter 10. At this point it is

120 See, for example, ECHR 26 March 1992, *Beldjoudi v. France,* 12083/86, paras 73-75; ECHR 8 January 2009, *Joseph Grant v. The United Kingdom*, 10606/07, para. 39; ECHR 20 December 2011, *A.H. Khan v. The United Kingdom,* 6222/10, para. 36.

important simply to observe the relationship between time, identity and expectation. The assessment of a future risk is based on an assessment of the migrant's identity, just like the ties that have become part of this identity. The proportionality test in Article 8 boils down to a balancing of the future risk and the ties, and therefore to an assessment of the migrant's identity.

3.5 Tolerated Illegal Time

Yet another time argument can be found in the case law on Article 8. We have seen in section 3.2 that migrants who unlawfully reside in the territory of the state have little to expect under Article 8. It is this expectation that appears to be crucial for the growth of entitlements, and it depends largely on the legality of residence. Largely, but not entirely: this is because there are also cases under Article 8 in which the Court grants migrants entitlements even though they have unlawfully resided in the territory. In the following discussion of this case law we will see that while the state's power to control entry does not generally erode over time, it can be counterweighted in exceptional circumstances. This analysis will therefore focus on the toleration of illegal presence.[121]

To reiterate one of the crucial passages in the *Rodrigues da Silva* case, it should be remembered that the Court held that one of the important considerations was 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'.[122] It is the awareness of this precarious status that precludes the development of strong entitlements over time: if one willingly presents the state with a *fait accompli*, it is only under 'very exceptional circumstances' that an expulsion will breach Article 8.[123] The sovereign right to decide who resides in the territory would not seem, therefore, to be eroded by a migrant's mere presence in the territory. As the Court stated in *Jeunesse v. The Netherlands*, 'The corollary of a State's right to control immigration is the duty of aliens such as the applicant to submit to immigration controls and procedures and leave the territory of the Contracting State when so ordered if they are lawfully denied entry or residence.'[124]

121 Another important aspect in this case law on unlawful stay under Article 8 is whether there are children involved. I will disregard this aspect here, however, as it relates more closely to the earlier assessment of the relationship between time, identity and expectation. The complexity of double timelines within the family is discussed in chapter 4. The difference between a child and an adult as to their identity and time goes beyond the scope of and so is disregarded in this research.

122 ECHR 31 January 2006, Rodrigues da Silva and Hoogkamer v. The Netherlands, 50435/99, para. 39.

123 See, for example, ECHR 25 August 1999, *Chandra et al. v. The Netherlands*, 53102/99 (decision); ECHR 3 May 2003, *Yash Priya v. Denmark* 13594/03 (decision); ECHR 31 July 2008, *Darren Omoregie et al. v. Norway*, 265/07, para. 64.

124 ECHR 3 October 2014, *Jeunesse v. The Netherlands,* 12738/10, para. 100.

Despite this strong power of the state to decide who enters and resides in the territory, this power is not absolute. When a state 'tolerates the presence of an alien in its territory thereby allowing him or her to await a decision on an application for a residence permit, an appeal against such a decision or a fresh application for a residence permit, such a Contracting State enables the alien to take part in the host country's society, to form relationships and to create a family there.'[125] And these ties with the country and the family can lead to a successful case under Article 8, even if the migrant has few grounds on which to base any expectations. 'Factors to be taken into account in this context are the extent to which family life would effectively be ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion.'[126] These factors are in fact the same as those applying to settled migrants. The same holds true for the question of tolerance of a migrant's presence over a long period of time, just as such tolerated time is also of considerable weight for settled migrants.[127]

What does this mean? Is the state's sovereign power to control the entry and stay of migrants in the territory protected from possible erosion over time, or does time change something for the state? It has become clear that time changes something for the migrant (ties, roots), and apparently this can, over time, even outweigh the state's power to control entry to the territory. But it is important to determine whether something also changes over time for the state as that may constitute an autonomous argument for granting stronger rights to migrants after lapse of time.

One could argue that the state's power remains the same over time as time does not influence the state's *general capacity* to grant or withdraw the right of entry and stay. Time influences only the possibility to use this power in an individual case. What changes is that because the state tolerated the migrant's presence in the territory, the migrant developed ties during the time that was granted to him. Moreover, this tolerated presence may change the migrant's justified expectation. If the state tolerates a migrant's presence over time, the migrant may slowly but surely begin to believe that the state tacitly consents to his presence. Similarly, if a state repeatedly does not attempt to expel someone who is legally ready to be expelled, that person's expectations may gradually change over time.

The argument would seem to be that *while the sovereign power to regulate migrants' entry to and stay in the territory remains intact over time, the fact that the state does not use this power to enforce its own standards provides an argument, over time, that this*

125 ECHR 3 October 2014, *Jeunesse v. The Netherlands,* 12738/10, para. 103.
126 ECHR 4 December 2012, *Butt v. Norway*, 47017/09, para. 78.
127 See, for example, ECHR 20 September 2011, *A.A. v. The United Kingdom,* 8000/08, paras 66-68.

changes something on the part of the migrant.[128] *This tolerance enables the migrant to develop ties and may gradually change his expectation.* The precise meaning of tolerated time will be further analysed in chapters 8 and 11.

3.6 Conclusions: Expectations Based on Time and Identity

One of the conclusions from the analysis of the Long-term Residence Directive was the observation that clock time can be manipulated and calculated to suit different aims. Its generality and objective character lend themselves to different policy goals: a more restrictive policy can be achieved by changing the time limit for granting stronger status to ten years, while a more lenient policy can be achieved by shortening the period of time required.

At the same time I concluded that the legal time in the Long-term Residence Directive is not dictated merely by clock time: human time is intricately interwoven with clock time. This becomes most visible in the notion of permanent residence, where the five years of clock time become the past of the migrant (i.e. human time). Why such a transformation of clock time into human time can serve as an argument for granting stronger rights remains puzzling. Although it was suggested that this could relate to integration, equality or putting down roots over time, a temporal rationale behind the time hypothesis has so far failed to be found. What conclusions can be drawn from the scrutiny of individual human time in Article 8?

Firstly, I clearly found the time hypothesis to be at work in Article 8. Migrants receive stronger rights after lapse of time, albeit in a much more complex manner than under the Long-term Residence Directive. This complexity arises from a crucial difference between the appreciation of time in the Long-term Residence Directive and that in Article 8. In both cases, time is related to the putting down of roots or development of ties (which I use synonymously in the following). In the former, however, time is qualified in a formal manner, while the latter uses time in an individual fashion. *In a formal perception of qualified time*, a certain lapse of time (i.e. five years) is the proxy for the *general* assumption that individuals develop roots/ties over time. The formal aspect lies in the circumstance that it is not necessary to substantiate this general assumption in every individual case. Instead, the migrant has to comply with some formal criteria (continuity, immediately prior to and legal). These formal criteria are intended to ensure that only non-temporary residing migrants can apply for the stronger status. If a migrant meets these formal criteria, his residence is expected to have

128 This conclusion is confirmed in the analysis of Hilbrink who argues that the power of the state to control the entry and stay of balanced against the substantive arguments of the migrant to pursue their lives on the territory, Hilbrink, *Adjudicating the Public Interest in Denying Residence to Foreign Nationals. An Empirical Legal Analysis of Strasbourg and Luxembourg Case Law*.

become permanent. Yet *if qualified time has an individual significance,* as in the case law on Article 8, everything depends on a *material* assessment of the circumstances of the case. The general and formal perception of time in the Long-term Residence Directive contrasts with the individual and material perception of time in the case law on Article 8.

The actual assessment of the ties in an individual case plays a significant role in this material qualification of what happens with the migrant over time. A list of the various ties and their importance is simply endless. Indeed, almost any generality seems to be lost when time is qualified in a material manner. Yet generality would seem to be a crucial element of the time hypothesis since time leads, in general, to stronger entitlements. Indeed, I have not been able to find a single material description of ties that, if attained, always lead to stronger entitlements. *Whereas a general tendency can be seen in Article 8 that longer residence leads to stronger entitlements, it is fairly impossible to qualify this in general material terms.*

I was nevertheless able to draw some general conclusions on the basis of the case law on Article 8. In the first place, expectation is essential, just like in the Long-term Residence Directive. If the family or private life is created at a time when it could not be expected that such life could be pursued in the host country, few entitlements can be expected under Article 8. Therefore, a justified expectation would seem to be an important prerequisite for stronger entitlements. Yet even if the expectation was not legally justified from the start (because *at that time* the migrant resided unlawfully in the country), this expectation can change over time. As well as such toleration of the migrant's presence in the territory enabling him to develop ties, it may also gradually lead to a justified expectation that he is allowed to stay in the territory. Here, we once again see the intricate entanglement of lapse of time and human time. The latter implies a present moment when there is a future to be expected and a past to be remembered, while the former suggests a succession of moments.

The toleration of presence, however, raises an important question: Does a migrant develop ties only during the time that his residence has been lawful (as suggested in the Long-term Residence Directive)? Or are roots put down whenever a migrant spends time in a territory? The latter seems to be implied by the case law on Article 8, given that migrants who have clearly failed to comply with any form of legally qualified time can receive stronger entitlements, under exceptional circumstances, on the basis of this Article. This is an important observation: time can be qualified and this can strongly diminish the growth of legal entitlements, but it does not eliminate the development of ties or roots. This shows the wider scope of Article 8, alongside the argument that tolerated time in the territory can work in the migrant's favour. It is in this sense that Article 8 could be said to function beneath the system of the Long-term Residence Directive: even if a migrant does not qualify under the Directive, that migrant may gain stronger rights over time on the basis of Article 8.

The analysis of Article 8 also revealed another aspect of human time at work in the legal time of European migration law. On several occasion I found legal time to have a temporal character in the sense that it creates a legally relevant moment at which the future and past are assessed. In the analysis of Article 8 I found the assessment of the migrant's future – and specifically the risk of a breach of public order – to be based on the construction of his identity. *The migrant's future is predicted on the basis of lasting characteristics of his identity*. If he has committed several crimes and did not change his way of life over a long period of time, this criminal behaviour is seen as having settled in his identity, or character if you wish.

Yet also ties that develop over time become durable parts of the migrant's identity. If the migrant has developed ties in the host country, has work and friends here, if he speaks the language, if he is integrated, and if his family lives here and his children were born here and have lived in the country for a long time, his identity is seen as having changed over time and having become rooted in the country. The ties with the host country have then become an important part of his identity, while the ties with his country of origin have slowly faded away. How exactly this relationship between time, ties and changing identity works remains puzzling, however. As does the recurring question of the lapse of time as a succession of moments and temporality (past, present, future).

One final observation regarding the qualification of time should be made. Even though time might not be qualified in a general, formal manner, such as in the case of the Long-term Residence Directive, it is nevertheless susceptible to various other forms of qualification. Indeed, the assessment of the migrant's identity is largely based on differing qualifications of time, based on the specific individual circumstances of the case. It is this individual and material character of time that clearly distinguishes the legal time in Article 8 from the general, formal time in the Long-term Residence Directive. The difference lies in the circumstance that, under formal time (five years, for example), the general assumption that migrants have developed roots or ties over time is enough for them to be granted stronger entitlements, while in individual time this has to be substantiated on the basis of all the circumstances of the case. The similarity is that, in both situations, time represents an attempt to assess the roots of the migrant's identity.

I will pursue this analysis by closely scrutinising the three principle subjects of European migration law: the family member (chapter 4), the refugee (chapter 5) and the economic migrant (chapter 6). Let me first, however, wrap up the observations from the analysis of the time hypothesis in these first two chapters in an intermezzo.

Intermezzo I: the Entanglement of Human and Clock Time in the Time Hypothesis

Migrants present in the territory receive stronger legal residence entitlements after lapse of time in European migration law. That is the hypothesis with which I started this book, and which I have now sufficiently verified in the previous two chapters. Generally speaking, lawfully residing migrants receive stronger rights after progress of time, as stipulated in the Long-term Residence Directive. This was further endorsed by the observation from the analysis of the case law on Article 8 that also a material, individual assessment of the time that a migrant has been present in the territory generally leads to increasing residence entitlements. Under exceptional circumstances, this even applies to migrants who are present unlawfully.

However, not every form of time counts for the time hypothesis. Legal time is always qualified time. The analysis of this qualification revealed that legal time implicitly refers to human time, primarily because law itself reflects the temporality that stems from human time: the legal decision is taken at a moment, and this moment is the legally relevant present in which an objectified expectation and an assessment of the past are made. This legal present, however, does not necessarily coincide with the human present of the migrant. The law can determine which legal moment is to be preferred: the moment of the application, the moment of the administrative decision, or the moment of the judicial decision (ex tunc or ex nunc).

So the manipulation of the legally relevant moment is based not only on human time, but also clearly refers to clock time. This is a clear example of the intricate relationship between human time and clock time as it implies a form of time-travel. As mentioned in the introduction, a calendar can be traversed in two directions: through its axial moment and through the existence of a human present. This means it is possible to go 'back' from the present to the past, and 'forward' from the past to the present. This is what is at stake when determining the legally relevant moment in an ex nunc or ex tunc judgment. Because of the calendar and the migrant's human present, it is possible to go back to determine the relevant moment on the basis of an ex tunc assessment.

The law may reflect the temporality in human time: in creating a legal moment it clearly distinguishes legal time from the migrant's human time. Nevertheless the legal time remains related to the human time of the migrant as it concerns the assessment of his past, and the construction of the expectation of his presence in the territory. This is also revealed in the case law on Article 8: it is the time during which an individual develops ties and roots that can be described and weighed in a material assessment. What happens in this human time is different for every individual.

This points to two final conclusions on the relationship between human time and clock time that is at work in the legal time of the time hypothesis. Law clearly endeavours to objectify the time of the migrant, and this readily relates to the objective, rationalised and standardised clock time. On the basis of clock time it is fairly easy to make a legal rule, such as five years of residence for a stronger status, or to determine when time has been continuous. And it is easy to adjust such rules as this simply requires

a change in the amount of clock time. Ultimately, however, time in migration law must remain related to the human time of the migrant as it is the migrant's presence in the territory that has to be controlled. Legal time would seem therefore, by necessity, to relate to the temporality of human time, and this unavoidably brings a subjective element into the equation. The expected future of the migrant at a certain moment can change at a later moment. A long-term residing migrant can migrate, or a temporary migrant can stay, and even unlawful migrants can remain in the territory.

This brings me to the final conclusion: the temporality of human time implies a moment: either the current moment in the life of the migrant or the legally relevant moment. In clock time it is fairly easy to express lapse of time as this is simply the time between that moment and the next moment. It is difficult, however, to see how lapse of time and the temporality of human time can be related to each other. The latter always presupposes a present moment, while the former implies a succession of moments. So how can they be reconciled? The key to finding a convincing rationale behind the time hypothesis can be found in the reconciliation of temporality and lapse of time.

Time and the Subjects of Migration Law

(chapters 4-6)

4.

Time and the Family

The Family Reunification Directive (2003/86)

Waiting time – Ties with the territory through the family – Time linked to territory – A timeless material assessment – Family time becoming individual time – Enduring moment of the refugee

The description of the time hypothesis has so far focused on the situation of one migrant who receives stronger rights after the progress of time. Yet the picture in many migration situations is not that simple. This has to do with the structure of family reunification, which implies multiple persons and multiple complex relationships. Before analysing the role of time in this field, it is important to make some preliminary remarks.

Instead of a simple binary relationship between state and migrant, a third party – the family member already present in the state (the sponsor)[129] – plays a significant role in family reunification cases. It is this triad that makes the issue of family reunification particularly complex. It was the late Sarah van Walsum who first argued that the traditional, binary picture of an individual migrant arriving at a state border is often too simplistic. It is not simply a case of the state opposed to the migrant; indeed migrants regularly already have all sorts of links to the said state through their families.[130] In terms of ties, therefore, such migrants are not simply outside the country, but are already partially inside the country before they actually enter its territory physically. To put it more succinctly: the *family member* is tied to the sponsor, who is already tied to the country. Essentially, these ties with the sponsor are the grounds for granting the migrant the right to enter the territory in the first place. These ties with others would seem to be the necessary condition for the migrant's future development of ties with the country. The expectation that the family member will reside non-temporarily is based on his ties with the family member already residing in the territory.

Yet it is difficult to translate this observation – that a migrant already has indirect ties with a country if his family resides there – into terms of time. This is because we have to deal with multiple times simultaneously. If this factor is taken into account, the particular relationship between family reunification and time becomes visible. *The question of whether the family member may spend time in the country is dependent on the time the sponsor has spent there. When a family member asks for family reunification, this*

129 The use of the word 'sponsor' in family migration law is rather puzzling because of the clear economic connotation of the word. Sponsor means 'financier' or 'person who bears the costs'. Not only does this seem to be a meagre depiction of a common family relationship, but more importantly, and as we will see in this chapter, it is primarily time, rather than money, that the sponsor provides to the family member. In chapter 6 I discuss a more economic-oriented form of migration. In the remainder of this chapter, however, I use the word 'sponsor', albeit reluctantly, in order to avoid further confusion.

130 S.K. Van Walsum, *Intimate strangers* (Migration Law Series, Vrije Universiteit Amsterdam 2012).

implies an assessment of the time the sponsor has spent in the country and the ties he has with the family member. These ties with the family member are often also expressed in terms of time (such as duration of the marriage, or the ages of any children). Consequently, the time *of the family member* does not play an autonomous role in this assessment as it is dependent on the time of the sponsor. It is only *after* the family member enters the territory that his own clock starts to tick. *Before the status is granted we encounter merely dependent time (time of the family member depends on that of the sponsor), whereas afterwards we see multiple interrelated autonomous times (because the time of the family member starts to play an autonomous role).*

Before I examine the precise relationship of these interrelated times, a final preliminary observation should be made. This is that the right to family reunification constitutes grounds for allowing family members to enter the country to reside with their family. However, reunification with this family is also a right of the sponsor who already resides in the country. We therefore constantly have to ask ourselves, whose right and whose time are being analysed?

4.1 The Time Hypothesis in the Family Reunification Directive

The Family Reunification Directive applies to third-country nationals legally residing in one of the Member States of the European Union. These migrants can apply for reunification with their family members (or the family members can apply for this themselves). As mentioned before, such a third-country national with legal status is called the 'sponsor' in this Directive (Article 2(c)). In this section I will call the migrant who already has a residence status in the country the 'sponsor', while the migrant seeking to be reunited with this sponsor will be referred to as the 'family member'. Family reunification consequently means the entry into, and residence in, a Member State by family members of a third-country national who is residing lawfully in that Member State 'in order to preserve the family unit, whether the family relationship arose before or after the resident's entry' (Article 2(d)).[131]

The Family Reunification Directive is in fact the result of the same objective as the Long-term Residence Directive, as stipulated at the Tampere meeting in 1999. Recital 3 reiterates this objective: fair treatment for third-country nationals lawfully residing in the territory of the EU and a more vigorous integration policy aimed at ensuring that the treatment of these migrants is equal to that of EU citizens. Recital 4 also states that 'Family reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the integration of third country nationals

131 The family reunification of Union citizens is regulated by the Citizenship Directive, which will be discussed in chapter 6, although without focusing on family members. This is because when it comes to time, the rules largely correspond to the rules for third-country nationals.

in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty.' It is for these reasons that family members *can* be granted the opportunity to be reunited with the sponsor in the host country.

Yet a straightforward reference to the time hypothesis is less apparent in the text of this Directive. As discussed in section 2.3, the questions of the integration of migrants and the equality argument fail to address how these arguments relate to lapse of time. Moreover, the integration and equality arguments do not even constitute proof of the existence of the time hypothesis since integration and equal treatment are both conceivable without being related to the progress of time (from the beginning, from a random moment in time, or never). Indeed, when presented as an argument of integration, family reunification seems more like something that should be allowed immediately, given that it would help the sponsor to integrate and also promote social and economic cohesion in the country. Whether family reunification is indeed allowed immediately after the sponsor has gained a residence status has still to be determined, however.

4.1.1 Time of 'the Sponsor'

In many respects the structure of the Family Reunification Directive resembles the structure of the Long-term Residence Directive. This becomes immediately apparent if the scope of the two directives (both Article 3) is compared. Both exclude certain categories of migrants whose residence is deemed to be temporary, although more categories of migrants are excluded from the Long-term Residence Directive. Family reunification is not automatically impossible for students, or for people pursuing vocational training, seasonal workers and diplomats. The sponsor should have reasonable prospects of obtaining the right of permanent residence. Migrants with temporary protection cannot apply for family reunification; nor can migrants who are still in the process of applying for authorisation on that basis. Similarly, migrants who are in the process of applying to be recognised as refugees and who have not yet received a final decision on their application cannot apply for family reunification. However, refugees whose status has already been acknowledged can apply for family reunification (see section 4.2). Clearly family reunification is restricted to migrants who remain non-temporary, with a perspective of residing permanently.

As well as this reference to the temporality of the migrant's time, there is a clear relationship to clock time in the Directive. The most revealing clock time criterion for the sponsor is laid down in Article 8, which stipulates that Member States *may* require the sponsor to have lawfully stayed in their territory for a period *not exceeding* two years before his family members join him.

This is a rather thought-provoking provision. Let us first, therefore, consider the optional character of the provision, whereby Member States are free to impose a *waiting period* before granting family reunification. The Court of Justice dealt with this provision in *Parliament v. Council*,[132] in which it stated that Article 8 does not 'have the effect of precluding any family reunification, but preserves a limited margin of appreciation for the Member States by permitting them to make sure that family reunification will take place in favourable conditions, after the sponsor has been residing in the host State for a period sufficiently long for it to be assumed that the family members will settle down well and display a certain level of integration.' This explanation firstly reiterates the possibility for Member States to use time criteria in order to achieve policy goals, as we also encountered in the *calculation* outlined in chapter 2. The possibility to grant a sponsor and his family members the right to family reunification can be limited by time. I refer to this as *waiting time*.

Yet the most puzzling aspect of this explanation is the relationship between time, settlement and integration as this begs the question of whose time in which who is settling and who is integrating? Let me first try to unravel the different timelines. At first sight, the time of the sponsor would seem to be a prerequisite for granting the family member the right to family reunification. But exactly whose right of family reunification is being analysed? The family member can derive a right to reside in the country (to live with his family) from the right to family reunification, while the sponsor infers something different: his right to live with his family. Although both are restricted by the same two-year time limit, this time has a different connotation for the two parties. In the case of the family member, it means that the family member can apply for reunification only after (a maximum of) two years of legal residence by the sponsor. The two years of the sponsor's time are thus a prerequisite for the family member to be granted the initial right to enter and reside. On the scale of increasing rights over time, this legal permission to enter and reside in the country comprises the first step. *It is in this sense that, after two years of the sponsor's time, the family member's time in the territory commences in response to the latter being granted the right to residence.* This right of residence is the family member's first entitlement within the time hypothesis. The meaning of the sponsor's time, however, is different. Since the latter already has a residence permit, his position on the scale of increasing rights over time is different. What he receives after two years is not the right to reside, but the right to be reunited

132 ECJ 27 June 2006, *Parliament v. Council,* C-540/03.

with his family. Or, more precisely, *after two years of his time, the sponsor's right to reside with his family can no longer be restricted.*[133]

This formulation reveals the complex relationship between the time of the sponsor and that of his family member. This relationship must be at the basis of the puzzling statement by the Court that it is during the waiting period (in other words, in the two years of the *sponsor's time*) that it is 'assumed that the family members will settle down well and display a certain level of integration'. In the analysis of the Long-term Residence Directive we saw that the lapse of clock time became human time, in the sense that it became part of the migrant's past. The settlement – or permanent status of the migrant – had to be related to this temporal understanding of time. Now, however, we encounter something novel: the family member can become integrated and settled over time without being present in the territory. How does this work?

Perhaps the provision on the two-year limit should be read in conjunction with a crucial passage in Article 3, which determines the scope of the Family Reunification Directive. As mentioned earlier, this latter provision states that a sponsor should hold a residence permit with a validity of one year or more and have 'reasonable prospects of obtaining the right of permanent residence'. This Directive consequently functions along the same lines as the Long-term Residence Directive: not only should the purpose of the stay be non-temporary, but a certain period of time must also have elapsed as evidence of this alleged non-temporariness. This expected permanence is necessary because it is on the basis of the expected permanence of the sponsor's residence that the link between the family member and the country is constructed. *The family member receives an entitlement to enter and reside in the country because he is firmly linked to the sponsor who is, in turn, tied to the country.* On the basis of this chain of ties, it is the stays of both the family member and the sponsor that are determined to be permanent. In other words, it is the human time of the family member that is constructed via the human time of the sponsor, or the past and future of the sponsor that count as the past and future of the family member. Maybe I should conclude that it is the time of the *family* that is at stake here.

Yet what would be the rationale for this time restriction if we were to look at it from the sponsor's perspective? Family reunification seems to be deemed to facilitate the integration of migrants, just as a stronger status is also supposed to do. This question of integration is not particularly helpful, however, for the rationale behind the time hypothesis, as we saw earlier. The question whether the right (i.e. a stronger status or

133 There is also another minor exception: Article 8 further stipulates that 'By way of derogation, where the legislation of a Member State relating to family reunification in force on the date of adoption of this Directive takes into account its reception capacity, the Member State may provide for a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members.' This provision was inserted as a concession to Austria and is relevant for that country only.

family reunification) is a means for integration, or integration is a prerequisite for the stronger right, remains unresolved. Moreover, the message we take from the structure of the Family Reunification Directive is contradictory: family reunification is important for social cohesion and integration, *while* family reunification can also be postponed for two years. Does this mean that the sponsor must first prove that he is able to integrate on his own, before being reunited with his family (which will enable him to integrate better), or will the sponsor's integration be better if he can immediately unite with his family members (as Recital 4 seems to suggest)?

The only clear conclusion I can draw at this point is that family reunification is deemed more important than a long-term residence permit: a migrant must already be able to apply for reunification after two years. Either family reunification is deemed so important for integration that it cannot be restricted any longer, or a period of two years is sufficient proof of integration to justify being granted the right to be reunited with the family. The question of why this is so remains puzzling in both visions.

It is important to observe, however, that, just as with the Long-term Residence Directive, time is not the only criterion for successfully applying for the stronger right. The other criteria are very similar to those in the Long-term Residence Directive and can again be roughly divided into two categories: money and identity. The money category can be found in Article 7, which stipulates that the migrant should have proper accommodation, sickness insurance and stable and regular resources for himself and his family so that he can maintain his family and avoid becoming a financial burden on the state. The criterion of identity is also similar: the family member's residence permit may be rejected for reasons of public policy, public security or public health (Article 6), while compliance with integration criteria may also be required for family reunification (Article 7, paragraph 2). As described earlier, these criteria all have the same structure: money and identity are used by the state as the basis for its expectation of whether the family members will become a financial burden on the state or breach public order in the future.

Another observation – namely that the migrant's identity is firmly entangled with, or even difficult to disentangle from, that of his family members – will prove to be important in the philosophical part of this research. In other words, it is the ties the *family* already has with the country that enable the *family member* to enter.

4.1.2 Time of the Family Member

The situation from the perspective of the *family member* looks quite different. The most obvious family members are the spouse and children of the sponsor (Article 4, paragraphs 1(a) and (b)). Although other forms of family relationship are possible, such family members have more to prove. Partners, for example, have to prove that they have a stable and long-term relationship, which is assumed in the case of marriage (while

this obviously can be falsified, I will disregard the question of fake marriages here). For the family members in Article 4, paragraph 1, the state *must* authorise the entry and residence, providing they comply with the conditions of the Directive, while the state *may* authorise the entry and residence of the family members referred to in paragraph 2.

Adopted children (not in a marriage) and unmarried adult children have to prove their dependence on the sponsor or spouse (Article 4, paragraphs 1(c) and (d); Article 4, paragraph 2(b)). Parents can also apply as family members within the meaning of the Directive if they are dependent and do not enjoy proper family support in the country of origin (Article 4, paragraph 2(a)).

Since the situation before and after these family members are granted residence status differs, I will look at them separately in the following.

Before: Still Outside While Already Inside the Territory

The past of family members before they apply for family reunification plays no autonomous role. However, their past can be assessed when it comes to the risk of public order, while a family member can also be required to comply with certain integration measures before applying for reunification. The state can test, for example, whether the family member has a basic knowledge of the language, culture and history of the host country. These integration measures can be imposed on the family member when he is still residing in the country of origin, and so before the clock for his time in the territory starts ticking. This form of integration is tested by means of a material assessment, in which lapse of time as such does not play any role.

This reveals an interesting feature in the relationship between time and integration. In chapter 2 we encountered integration as either the *cause* of stronger rights or the *effect* of it. Now, however, we see that it can also be the *precondition* of rights. The clear difference between the first two and the latter is that time in the territory plays no role where integration is a precondition. While integration has so far been presented as somehow related to lapse of time, it can apparently also be unrelated to time. Obviously it takes time to be able to fulfil the material criteria. As such, however, this does not matter. *This points to a difference between a formal time criterion and a material assessment of certain capacities or knowledge. Ultimately the former precludes a material assessment of the individual circumstances of the case, while the latter fails to address the issue of time.* We already encountered this in the difference between formal time in the Long-term Residence Directive and individual time in Article 8, albeit not in such a clear fashion. After all, time in the material assessment of Article 8 was one of the material criteria. This assessment could therefore be seen as a combination of a formal and a material assessment. Yet the pre-entry integration test is a purely material assessment, entirely detached from time, whether clock time or human time.

It can therefore be concluded that, in the time hypothesis, time is always linked to presence in the territory. We encountered this earlier when I discussed the question

of interrupted continuity, with such interrupted time outside the territory playing a role only if it was linked to a long period of time inside the territory. If the amount of time spent outside the territory becomes too much, it is no longer counted as continuous time inside the territory. Time outside the territory thus has to be attached to time inside the territory to count as relevant time.

This is precisely what is the case in family reunification, albeit very indirectly. In spite of the lack of time in the territory, the link with the territory must be proved via the link with the sponsor and the links the sponsor has with the country, including the non-temporary character of his residence and the waiting period. If the sponsor meets these criteria, the family member is tied to the territory via the ties *his family* has with it. Accordingly the sponsor and the family member are firstly treated as individuals: the former has to prove that his residence is non-temporary, while the latter has to prove that he has already been integrated before arriving in the territory. If they meet these criteria, they are treated as a family with ties to the territory that enable the family member to enter the territory. It is the *future* of the family (in the territory) that enables the family member to enter. Here we see a temporal understanding of the family at work.

After: Reunited With the Family Within the Territory

Yet it is not the family that has rights, but rather the individuals constituting the family. Accordingly it is not the family who falls under the time hypothesis the moment it is united in the territory, but rather the family member (and the sponsor). A family member who receives a residence status on the basis of family reunification immediately receives certain rights.[134] However, his residence entitlement remains dependent on the sponsor. In order to appreciate how the time hypothesis functions for the family member, we must first disentangle the interrelated times of the sponsor and the family member. We have already observed that as soon as the family member enters the country, his time starts ticking independently of that of the sponsor, while his time was previously entirely dependent on that of the sponsor. This does not serve to say, however, that when the family member enters the territory, his time is suddenly independent of the sponsor's time. We will see that, at first, they are firmly linked to each other, and only after lapse of time do they start to diverge.

In the previous discussion we observed that we must distinguish between two meanings of the sponsor's two-year period. Both the family member and the sponsor gain a stronger right after these two years, but the rights they gain are not the same. For the sponsor, it is the reunification with his family, while for the family member it is the right to enter and reside in the country. The moment the family member enters the country, however, his time – and subsequent development of rights – also starts to play an independent role. And gaining a residence permit that is not dependent on that of

134 He is entitled to access to education, employment and self-employed activity and to vocational guidance and training (Article 14, para. 1).

the sponsor is one of the stronger rights that the family member receives after lapse of time.

With the previous analysis in mind, this is perfectly conceivable: it is only after lapse of time within the country that the family member develops autonomous ties with the country. *It is this lapse of time becoming his past (human time) in which he develops ties or roots that are the grounds for his stronger individual entitlements*. Yet how exactly does this function in the Directive? As soon as the application for family reunification has been accepted, the family member will be authorised to enter and to receive a residence permit for the duration of at least one year (Article 13, paragraphs 1 and 2). The fact that the family member's residence permit is dependent on that of the sponsor is best illustrated by Article 13, paragraph 3, which stipulates that the duration of the family member's residence permit shall not in principle go beyond the expiry date of the sponsor's residence permit. The expectation of the family member's future at that moment is firmly linked to that of the sponsor. If the sponsor loses his residence permit, and the family member has not yet been granted autonomous residence status, the Member State may also, therefore, withdraw the family member's residence permit. *At this point the family member is tied solely to the family, but not yet to the country.*

After five years of residence the family member's status can become autonomous (Article 15). The conditions relating to the granting and duration of this residence permit are established in national law (Article 15, paragraph 4). Upon application, a spouse, unmarried partner or adult child shall be entitled to a residence permit, independent of the sponsor. Again we see that the situation is slightly different for children who were already adults when they reunited with the sponsor, and also for parents of the sponsor or his partner. Member States may but are not obliged to issue an autonomous residence permit to those family members (Article 15, paragraph 2). In the case of particularly difficult circumstances, such as widowhood, divorce, separation or the death of first-degree relatives, an autonomous residence permit may also be issued upon application. In such cases, the time limit of five years does not apply (Article 15, paragraph 3). Generally speaking, the family member is entitled to an independent residence permit after a period of five years. *In other words, it takes five years of family time before the family member has an individual future in the territory, independent of the future of his family.*

The circumstances under which the family member's residence permit can be withdrawn overlap to a great extent with those in the Long-term Residence Directive and are not discussed separately here. Specific to the Family Reunification Directive, however, are the grounds for withdrawing status that are related to family ties. Because the ties between the family member and the country are constructed via the ties the family member has with the sponsor, there are strict regulations on what constitutes a genuine family. If the marriage, partnership or adoption is found to have been contracted for the sole purpose of enabling the person concerned to enter or reside in the Member State, the application may be rejected immediately (Article 16, paragraph 2).

4.2 Time of the Family Member of the Refugee

A refugee is any third-country national or stateless person enjoying refugee status (Article 2(b)).[135] The procedure applying to a refugee's family members who wish to be reunited with their 'sponsor' (Chapter V of the Directive) is different from that applying to family members of other migrants. The same definition of family members applies to the situation of refugees (Article 10, paragraph 1), albeit that children older than 12 years of age and who arrive independently *cannot* be asked to comply with integration criteria before being granted entry and residence. The definition of family members is also broader because Member States may authorise family reunification for a wider range of family members, as long as the latter are dependent on the refugee (Article 10, paragraph 2). The reunification of the family or legal guardian of an unaccompanied minor is also easier than the situation for non-refugees (Article 10, paragraph 3).

The most important time provision for family reunification of refugees is laid down in Article 12. This provision clearly differentiates the situation of refugees from that of regular migrants. It stipulates that the 'refugee sponsor' *does not have to prove* that he has accommodation, sickness insurance and stable and regular resources sufficient to maintain himself and his family members (the conditions of Article 7). This provision means that the family reunification of refugees is much easier than that of regular migrants. This clause, however, has a clear time demarcation as it applies only during the first three months of the lawful residence of the 'sponsor refugee'.[136] If no application for family reunification is submitted within three months after the granting of refugees status, Member States may require the refugee to meet the said conditions, just like any other family member. In other words, family members fall under a special refugee regime during the first three months of the refugee sponsor's residence, but afterwards are considered to be regular family members. Under the refugee regime, the sponsor is obviously not required to have resided in the Member State for two years prior to the application for family reunification (Article 12, paragraph 2).

This is the first clear exception to the time hypothesis encountered so far. Indeed, time has an opposite meaning here: after three months, the refugee has fewer rights. What could be the rationale for this? In Recital 8 we read that 'Special attention should be paid to the situation of refugees on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there. More favourable conditions should therefore be laid down for the exercise of their right to family reunification.' *The involuntary character of their migration appears to be the*

135 I will discuss the question of refugees separately in chapter 5.

136 The provision states that 'Member States may require the refugee to meet the conditions (…) within a period of three months'. It is an optional clause, therefore. Here I analyse the meaning of this scope if applied. However, the question of whether this is indeed the current practice in the Member States falls outside the scope of the present research.

reason for the different treatment. Living with their family might help them to settle in the Netherlands as this would facilitate their integration. Yet this applies only if family reunification is requested within these first three months. Two important conclusions can be drawn from this interesting provision.

Firstly, both the sponsor and the family member – when it comes to family reunification – are considered to be refugees for only three months after the refugee status is granted. This implies that the relationship between stronger rights, time and integration changes radically within a short period of time. At first, his strong rights (to family reunification) are very much needed, whereas after three months it is the other way around (i.e. two years of time to prove integration before stronger rights are obtained). *Apparently refugees are very much in need of family reunification, but their application for the more favourable conditions can be restricted by a time limit. After three months, the refugee is considered to have become a normal migrant.*[137]

The second conclusion relates to the exception from the time hypothesis. We have already encountered several examples of situations in which the time hypothesis is conditioned, specifically when the state manipulates time in order to condition the *precise stronger rights* that are granted to *certain migrants* after a *certain lapse of time.* All the elements (subject, rights, time) of the time hypothesis obviously lend themselves to precise definition and, therefore, manipulation. So far, however, this has not challenged the time hypothesis as such. Even if fewer or weaker rights are granted to certain migrants after more time, this still does not contradict the hypothesis. As long as migrants receive stronger rights after lapse of time (albeit less strong than in an earlier situation), the time hypothesis still applies.

The refugees' situation, however, actually contradicts the time hypothesis as these refugees can apply for stronger rights immediately after the residence permit is granted to the sponsor, while a less strong regime applies to them after three months. After this period, they fall within the scope of the regular time hypothesis. *In this sense I must conclude that the situation of refugees is only a temporary exception to the time hypothesis (because after three months their rights realign with those of ordinary migrants).*[138]

4.3 Conclusions: Disentangling Different Timelines

The complexity of time in relation to family migration relates to the intertwining and interdependency of time between the family member(s) and the sponsor. To understand the question of time and the family it is important to constantly and clearly distinguish which time is at stake.

137 I will further elaborate on the peculiar status of refugees and their relationship to time in chapter 5.
138 See also chapter 5.

The first conclusion I draw from the observation that the time of the family member starts to tick only when he enters the territory is that time must somehow be related to presence in the territory in order to be able to result in stronger rights. The situation before the family member enters the territory also shows a third relationship between time and integration. Besides integration as a *cause* of stronger rights, or integration as an *effect* of stronger rights, we have now encountered integration as a *precondition* of time in the territory. In this sense, integration is a precondition for access to the time hypothesis. This leads me to the conclusion that time plays no role in a purely material assessment of integration, while individual ties cannot be tested in a formal assessment based merely on clock time.

The time of the family member before entering the territory plays no autonomous role and is entirely dependent on the sponsor's time. Only if the sponsor resides non-temporarily for at least two years and has a reasonable prospect of obtaining permanent residence may the family member apply for family reunification. At the moment he arrives in the territory, the family member himself has no ties with the state, but his ties with the sponsor attach him to the territory. It is on the basis of this chain of ties – the ties of the family – that both the family member and the sponsor gain stronger rights (i.e. rights of entry and residence, and the right to family reunification).

As time passes after the family member has entered the territory, however, the relationship between his time and that of the sponsor changes from one of full dependency to one of autonomy. After progress of time, the family member individually falls under the scope of the time hypothesis; he develops independent ties with the country, and the lapse of time becomes part of his past and the basis for an independent expectation of his permanent residence.

As a result of these intertwining times, the time hypothesis functions differently for the sponsor and the family member. Whereas granting the residence title to stay with the sponsor is the first step in the time hypothesis for the family member, it is a next step in the time hypothesis for the sponsor, and this next step constitutes his right to live with his family after two years of residence.

We have seen that the relationship of a refugee and his family to the time hypothesis is different from that of other migrants. In the first three months the refugee is supposed to be in great need of family reunification because of the involuntary character of his migration. After three months, however, the refugee is perceived as a normal migrant again, which implies that the refugee's family falls under the normal time hypothesis. This means that, after three months, the refugee receives fewer rights. These three months seem a clear, yet temporary exception to the time hypothesis. This peculiar situation of the refugee is enough reason in itself to justify scrutinising his legal position independently in the next chapter.

Lastly, some final observations on time. Whereas family members and the sponsor can benefit from the time hypothesis, the state's control over the presence of

migrants in this domain of migration law is very obvious. The most prominent example of this control is the *waiting time*, i.e. the time it takes before the sponsor and family member can be reunited in the territory. However, the *dependent time* of the family member also shows the state's control, whereby a state seeks to preclude migrants from using a sponsor as a cheap ticket to entry and residence in the territory.

Moreover, pre-integration measures, which demonstrate the state's power to control entry to the territory, also show that time is left out of the equation in a fully material assessment of integration. This contrasts sharply with a purely formal integration criterion that focuses merely on the amount of time spent in the territory, without any link to actual integration. The point is that a purely material assessment – whether, for example, a person speaks the language – can be fulfilled at *any moment or never*, while a formal criterion makes it clear *when* it can be fulfilled, but not what has happened during the specific period of time. Although we often see both aspects at work, it is important to distinguish the two conceptually.

5.

Time and the Refugee

The Asylum Qualification Directive (2011/95), Asylum Procedure Directive (2013/32) and Temporary Protection Directive (2001/55)

Time of a declaratory act – Time limits and truth about the refugee – Future determines the past – When is an asylum seeker a refugee? – Temporary yet permanent protection – Profanation of the sacred refugee

The previous chapter focused on what has been called 'voluntary migration', as distinct from 'forced migration'. Voluntary migration can be for a wide variety of purposes, including economic activity, knowledge-related activity, the receipt of medical treatment and family reunification. Forced migration, on the other hand, involves people fleeing a dangerous situation in their country of origin and seeking protection in another country.[139] Refugees and persons seeking subsidiary protection constitute the main categories of forced migration in European migration law.

Thus far I briefly discussed the situation of refugees in section 2.1.2, while analysing the Long-term Residence Directive and examining the question of refugee family members in section 4.2. I analysed the relationship between refugees and the time hypothesis, specifically focusing on the time spent after the migrant had been granted refugee status. The most peculiar observation relating to these refugees was that at least half of the time that their procedure took (or the entire period if the procedure takes more than 18 months) counted towards the five-year term of the long-term residence permit. The Long-term Residence Directive did not provide enough arguments to discuss the rationale behind this rule. In this section I will therefore seek to identify the reasons for this differing treatment of refugees in the time hypothesis by analysing the concept of both the refugee and the asylum seeker, as well as their respective expectations of the future within the asylum procedure.

I will only analyse refugee protection, while the rules regulating subsidiary protection (most notably Article 3 of the European Convention on Human Rights and Chapters V and VI of the Qualification Directive) will be disregarded. An analysis of subsidiary protection would not add much to the analysis of time and risk conducted in section 4.1.2, while the scrutiny of time in the asylum procedure will be very revealing.

The subsequent analysis is divided into subsections (5.1 and 5.2), which division mirrors the one used in the discussion of the Long-term Residence Directive. There I first analysed the situation *before* long-term resident status was granted, and subsequently the situation *after* this moment. Whereas the division may be similar, the words 'before' and 'after' are not used here because, as I will demonstrate, it is precisely

139 Boeles and others, *European Migration Law*, p. 3. Such a distinction is obviously problematic (as is every general dogmatic distinction) since economic or family migrants may equally well feel forced to migrate.

this classification of time that is at stake here in the definition of the refugee. Therefore I will separately discuss 'procedural time' (section 5.1) and the relationship between the refugee and the time hypothesis (section 5.2).

According to Article 2(d) of the Qualification Directive, a refugee is a third-country national who is outside the country of nationality owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, and is unable or, owing to such fear, unwilling to avail himself or herself of the protection of that country. This definition is based on the refugee definition in Article 1A (2) of the 1951 International Refugee Convention. I will not discuss the extensive case law and literature on the specific elements of the refugee definition,[140] nor the precise relationship between Union law and the Refugee Convention,[141] since these are not useful for my analysis of the question of time. What is especially interesting from a time perspective is the relationship between the identity of the refugee and the particular way this is legally determined in the asylum procedure.

5.1 Procedural Time

You are aware of only one unrest;
Oh, never learn to know the other!
Two souls, alas, are dwelling in my breast,
And one is striving to forsake its brother.
Goethe, Faust.

Recital 21 of the Qualification Directive states that 'The recognition of refugee status is a declaratory act.' This means that granting refugee status does not turn a migrant into a refugee, it declares him to be one.[142] 'He does not become a refugee because of being recognised, but instead is recognised because he is a refugee.'[143] This seemingly simple statement has significant consequences for the asylum procedure and for the notion of time in it. It implies that *the moment* a migrant fulfils the condition of the Refugee Convention, he *is* a refugee. Here we encounter a feature of time that we have not seen before, at least not so clearly: the relationship between time and the *legal procedure*.

140 See, for example, G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford University Press 2007), J.C. Hathaway and M. Foster, *The Law of Refugee Status* (Cambridge University Press 2014). I will leave the question of '*réfugiés sur place*' out of the discussion.

141 H. Battjes, *European Asylum Law and International Law* (Martinus Nijhoff Publishers 2006).

142 Boeles and others, *European Migration Law*, p. 298. This is one of the basic principles of refugee law. See also Goodwin-Gill and McAdam, *The Refugee in International Law*, p. 51.

143 UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, 2011), para. 28.

Before analysing the meaning of procedural time, however, I first have to consider the meaning of a declaratory act. What is so peculiar about such an act?

5.1.1 What Is a Declaratory Act (and What Difference Does it Make)?

We have just seen that a refugee becomes a refugee when he fulfils the criteria for being a refugee, not because he is recognised as a refugee. In order to fully appreciate the meaning of such a declaratory act and the difference with its antonym – the constitutive act[144] – we first have to distinguish between 'being a refugee' and 'recognition of refugee status'. A naïve understanding of the question of being a refugee would see some people as already belonging to a certain category or identity before or even entirely without the involvement of the law, whereas others are merely created by the law and have no existence outside it. This would suggest that there are entities that find their way into law, and which have meaning within law, without their being qualified by law. If that is to be the case,[145] it is certainly not true for categories of people. After all, the criteria defining who *is* a refugee are provided in law and are not exterior to it.[146] Moreover, not everyone claiming to be a refugee will be recognised as such. Not only does the law stipulate who qualifies as a refugee, and who does not, but it is also in the legal procedure that the question of whether a person indeed fits the legal criteria is determined. *So we have to distinguish between the criteria and the application of these criteria.* The difference between a declaratory act and a constitutive act does not relate to a difference in criteria: both have *legal* criteria and not extra-legal criteria.

The difference must therefore be sought in the *application* of the legal criteria to the case of a human being. And this difference is one of time, as becomes apparent if we pose the following question: What are the legal consequences if it is determined in a procedure that a certain person falls within a requested legal category? *If the legal act merely has a prospective effect, it is a constitutive act. If, however, it has a retrospective* and *a*

144 The question of a declaratory act and constitutive act is also relevant in international public law with regard to the question of whether new entities become states when they fulfil the criteria for statehood or when they are recognised as such by other states. See, for example, S. Talmon, 'The Constitutive Versus the Declaratory Theory of Recognition: Tertium Non Datur? ' (2005) 75 The British Year Book of International law .

145 We have already seen that it is not true for time, which is always qualified time. It certainly is not true for territory either; see Bosniak, *The Citizen and the Alien* and also L. Bosniak, 'Being Here: Ethical Territoriality and the Rights of Immigrants' (2007) Theoretical Inq L 389. Could it possibly be true for weight or distance? According to Agamben it is true for biometric evidence, and this bears witness of the incorporation of 'naked life' in law that dissolves the differences between fact and law, see 'identity without person' homo sacer

146 We will see that this also rests upon a problematic conception of identity as it would entail that law *represents* the real identity of the refugee, and is not part of the identity-formation as such; see chapter 10.

prospective effect, the act is declaratory. Because the recognised refugee *has been* a refugee irrespective of being recognised (retrospectively) as such in the procedure, he will profit from the rights and entitlements from the moment as soon as he is recognised as such (prospectively). The recognition is thus declaratory.

Yet there is another aspect of time to be discussed that makes the refugee's situation particularly peculiar: the length of the procedure. The difference between a declaratory act and a constitutive act becomes particularly significant if the procedure to establish whether the person falls within a certain legal category takes a long time. Only if there is a long time between the moment of the application and the moment of the decision does the question of a declaratory act become interesting from a perspective of time. If we take the situation of EU citizens (to be discussed in more detail in chapter 6) as a counter-example, we will see that there is more at stake than merely the difference between declaratory acts and constitutive acts. Just like recognition of a refugee, recognition of an EU citizen is a declaratory act. The difference, however, is that whereas recognition as a refugee is often time-consuming and complicated, recognition of an EU citizen is fairly simple. Article 2 of the Citizenship Directive (2004/38) stipulates that a Union citizen is any person having the nationality of a Member State. So if a migrant shows a valid identity card or passport issued by a Member State, the procedure is finished. The procedure of establishing whether someone is an EU citizen is generally, therefore, close to 'automatic'; it takes almost no procedural time. In such cases, the retrospective effect of a declaratory act is not very revealing as the retrospective character does not involve any substantial lapse of time between application and recognition.

I have now made three observations on the question of a declaratory act. The first is that the difference between a declaratory and a constitutive act is not one of legal or extra-legal criteria. The second observation is that the difference is *temporal*: a declaratory act also has retrospective effect, alongside the prospective effect it shares with a constitutive act. And the third observation is that this retrospective effect becomes particularly significant if the procedure involves a long time span. With these three observations in mind I can now approach the question of refugee recognition.

The meaning of the declaratory status of a refugee's recognition can consequently best be understood as temporal. *The moment* the refugee is recognised as such, *it turns out* that he *was a refugee all the time.* This is striking only if the procedure took a long time to complete and the decision was not generated almost automatically. This is because only in such a situation are we confronted with an inconsistency of time: the application of legal criteria means someone becomes a refugee, but this has an effect even before those criteria were applied. And therefore the time between the moment of decision and the moment of application is *erased* because, as it turns out at a particular moment, the migrant *has been a refugee since* the moment he left his country of origin (and therefore was already a refugee when he applied for the status). We will see in the following that

this even implies that his previous legal identity as an asylum seeker is erased.[147] At this point we can already see that this problem of the refugee's time boils down to a conflict between a temporal conception of time (past, present, future) and the lapse of time.

Before addressing such consequences, I will first analyse how the refugee is recognised as such in the procedure. As mentioned earlier, I will not discuss the definition of a refugee in depth, but will instead focus on the temporal aspects of the risk assessment and discuss the specific questions on evidence, substantial proof and credibility.

5.1.2 How to Prove that One's Life and Freedom are at Risk?

I have already observed that recognition as a refugee is not an automatic application of the legal criteria to the case at hand. Instead it is often a difficult procedure in which it must be established whether the migrant fulfils the criteria of the refugee definition (Article 2(d) of the Qualification Directive) or subsidiary protection (Article 2(f) of the Qualification Directive). In the following I will focus on how to substantiate a well-founded fear.[148]

A fear or risk is by definition a danger that *might happen in the future.* As seen in section 2.2.2 with regard to a risk to public order constituting grounds for withdrawing a given residence status, determination of a risk always consists of an *expectation* of the future. As we have already encountered several times now – with regard to the expectations of residence under Long-term Residence Directive, of the future in Article 8 of the European Convention on Human Rights, and of the withdrawal of residence status because of an infringement of public order – every question of expectation creates a temporal problem, and specifically the problem of how to substantiate the likelihood that something will happen in the future. After all, nothing can be substantiated on the future itself. We have seen that the law tries to resolve this problem by substantiating the expectation on something else. In Article 8 of the European Convention of Human Rights the expectation is based on time and identity, while under the Long-term Residence Directive it is based either on time spent in the territory (for acquiring the status) or on the actuality of the danger (for losing the status). The potential risk an asylum seeker alleges to face in the future is, in turn, based on an assessment of the *general* situation in the country of origin, an *individual assessment of the particular*

147 The term 'asylum seeker' will be used in the following as a synonym of 'applicant' in terms of both the Procedure Directive and the Qualification Directive; see, for example, Slingenberg, *The Reception of Asylum Seekers Under International Law. Between Sovereignty and Equality.*, p. 14.

148 As mentioned in the introduction, the difference between well-founded fear in the refugee definition and the real risk under the subsidiary protection will be disregarded. Only the temporal aspect is relevant to my analysis – I will focus on the question of how to substantiate a future risk on the basis of the past – and this is the same for both forms of protection.

risk this individual seems to run and *a credibility assessment.* Discussing these elements separately will show that they lead to different time issues.

It Is About Truth (at a Particular Moment)

Article 4, paragraph 3(a), of the Qualification Directive holds that account must be taken of all relevant facts relating to the country of origin, including laws and regulations of the country of origin, and the manner in which they are applied. It is interesting to note that this provision stipulates that the relevant moment for taking all these factors into account is the time of the decision on the application. Hence, the relevant point in time is not the moment the migrant leaves his country of his origin. Since being outside the country of origin is one of the criteria for defining a refugee, a refugee generally fulfils the criteria of being a refugee as soon as he crosses the border.[149] Nevertheless, account must also be taken of the migrant's activities after he leaves his country of his origin and before the legal decision is announced (Article 4, paragraph 3(d), Qualification Directive). Just like developments in his country of origin since his departure must be incorporated into the assessment. *We clearly see here that the law fixates a certain moment in time as the relevant moment for the assessment: what happens before this moment can be taken into account?* That may be obvious if this moment coincides with the present of the migrant. The point, however, is that the legal present and the present of the migrant do not necessarily coincide. *As we have encountered earlier, legal time implies the temporal aspect of human time (a moment with a past, present and future), but does not coincide with the human time of the individual migrant. After all, the legal moment is not necessarily the actual moment in the life of the migrant.*

In the appeals procedure, the relevant legal moment for the judgment is *ex nunc,* with all relevant circumstances being taken into account up until the moment of the ruling (Article 46, paragraph 3, Procedure Directive). Whereas this provision clearly stipulates that all relevant aspects should be taken into account in an appeals procedure, it is important to see that the law can manipulate this moment. Although the relevant moment of time in the legal procedure can obviously be of utmost importance for the outcome in a case, what counts as the relevant moment for the decision is determined by the law. This hints again at the legal possibilities to regulate and control the entry and residence of migrants by manipulating time criteria. I will return to this when I discuss the consequences of the declaratory act of recognition of the refugee in more detail in section 5.1.3.

As well as this information about the country of origin, the relevant statements and documents presented by the applicant must be taken into account in the assessment (Article 4, paragraph 3(b), Qualification Directive). These consist of statements and documentation regarding the applicant's age, background (including that of relevant

149 As mentioned before I will not discuss '*réfugiés sur place*'.

relatives), identity, nationality, countries and places of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection (Article 4, paragraph 2, Qualification Directive). Article 4, paragraph 1, Qualification Directive states that it is the duty of the applicant to submit all these elements *as soon as possible.*

This duty to provide these elements swiftly again shows an attempt to fixate a legal moment for the decision at which all the *relevant aspects* can be taken into account. Since a legal decision is inevitably taken at a certain moment, it is necessary to make rules that regulate when that legal moment occurs and what must be taken into account at that time. In order to properly decide on all the relevant aspects of the case, it is the applicant's duty to present all the elements as soon as possible. This implies, however, that information that is *not provided soon enough* will not be taken into account. According to Recital 18 of the Procedure Directive, such time pressure is in the interests of both the Member State and the applicant as both parties have an interest in a procedure that is not endless. Although *time limits can clearly prevent substantial evidence from being taken into account*, the importance of a legal decision at a certain moment prevails over an endless or timeless procedure that leaves open the possibility to raise new issues time and time again. *In other words, it is in the interests of both parties that justice is done and that a decision is taken swiftly.*[150]

Basing the Future on Evidence and a Credible Identity

If I postpone this question of a speedy and just procedure for a while, what remains is the question of the establishment of the refugee status. I observed that this must be based on all the relevant individual circumstances of the case, taking into account the general situation in the country of origin. This is not the entire picture, however, as it is almost a characteristic of asylum seekers that they lack substantive amounts of objective proof to substantiate their claims. This is already intuitively conceivable if we take into account that it is often the government that is feared by this person. Therefore the particular government is often unlikely to provide the objective proof required to substantiate the asylum request. Substantiation of the application is regularly based solely or partially on statements by the asylum seeker that cannot be substantiated by documents or other evidence. How can these statements then be taken as proof substantiating the claim of the applicant?

Article 4, paragraph 5, of the Qualification Directive states that in such a situation those aspects do not need further substantiation if the asylum seeker is deemed 'credible'. This is the case if he has made a 'genuine effort to substantiate his application' (paragraph 5(a)); all relevant elements at his disposal have been submitted and a satisfactory explanation has been given for any lack of other relevant elements

150 I will elaborate more on the time of the procedure, and the effectuation and enforcement of the legal decision, in chapter 11.

(paragraph 5(b)); the statements are plausible and do not run counter to other available information (paragraph 5(c)); the asylum seeker has applied at the earliest possible time (or has provided convincing reasons why he did not do so) (paragraph 5(d)); and his 'general credibility has been established' (paragraph 5(e)).

In short, therefore, there are two forms of information: general information about the country of origin and the particular individual, and statements by the applicant. All available information should be provided, and this information must be plausible. The statements by the individual can be accepted, even if there is no further proof, providing the asylum seeker is deemed to be credible. This latter aspect not only comes to the fore in the last requirement, but is also apparent in the requirement that a *genuine* effort to substantiate his claim must have been made. Similarly, an asylum seeker is deemed not to be credible if he withholds certain information or if he contradicts himself or other available information.

With these observations in mind I can now answer the question of how the expectation of future risk is constructed: on evidence and credibility. In the first place, the asylum seeker should submit documentary and other evidence (individual and about the general situation in his country of origin) to substantiate his claim. This evidence should be coherent and convincing. If, however, such evidence is not available or not yet sufficient, the statements by the asylum seeker gain importance. Such statements can be taken as evidence only if the asylum seeker's credibility is assured on the basis of the criteria set out in Article 4, paragraph 5, of the Qualification Directive. Whereas it is possible for parts of the asylum seeker's statements not to be considered credible, such a person must not lack general credibility if he is to qualify as a refugee (paragraph 5(e)).

The way the legal expectation is constructed is reminiscent of the construction of expectation under Article 8 of the European Convention of Human Rights. The expectation of the future risk is established on the basis of an assessment of *evidence and credibility of the identity*. It is clear that this evidence is based on the past as it consists of documents and statements about the asylum seeker's past and the general situation in the country of origin. It is certainly possible that the future risk can be established purely on the basis of such evidence. Yet in cases where such evidence is lacking, the risk must be established on the basis of the statements by the asylum seeker (in combination with the available evidence). And in such a scenario, the asylum seeker's credibility is decisive. Obviously this involves assessing all the specific statements the asylum seeker has made in substantiation of his claim; however, the credibility of these statements relates to his identity. Not only because the overall identity of the asylum seeker is clearly at stake (in paragraphs 5(d) and (e)), but more generally because the procedure entails constructing the legal identity of the applicant. The procedure will establish either that he is a 'refugee' or that he is a 'non-refugee or illegally present migrant'. The evidence and the statements the asylum seeker brings to the fore form the substantiation of the claim that *he is a refugee* and that he fits the legal category of identity. As we will see in

chapters 10 and 11, such stories form an important part of human identity and the basis on which the necessary legal categorisation takes place.

If a real risk of persecution is found to exist, the asylum seeker is retrospectively recognised as a refugee. A refugee is someone who *potentially* risks his life if he is sent back to his country of origin. And it is this assessment of the future of the refugee that has consequences for the past of the asylum seeker.

5.1.3 The Split Personality in the Procedure: Being *and* Not-being a Refugee

The question about the consequences of the retrospective effect of being recognised as a refugee can best be addressed by analysing the difference between the refugee and his predecessor, the asylum seeker. If a refugee has to be understood as someone who was already a refugee at the moment he applied for recognition as such, the question arises as to what the status is of someone who has applied for recognition, but who was not recognised as a refugee at that particular moment. Such an asylum seeker may turn out to *have been* a refugee in the first place, but it may equally well turn out that he *is* not a refugee. This implies that an asylum seeker is someone who is *simultaneously potentially a refugee and potentially not a refugee*.

Here we encounter, once again, a legal attempt to construct an expectation of the future, albeit that this expectation clearly has double potentiality. The law takes account of two scenarios at the same time. And if the law constructs the expectation of a migrant's future in the case of his long-term residence status, two possibilities are certainly also apparent (i.e. will he stay or will he go?). The point, however, is that under the Long-term Residence Directive the law constantly tries to divide these two expectations into different legal categories: one category for migrants with a temporary objective, with another category for non-temporary residence, and yet another category for long-term residents, while family members are treated differently again. *A typical feature of the asylum seeker is that these two expectations or potentialities are present at the same time in the same person.* Such a *double potentiality* as a legal feature is not restricted to asylum law; the parallels with the accused in a criminal case, for example, are apparent. *Yet the point is that both these potentialities structure the way the subject is dealt with in a procedure.* On the one hand, the person is granted certain rights, while on the other hand certain restrictive measures can also be imposed upon him. Not only does the asylum seeker have two souls residing in his breast, but these two souls also represent the two poles of the spectrum: the potential refugee as the good spirit, with the potential non-refugee as the evil spirit. *What is particularly striking, however, is that it will later turn out that the person has been a refugee (or non-refugee) all the time.*

Yet which rights are granted to the split personality of the asylum seeker? Of the rights granted to the *potential refugee*, the right to stay in the territory is certainly the most important for my scrutiny of the time hypothesis. Recital 25 of the Procedure Directive states that 'In the interest of a correct recognition of those persons in need of protection as refugee (…) every applicant should have an effective access to procedures (…) [which] should normally provide an applicant at least: the right to stay pending a decision by the determining authority (…)'. Article 9 of this same Directive stipulates that the asylum seeker may remain in the territory for the sole purpose of the procedure until the determining authorities make a decision. Although this right to remain does not constitute an entitlement to a residence permit (Article 9, paragraph 1), it is perfectly clear that the potentiality of being a refugee is enough to grant the asylum seeker the right to remain in the territory.

Yet the consequences of *potentially being a non-refugee* can also be clearly seen in the Directive. Article 31, paragraph 8, of the Procedure Directive stipulates the circumstances in which Member States may provide for an accelerated examination or border procedure. Most of these situations involve serious doubts as to whether the migrant is actually a refugee (Article 31, paragraphs 8(a)-(g)). In such cases, the entire procedure to establish whether someone is a refugee may be completed within a short period of time (which must, however, be reasonable; Article 31, paragraph 9), and entry into the country can be refused. The grounds for refusing entry must be that it is expected to be easy to prove that the applicant is not a refugee. Again we see that the law works with an expectation, this time it is an expectation as to the length of the procedure. If it is expected that it can be quickly established that the migrant is not a refugee, the accelerated asylum procedure applies. Yet this does not serve to say that the applicant in such cases is merely a potential non-refugee; the potentiality of his being a refugee is still there, albeit in the background (after all, he is still not sent back to his country of origin). His potential of being a refugee arises as soon as it is apparent that it cannot be quickly established that he is *not* a refugee. Article 43, paragraph 2, Procedure Directive stipulates that entry into the country can no longer be refused if the border procedure takes longer than four weeks.

5.2 The Asylum Seeker, the Refugee and the Time Hypothesis

In his capacity as a *potential refugee* the asylum seeker is already granted entry to the territory and permission to stay there for the duration of his application procedure. This has not previously been seen in my scrutiny of the time hypothesis: the migrant who is given permission to enter and stay *before* his application has resulted in a decision. Even a family member, who is supposed already to have one foot in the country because of his ties with the sponsor, is not granted the right to enter and stay during his procedure.

However, the question of exactly who falls within the scope of the time hypothesis in the case of refugee protection is not particularly straightforward. The asylum seeker, in his capacity as a potential refugee, may fall within the scope, but does he receive stronger rights after lapse of time? On first sight, the answer to this question would seem to be negative. An asylum seeker who is still in the normal procedure does not receive stronger residence rights after lapse of time. It is only if the asylum seeker is granted refugee status (under Article 13 Qualification Directive) that a stronger residence status is implied (and this is then the next step in the catalogue of rights after the right to enter and stay in the territory). One could argue that this applies to every form of stronger status: only if such status is granted (and this is not a mere function of time) has the time hypothesis been at work. Yet I concluded in the previous section that if the stronger status *could be* granted after a certain time on the basis of a legal provision, this implied a next step in the time hypothesis. The mere fact that, in practice, not everyone will receive the stronger status is not at odds with this hypothesis.

Once again, this difference relates to the double potentiality of the asylum seeker. Since the asylum seeker is a potential refugee, he is granted certain rights (i.e. the right to enter and stay) *as if* he *is* a refugee.[151] Yet the effect of the declaratory status is that from the moment he is recognised as a refugee, we act *as if* the asylum seeker had been a refugee *all the time*. This implies, however, that the opposite is also true: in other words, that if he turns out *not to be* a refugee, we act *as if* he had not been a refugee at any point in time. *In other words, we erase retrospectively the earlier double potentiality of the asylum seeker's past.* And it is precisely this erasure that marks the crucial difference with the granting of a stronger status in the normal situation of the time hypothesis.

If a regular migrant receives long-term resident status, this does not mean that his past is erased and rewritten; on the contrary, his past in the territory is a prerequisite for the said status. This is not the case for an asylum seeker: *Strictly speaking, I must conclude that if the asylum seeker turns out to be a refugee, retrospectively the asylum seeker did not exist. Therefore we must say that the time of the asylum seeker in the territory does not count (since he is both a potential refugee and a potential non-refugee), whereas the time of the refugee in the procedure (which can only be determined retrospectively) does count for the five-year period in the Long-term Residence Directive.* Half of the time spent in the procedure counts for the period of the long-term resident status, and even the entire period of time if the procedure takes longer than 18 months. As soon as the person is

151 This *as if* character of the asylum seeker is well known; see, for example, 'Every refugee is, initially, also an asylum-seeker; therefore, to protect refugees, asylum-seekers must be treated on the assumption that they may be refugees until their status has been determined.' UNHCR, 'Note on International Protection', UN DOC. A/AC, 96/815 (1993), para. 11, as cited in J.C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005), p. 159.

recognised as a refugee, his stay in the territory turns out to have been non-temporary all the time.[152]

And because the refugee has retrospectively been a refugee during his entire time in the territory, the question of the time hypothesis is also resolved. He falls under the time hypothesis the moment he enters the territory because, at that time, he was already a refugee. His entry and stay are his first rights in the catalogue of rights, with the residence status constituting the subsequent step. Yet what does this imply for the non-refugee?

I have already discussed the accelerated or border procedure as a procedure for migrants who are likely to turn out to be 'non-refugees' and so who can be refused entry to the territory, providing a decision to this effect is taken within four weeks. On this basis, it would seem obvious to conclude that this time clearly falls outside the scope of the time hypothesis since time outside the territory does not count (as we have seen earlier). Yet what is striking to observe here is that the notion of territory is being manipulated: just as time is always qualified time, so too is territory always qualified territory. Purely geographically, the migrant may have entered what is normally considered to be the territory and may stay there. Legally speaking, however, he is refused entry and stays at the border.[153] We have also seen that the possibility to manipulate the question of entry and stay in the territory has been limited by time: if the border procedure takes longer than four weeks, entry can no longer be refused.[154]

Taking this into account, I have to conclude that whereas this asylum seeker is likely to be a non-refugee and outside the scope of the territory because he has not legally entered, he is granted a stronger right (i.e. entry) by mere lapse of time. *From this I conclude that, for the time hypothesis, mere presence in the territory is the prerequisite, irrespective of what the prospects are at that particular moment.* We already encountered in the discussion of unlawfully residing migrants under Article 8, and here this point is reiterated.

Taking this into account, however, does not lead to a different perception of the relationship between the *potential non-refugee* and the time hypothesis. After all, the asylum seeker receives this stronger right after a period of four weeks, during which it became less likely that he would be a non-refugee. As his potential of being a refugee became more likely, he is allowed to enter the territory. *By mere lapse of time he receives*

152 In the Netherlands the residence permit is provided from the moment of the asylum request, and so the entire period then counts; see Article 44 Aliens Act [*Vreemdelingenwet*] 2000.

153 For a classic example of this, see ECHR 25 June 1996, *Amuur v. France*, 19776/92. According to the French government, Paris Orly airport, which is located just south of Paris (i.e. the heart of France), was deemed in French national law to be outside the legal territory for the purposes of asylum law (the Court did not allow this).

154 For an analysis of the manipulation of territorial presence, see H. Battjes, 'Territoriality and asylum law. The use of territorial jurisdiction to circumvent legal obligations and human rights law responses' (2016) 46 Netherlands Yearbook of International Law

the stronger right of legal entry because he is already present in the territory and it became less likely that he would be a non-refugee.

In conclusion, the difficult relationship between time, the asylum seeker and the refugee relates to their strange temporal relationship. What you see depends on the perspective from which it is perceived. From the perspective of the asylum seeker, the refugee comes *after* the asylum seeker. Yet from the perspective of the refugee, there is *no time relationship* with the asylum seeker as the refugee has retrospectively been a refugee from the start of the procedure. Or, to put it in temporal terms, the refugee is the future of the asylum seeker, while the asylum seeker is not the past of the refugee. This is all because the procedure to recognise the refugee takes time as the process of applying the refugee criteria to the individual migrant is not automated, while the time taken to complete the application is erased. Why all these temporal difficulties?

5.3 What Is so Special About the Refugee?

We have seen that the most striking difference between a regular migrant and an asylum seeker is that the latter is granted the right to enter and stay in the territory before it has been established whether the criteria for further residence apply, while the former is not granted such privilege. Especially in times of restrictive migration policy this is a fairly remarkable rule, given the functioning of the time hypothesis, whereby the migrant may receive stronger rights once he is in the territory.[155] States run the risk that even people who do not fulfil the criteria for a residence permit receive stronger rights after progress of time. Why do asylum seekers receive such treatment?

The answer is plain and simple: because of the principle of *non-refoulement*, as codified in Article 21 of the Qualification Directive. This principle of non-refoulement prohibits the expulsion or return of a refugee to frontiers of territories where his life and freedom are in danger. Most notably, this is forbidden by Article 33 of the 1951 Refugee Convention.[156]

The point here is that refugee protection is linked to the prohibition of refoulement: if an asylum seeker is a refugee, he cannot be sent back to the frontiers of

155 Obviously the point is that asylum seekers must first *reach* the territory before being granted this privilege, and it is this that is becoming increasingly difficult; see, for example, the EU-Turkey statement of the Council of the European Union of 18 March 2016. If, in times of restrictive migration policies, asylum seekers' right to entry and stay cannot be rigorously restricted from the moment they reach the territory, another option for a restrictive asylum policy is to make sure that people do not arrive at the territory in the first place.

156 It can also be found in Article 3 ECHR. This, however, has a different scope as it does not require a nexus between the persecution grounds and the risk, and consequently does not apply only to refugees. As mentioned earlier, this form of subsidiary protection falls outside the scope of this research.

territories where his life or freedom would be threatened. This has obvious consequences for every potential refugee; the protection against refoulement would become illusory if every asylum seeker could be sent back before it was established whether his asylum claim should be granted. The whole point in making the status of refugee declaratory seems to be that the principle of non-refoulement applies from the moment he requests asylum. So this principle of non-refoulement is at the basis of the schizophrenic identity of the asylum seeker: because the *refugee* cannot be sent back, the *potential refugee* may not be sent back either and is granted the right to enter and stay in the territory.[157]

Yet the risk to which Member States are exposed not only has consequences *before* refugee status has been granted. Indeed the risk assessment underlying the principle *of non-refoulement is* crucial for understanding the entire concept of the refugee, both *before and after* the refugee determination. Article 14, paragraph 1, Qualification Directive stipulates that the Member States shall revoke, end or refuse to renew the refugee status if the person ceases to be a refugee because the circumstances under which he was recognised as a refugee have ceased to exist (according to Article 11 Qualification Directive). Here we see, once again, the systematic link with the principle of non-refoulement. The refugee status is supposed to protect against a certain risk to the life and freedom of the refugee. If this risk durably ceases to exist, and protection can be provided by the country of the person's nationality, this asylum protection is no longer needed.[158] *This reveals that the refugee status is a temporary status. It is granted for the time that the refugee runs a well-founded fear of being persecuted in his country of origin. Therefore the assessment of the future risk is always a momentaneous assessment, which can be superseded by new developments after lapse of time.*[159]

A crucial change in his situation occurs if the refugee gains the status of long-term resident. From this moment onwards, his status can no longer be withdrawn merely because the risk in his country of origin has ceased to exist. The temporary character of his stay thus becomes permanent, within the sense of the Long-term Resident Directive, as soon as he receives the said status. *After lapse of time the refugee becomes a normal migrant, who falls under the realm of the time hypothesis just like 'regular migrants'.* It

157 There are two exceptions to this: Article 1F of the Refugee Convention exempts applicants from the scope of the Convention if, most notably, they have committed crimes against peace, war crimes or crimes against humanity, while Article 33, para. 2, excludes refugees from the principle of non-refoulement if they form a danger to the security of the country (cf. Article 21 Qualification Directive). Although 1F of the Refugee Convention in particular gives rise to interesting time issues, it will not be discussed here, given that the question of 1F is most notably a matter of national law. The risk assessment of Article 33, para. 2, with regard to the time aspect does not add much to the assessment of risk in respect of the withdrawal of long-term resident status. This exception to the non-refoulement principle will be discussed in section 5.3.1.

158 ECJ 2 March 2010, *Salahadin Abdulla*, C175/08, C176/08, C179/08, para. 72.

159 'Actual' is a key word in relation to a refugee: he ceases to be a refugee the moment his risk ceases to be actual (thus making the potential refugee someone who potentially faces an actual risk).

is particularly interesting that this form of temporary residence is brought within the scope of the Long-term Residence Directive, and I will return to this in section 5.3.2.

From the start, therefore, the status of a refugee is extraordinary, as most notably expressed in his right to stay during the procedure and his extended right to family reunification immediately after being granted refugee status. Moreover, the time during his procedure counts for the period of the Long-term Residence Directive, which means that his time runs faster than that of a regular migrant. If his procedure takes an extremely long time, he may even be eligible for long-term resident status as soon as he has been granted refugee status. The point, however, is that at that particular moment – when he receives the latter status – he is no longer treated as a refugee, but receives the same long-term resident status as any other migrant. A refugee, therefore, profits from time, just like any other migrant does: after lapse of time, his entitlements become stronger.

How do these two times – the temporary time of the refugee, and the non-temporary time of the normal migrant – relate to each other? In order to address this latter question, I inevitably have to further elaborate on the two distinctive elements relating to the refugee: the temporal character of the protection (section 5.3.1) and the determination of the future as definite or indefinite (section 5.3.2).

5.3.1 Is the Protection Temporary or Permanent?

We have already observed that refugee protection is temporary, given that if the risk in the country of origin ceases to exist, the protection will no longer be needed. Yet if the danger endures, the protection remains needed and so the refugee cannot be *refouled.* The only exception to this is if the refugee constitutes a danger to the host state, either because there are reasonable grounds for believing this or because he has been convicted of a particularly serious crime (Article 21 Qualification Directive). Let us focus in the following on the refugees to which this provision does not apply.

In the character of refugee protection, we encounter something not previously seen: the time of the protection can be called *permanent as well as temporary,* depending on whether the focus is on the risk or on the residence respectively. If the dangerous situation comes to an end, the protection will have been available at any time when the risk was apparent. In this sense, the protection will have been permanent with regard to the risk. This is because if the risk was actual, the refugee *never had to fear it because he was protected all the time and resided in the host territory throughout the entire period*.

If, on the other hand, we focus on residence, it can be concluded that if the risk ceases to exist, the protection and residence in the territory were temporary (*post facto*) *because* the dangerous situation has come to an end. *The protection of the refugee may therefore be called permanent, while the residence in the host country may turn out to*

be temporary because of the changed situation in the country of origin. During the *entire period* of crisis in his country of origin the refugee was *permanently* protected, while this protection ceased to be necessary as soon as the danger turned out to be temporary.

Here, too, we encounter the same schizophrenia as seen earlier in the case of the asylum seeker who was both a potential refugee and a potential non-refugee. We can now see that this schizophrenia was caused by the *permanent* character of the protection: the refugee must *always* be protected against the danger he has fled from. This implies that this protection should take effect even before it is established whether someone is in fact a refugee. The moment the refugee sets foot outside his country of origin, he fulfils the refugee definition. Even before the refugee reaches the country where he will apply for asylum, he *is* a refugee. Now we see a similar relationship between the protection and its effect after the status has been granted. *A refugee will always be protected*, but this protection does not stop time from moving on. After lapse of time, circumstances may have changed and the person may have ceased to be a refugee. *If* the dangerous situation ends, the protection will turn out to have been temporary (post facto); if not, it will endure endlessly. The similarity with the double potentiality of the asylum seeker is evident.

I can conclude from this that the entire issue of refugee protection struggles with the same problem: how to effectuate the permanence implied in the protection in legal time? In the first place, this leads to the double potentiality of the asylum seeker because the protection is permanent *before* it is established whether someone needs the protection. If the status is granted, this leads to a schism because the protection is permanent and must last *as long as the dangerous situation endures.* The point is that this *future of the refugee* is uncertain, and the law therefore has to take account of two contradictory scenarios at the same time.

This formulation brings me very close to a possible answer to the question I set out to answer here: What is so special about the refugee? To grasp the peculiar temporal character of the refugee, I have to make one more temporal distinction. My scrutiny of the Temporal Protection Directive in the next section will highlight yet another temporal division at work in the protection of 'displaced persons'.

5.3.2 What Is the Difference Between Temporary Protection and Temporary Protection?

As well as the normal refugee protection described in the previous sections, there is yet another form of protection available for 'displaced persons' in European migration law. This form of protection is provided for in the Temporary Protection Directive (Directive 2001/55). The main goal of this Directive is to provide protection in cases of mass influxes of displaced persons who cannot return to their country of origin (Article

1). Article 2(c) stipulates that 'displaced persons' are third-country nationals or stateless persons who have had to leave their country of origin, or have been evacuated and are unable to return in safe and durable conditions. It is important that these persons 'may fall within the scope of Article 1A of the Refugee Convention'; in other words, that they may qualify as refugee. In particular, persons who have fled areas of armed conflict or endemic violence, and persons at serious risk of systematic or generalised violations of their human rights, fall within this target group. Although this Directive has never been applied since coming into force, it is interesting to see yet another relationship between time and protection.

Displaced persons are defined in the Temporary Protection Directive as people who *potentially* fall under the refugee definition. This adds another level of uncertainty to the protection of people who have fled their country of origin. We concluded above that refugees are people with a well-founded fear of being persecuted, and that this implies an assessment of an expectation of the future. This expectation is based on evidence and on an assessment of the refugee's credibility. The permanent character of the *non-refoulement* principle underlying the protection of refugees means that even *potential* refugees have certain entitlements, with the right to stay being the most prominent. Now we see that, in exceptional circumstances, this potentiality can even have consequences *outside the refugee procedure* for those who *may fall* under the refugee definition.[160] These people will receive *group protection* in Europe; it is not necessary to establish whether a person individually falls under the refugee definition. Under Article 5 of the Directive, the European Council can introduce protection if it establishes by a qualified majority, on the proposal of the European Commission, that there is a mass influx of displaced persons.

This form of protection is far-reaching: these displaced persons receive the right to reside in the territory (Article 8) and all sorts of other rights almost equal to those of asylum seekers (Articles 9-19).[161] However, this protection is granted without an individual inquiry into whether a person indeed falls under the refugee definition. It is enough that the Council designates a certain group to be displaced persons. Yet this generosity comes at a price: the protection is temporary and will end when the maximum duration has been reached, or at any time earlier by Council decision (Article 6). The duration of the temporary protection is one year, while it may automatically be extended by up to one year (Article 4, paragraph 1). If the reasons for the protection persist, the protection may then be extended by Council decision for a further year (Article 4, paragraph 2). The maximum duration of the protection is, therefore, three

160 The Temporary Protection Directive could also apply to migrants who are already in the territory. In that scenario it would amount to a waiting period before the actual asylum procedure starts.

161 For an analysis of the difference in treatment, see Battjes, *European Asylum Law and International Law* , para. 8.8.

years. This wide-ranging protection, however, also comes at a price, given that, as mentioned before, it has so far never been applied in practice.[162]

For the purposes of this inquiry, however, it is interesting to extend our understanding of the temporary character of protection by analysing this Directive, and specifically answering the following question: How does this form of *general* temporary protection relate to the temporary character of refugee protection?

First of all, it should be noted that the general protection provided by this Directive does not preclude a displaced person from lodging an asylum request (Article 3, paragraph 1, in conjunction with Article 17). This is because the temporary protection of displaced persons extends to any person who may fall under the refugee definition. If the examination of an asylum procedure has not ended by the time the maximum duration of the temporary protection has been reached, the asylum procedure will be completed after the end of that period (Article 17, paragraph 2). This makes sense; otherwise, the Temporary Protection Directive would undermine refugee protection. Yet a striking feature of the Temporary Protection Directive is that this form of protection *does not end* if a displaced individual is found not to be eligible for refugee (or subsidiary) protection (Article 19, paragraph 2). The protection is granted to the entire group for a determined period; the conclusion in an individual case that someone is not a refugee does not exclude him from the temporary group protection available.

The relationship between temporary protection and refugee protection is furthermore determined by the principle of *non-refoulement*. The Temporary Protection Directive is also based on this principle because Member States have to apply temporary protection with due regard for the obligation regarding *non-refoulement* (Article 3, paragraph 2). It is perfectly conceivable, therefore, that when the temporary protection ends because of reaching its maximum duration, Member States will not be able to expel the displaced persons because such an expulsion would violate the prohibition of *refoulement*. What, however, is the particular difference in time between individual refugee protection and general temporary protection?

I concluded above that refugee protection is permanent with regard to the protection it provides against risk, while it can turn out to be temporary with regard to residence. The temporary character of the residence is therefore linked to the *indefinite* character of the situation in the country of origin. *If* this situation ends, the protection ends; if not, the protection endures. Focusing on the indefinite character of the temporary protection of refugees highlights the difference between this and the temporary character of protection under the Temporary Protection Directive. The latter

162 The reason for this would seem to be that entire groups of people are legitimately allowed to enter and reside in the territory for a certain period of time, and their presence in this territory means they fall, in one way or another, under the workings of the time hypothesis. This precludes the state's power to decide who may enter, stay and reside in the territory even more than under the Refugee Convention.

form of temporary protection has a definite character, it is determined *beforehand* that this protection *will come to an end* after a maximum period of time. In this sense, it is stipulated what will happen in the future. This contrasts sharply with the refugee protection because, under this latter form of protection, the question of whether the protection will end in the future is *dependent on the same future*. In other words, the question of whether the refugee protection will turn out to be temporary is not certain beforehand.

This difference reveals another axis along which time can be distinguished: definite time and indefinite time. This distinction has a prospective character because it implies an expectation.[163] It is only with such a distinction in mind that we can differentiate between the two forms of temporary protection that are available for displaced persons: definite temporary protection and indefinite temporary protection: in the former, the end is already foreseen at the moment the status is granted, while in the latter the period of time may come to an end.

Yet again I have to conclude that the problem in every expectation of the future is the future. Irrespective of whether an expectation is definite or indefinite, every expectation of the future remains a prediction and can, therefore, be falsified by unexpected circumstances arising. As seen in the Temporary Protection Directive, the law tries to take account of this unexpected character of the future. Whereas the protection under this Directive clearly has a definite temporary character, this does not preclude the displaced person from applying for refugee status. In this sense, the group protection may clearly be temporary, although an individual refugee may legitimately stay longer than expected. However, it is also quite conceivable that whole groups will end up staying non-temporarily, either because their protection will be guaranteed by individual asylum claims or because the *non-refoulement* principle will make it impossible for Member States to expel them. Whether this may happen is still uncertain – not as a matter of principle, but as a matter of fact – because the Directive has never been used in practice since entering into force in 2001. These final observations provide all the elements needed to draw conclusions as to the special character of the refugee protection.

163 This raises the question of whether this axis of definite and indefinite time also runs through retrospective forms of time. At first sight, this may be the case: definite would be the situation in which beginning and end are established, while indefinite would be the situation in which beginning or end, or both, are *unknown*. Yet such uncertainty seems to point more to a question of evidence than to the potential changeability of the future. This eventually leads to questions relating to the ontological difference between past and future, a subject that I will happily disregard here as it would not seem to play a significant role in European migration law.

5.4 Conclusions: The Profanation of the Sacred Refugee

Perhaps nowhere do the difficulties of the relationship between time and law, and the failure to legally address lapse of time, become as apparent as in the case of refugee protection. The previous analysis of the relationship between time and the refugee has probably been the most puzzling aspect in my scrutiny of time in European migration law.

It proved to be fairly difficult to determine the temporal relationship between the asylum seeker and the refugee. A naïve understanding would have that the asylum seeker precedes the refugee in time, with a subject present in the territory firstly being seen as an asylum seeker and subsequently as a refugee (if his case proves to be successful). The mind-boggling and crucial aspect of the refugee, however, is that as soon as the procedure determines him to be a refugee, he turns out already to have been a refugee at the moment of submitting his application. In this sense, there is no temporal relationship between the refugee and the asylum seeker; in other words, there is no moment at which the asylum seeker becomes a refugee.[164] When the procedure ends, the person has either been a refugee throughout the procedure, or a non-refugee.

This ambiguity obviously has consequences for the subject of the procedure, who is marked by his double potentiality: he is simultaneously a potential refugee and a potential non-refugee. His rights and duties during the asylum procedure are marked by this equivocality. The law constantly takes simultaneous account of these two scenarios, with the right to stay in the territory during the procedure and the possibility to be detained being the two most extreme examples of this.

Yet this complexity does not end when the refugee receives a residence permit. His status appears to be simultaneously temporary and permanent, which has to do with the permanent character of the protection against the risk. If the risk endures, protection should always be granted to the refugee. Yet as soon as the risk comes to an end, protection is no longer needed, and the refugee status turns out to have been temporary.

We have encountered yet another attempt to address the temporality of the refugee status. By comparing the difference between the temporary character of the refugee protection and that in the Temporary Protection Directive, we encountered a difference between definite and indefinite time. Through this distinction, the law endeavours, once again, to address the future. Group protection in the Temporary Protection Directive has a definite temporal character; the end date of the protection is foreseen at the moment the status is granted. Individual refugee protection, on the other hand, has an indefinite character; at the moment the status is granted, it is still

164 Strictly speaking, one could argue that this moment does exist; i.e. when he leaves his country of origin and so fulfils the refugee definition. The point here, however, is that this does not exist as a moment in the procedure.

uncertain how long it will endure (permanently or temporarily). Like every prediction of the future, however, changed circumstances can mean such a future distinction can turn out to be entirely false. Group protection can be succeeded by individual refugee protection (i.e. definite becomes indefinite), while a refugee can be granted long-term residence status (i.e. indefinite becomes permanent) and can also choose to leave of his own accord.

There is a clear reason for this problematic temporal character of the refugee: his protection must be permanent. We grant certain rights to asylum seekers even before we have established whether they are asylum seekers, purely on the basis of their potentiality as refugees. If we did not provide such a temporal trick, we would run the risk of eroding the permanent character of the protection. In this sense, the refugee is outside of time; his protection must be permanent and cannot, therefore, be legally restricted in or by time.

What does this mean? It shows that the category of the refugee has to be positioned in human *and* clock time, and that this is fairly problematic. Providing a temporal basis to the refugee leads to the perplexities I encountered while relating the asylum seeker and the refugee to each other, and when analysing the temporal expectation of the protection. The refugee is the possible future of the asylum seeker, while the asylum seeker is not the past of the refugee. And, at a certain moment, the refugee protection may be *both* temporary and permanent: temporary because it is dependent on the situation in the country of origin, and permanent because protection against the risk must always be provided. The question of protection thus also shows the difficult relationship with the lapse of clock time. The refugee protection is proof of the legal attempt to effectuate permanent protection in the ever-changing course of time.

We could describe the question of the refugee and time in terms of the sacred and the profane. Sacred is that which belongs to the gods and is made unusable for human practice, while profane is that which once was sacral or religious, but is now given back for the general use and possession of humans.[165] Sacred is what is outside human time and eternal, while profane is the finite time of human beings. These two forms of time are irreconcilable. The refugee is difficult to relate to human time and clock time

165 The description of these terms is taken from G. Agamben, *Profanaties* (Boom 2015). Agamben discusses them more elaborately in G. Agamben, *Homo Sacer. De soevereine macht en het naakte leven* (Boom 2011); see, most notably, p. 81-123. It would certainly be worthwhile relating Agamben's analysis to the relationship between time, the asylum seeker, the refugee and the long-term resident as there seems to be an interesting form of sacralisation and profanation at work. The refugee procedure, as the sacralisation of the migrant, makes the sacrifice possible, while this refugee becomes profane again during his time in the host country, when he develops contacts with others and the environment. Such analysis, however, falls outside the scope of the present study and is still in the future. Here I will merely seek to relate the sacred and the profane to time in order to illuminate the time perplexities encountered so far.

because the refugee signifies a sacred concept that should be permanently protected and is thus situated outside human time. All the time problems we encountered above relate to this endeavour to deal with this sacred refugee in (procedural) time. In this sense, procedural time must be erased because the refugee cannot be constructed – he is beyond legal and human construction – and the endurance of his refugee status cannot be put into temporal terms because he is sacred.

This strange relationship between time, protection and the refugee also clearly comes to the fore in the question of family reunification as described in chapter 4. There we saw that, because of the involuntary character of their migration, refugees may bring their families over within the first three months after being granted refugee status. This regime for family reunification in the first three months is more lenient than that applying to normal migrants. Moreover, states cannot require the refugee to have resided in the territory for a certain period of time before being allowed to apply for family reunification, as they may in the case of normal migrants. This possibility to restrict refugees' lenient right to family reunification by imposing a time limit of three months is a good example of the speedy profanation of the refugee as a result of his protection in legal time.

Generally we see that as soon as the asylum seeker is recognised as a refugee, he falls under the time hypothesis and is treated as a normal migrant. Owing to his presence over time in the territory he loses his sacral status, with the contact with other human beings and the environment representing a process of profanation. Long-term resident status represents the acknowledgment that the refugee has lost his sacral status and has become human again. The refugee protection essentially comprises a legal attempt to protect the sacred within the course of human and clock time. I will return to this in chapter 11.

6.

Time and the Economic Migrant

Citizenship Directive (2004/38)

Time borders between internal market and state – Time is money – Granting rights to keep control – Dim version of the time hypothesis – Freedom to move and time to settle

The statement that 'The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers', is one of the opening statements of the Citizenship Directive. With regard to the rights and freedoms of migrants in European migration law, citizens of the European Union are without doubt the most privileged. Free movement of nationals of the Member States of the European Union has been one of the key goals of integration ever since the European Economic Community was established in 1957.[166] Compared to the legal rules regulating family reunification and asylum, it is clear from the outset that the Union citizen has strong entitlements to enter and stay in the other Member States. This chapter discusses these rules for Union citizens in order to highlight the differences with the other main branches of migration law. This form of migration will be shown to be governed by economic reasoning.

I will limit myself to a discussion of the Citizenship Directive, even though there are plenty of other rules regulating economic migration.[167] A separate analysis of these different subcategories will not add much to the analysis of the time hypothesis, given that the rationale behind these rules is roughly the same. The analysis of the Citizenship Directive will reveal that the main reason for these migrants' particularly privileged position is to be found in economic arguments, just as the restrictions on their free movement are primarily dominated by questions of money. The subsequent analysis will also disclose the spatial presumptions of the time hypothesis and clearly bring to the fore the possibility of differentiating the time hypothesis for the more privileged migrants. The conclusions will reveal an unexpected paradox in the relationship between stronger rights and differentiation between wanted and unwanted migrants. But let me start by outlining the framework for migrating Union citizens.

166 For a concise description of the historical development, see Boeles and others, *European Migration Law*, p. 30 et seq.

167 See, most notably, EU Blue Card Directive (2009/50); Seasonal Workers Directive (2014/36); Researchers Directive (2005/71); Students Directive (2004/114).

6.1 Free Movement of the European Citizen in the Internal Market

A Union citizen is any person who has the nationality of a Member State (Article 2.1). Nationals of a Member State have the right to free movement within the internal market. One of the characteristics of this internal market is that it constitutes an area without internal frontiers and in which the free movement of persons is ensured. The territory of the Member States of the Union consequently functions as one area (a single market). Confusingly enough, however, the internal borders within this market have not been abolished. Although the Union citizen may not encounter actual border controls when moving between different European countries, he still resides in a specific Member State and so not in the entire Union. That is to say, he has access to the whole territory of the EU, but it is for the individual Member States to secure the rights and duties of migrants.[168]

Union citizens with a valid identity card or passport have the right to exit the state of their nationality and enter the territory of other Member States without any visa or equivalent formalities being imposed on them (Articles 4 and 5). They may then stay there for the next three months without any conditions or formalities (Article 6). After these three months, however, their right to residence is restricted by certain conditions (Article 7). Union citizens wanting to reside in the other Member State for longer must work (Article 7, paragraph 1(a)) and have sufficient means and comprehensive sickness insurance in order not to become a burden on the social assistance system (Article 7, paragraph 1(b)), or must study (Article 7, paragraph 1(c)). Family members of Union citizens who comply with these criteria may accompany them (Article 7, paragraph 1(d)).

Just like refugees under the Family Reunification Directive, Union citizens are clearly brought under the regime of the time hypothesis three months after their entry into the territory. If Union citizens comply with the criteria in Article 7, they are subsequently entitled to reside in the territory of the other Member State for longer. After five years of continuous and legal stay, they will have the right to permanent residence (Article 16), which is a clear reference to the time hypothesis[169] (the question of how these first three months count will be examined at the end of this section). There are also similar (but more favourable) provisions relating to continuous presence in the territory (Article 16, paragraph 3). Instead of a maximum absence of six consecutive months and a total of ten months in the entire five years of the Long-term Residence Directive, the continuity of residence for Union citizens is not affected by temporary absences not exceeding a total of six months *a year*. This means that the Union citizen

168 Boeles and others, *European Migration Law*, p. 39.

169 Albeit that, under Article 17, those who have reached the age at which they are entitled to an old age pension or who stop working because of a permanent incapacity to work can be granted the status of permanent resident before the period of five years has expired.

can safely be absent from the territory for half of each year, and so for half of the total period of five years, and still apply for the right of permanent residence. In addition to this general rule, absences of longer duration for military service or a single absence of up to twelve consecutive months for reasons such as pregnancy and childbirth, serious illness, study or vocational training are allowed.

The rules relating to the withdrawal of the residence permit (Article 14, paragraphs 3 and 4; Articles 27-33) are also quite similar to those in the Long-term Residence Directive, albeit that the question of becoming a burden on the host state's social welfare system is of more importance in the Citizenship Directive.[170] Equivalent provisions apply to family members with regard to their autonomous residence right (Articles 12-14) and their permanent residence (Article 16, paragraph 2). Despite an occasional difference with the situation under the Family Reunification Directive or the Long-term Residence Directive, these provisions in the Union Citizenship Directive contribute, as such, nothing new to the analysis of the time hypothesis.

In addition, the fact that family members can immediately accompany their Union citizen sponsor, instead of observing the two-year waiting period required under the Family Reunification Directive, does not provide a new understanding of the time hypothesis (I will touch upon a novel aspect of family reunification for the Union citizen in the next section).[171] Instead, it merely underscores that Union citizens have a privileged position, not only with regard to their residence entitlements, but also regarding the entitlements of their family members. This reiterates what we have encountered before: *the possibility to restrict (or not restrict) certain rights by manipulating time criteria, and a distinction between Union citizens and third-country nationals because of an apparently different appreciation of these types of migration.*

The question of the withdrawal of the residence permit also seems familiar. A Union citizen's right to reside in the host Member State can be withdrawn for reasons of public policy or public security (Article 28). These grounds will not be invoked to serve economic ends (Article 27). It is striking that the individual's personal conduct must represent a *genuine, present and sufficiently serious threat* affecting a fundamental interest of society before his residence permit can be withdrawn. Previous criminal convictions do not in themselves, for example, constitute grounds for taking such expulsion measures (Article 27, paragraph 2). This reminds us of the analysis of the withdrawal of long-term resident status and the risk assessment for refugee protection, where the *moment* of the decision is of utmost importance. It is perfectly conceivable that someone constituted a

170 For an analysis of this, see K. Lenaerts, 'European Union Citizenship, National Welfare Systems and Social Solidarity' (2011) 18 *Jurisprudence* 397.

171 Nor do the exemptions for people who no longer work in the host member states because of disability or receipt of an old age pension (Article 17).

serious and genuine threat to public security or policy in the past, but that this danger diminished after lapse of time.[172]

Interestingly, we see the time hypothesis at work again in the criteria for removal of Union citizens on these grounds. During the first five years, a Union citizen can be expelled only on grounds of public policy or public security. Once he obtains the permanent resident status, however, only *serious* grounds of public policy or security may lead to expulsion (Article 28, paragraphs 1 and 2), while only *imperative* grounds of public security may lead to the expulsion of Union citizens who have resided in the host Member State for ten years, or minors. Here, therefore, we see a 'sliding scale'[173] of opportunities for a state to remove a Union citizen from its territory; the longer a Union citizen resides there, the more serious the threat should be to justify his removal. This is a clear reference to the time hypothesis.

6.2 When Does the European Citizen Arrive in a National State?

Based on the above, one might think that Union citizens who migrate to another Member State would have *fewer* rights after three months because certain restrictions apply from that moment onwards. The status of these first three months therefore has to be determined. It seems that Union citizens first reside unconditionally in the borderless European internal market for three months, whereupon they start to reside in a Member State. *The difference between the territory of the European internal market and the territory of the Member State can therefore be framed in terms of time.* In the first three months of the time spent by the individual migrating Union citizen, the territory of the other Member State is considered to be part of a borderless territory into which the Union citizen can freely move, virtually without restriction. After this period, certain restrictions are imposed on the citizen, thus implying that, from then onwards, a border re-arises within this borderless market space.

This is confusing as the way in which the internal market operates would appear to be dependent on the time of the individual migrant. It is perfectly conceivable that two Union citizens could reside at the same physical location at the same moment, while legally being in a different territory. While the first could still be in his three-month period and, therefore, purely in the internal market, the other may already reside in the Member State. *Such a time definition of the internal market implies that this area is subject*

172 See, for example, ECJ 29 April 2004, *Orfanopoulos v. Land Baden Württemberg*, C-482/09 and C-493/01.

173 This term stems from the Dutch provisions on the removal of migrants on the basis of public policy and security (Article 3.86 Aliens Decree [*Vb*] 2000). For a (Dutch) analysis of the role of time in this respect, see M.C. Stronks, 'Een bijna ongebrijdelde beteugeling van de tijd. Een analyse van aanscherpingen van de glijdende schaal' (2013) NJB 2306.

to the time frame of individual migrants and has no general appearance. The internal market is related to human time as it is the time of someone – rather than a general conception of clock time – that determines whether a person is in the internal market or not.

This clear distinction between entitlements in the internal market and entitlements in the Member State is too simplistic, however. This is because Union citizens also remain very privileged three months after they enter the Member State. Indeed, there are only a few restrictions that can be imposed upon them after those three months. Union citizen consequently profit only from a dim version of the time hypothesis, given that they already possess almost every right. It is probably more accurate, therefore, to stress that the internal market is still prominently at work after three months, albeit that, from this moment onwards, the state has slightly broader powers to regulate the residence of these migrants.

Some important conclusions can nevertheless be drawn from this schematic depiction of the relationship between the internal market and the Member States. This depiction clearly reveals the tension at work in this area of Union law as the two domains do not fit together neatly: on the one hand, there is the internal market, with its freedom of movement for migrants, while, on the other hand, there is the Member State where the rights and duties of these individual migrants are *effectuated and enforced*. One could say that this internal market serves as an empty space, or a blanket that is placed over the territories of the Member States. During the first three months after the individual Union citizen leaves his country of origin, the space remains empty and the citizen can move freely. After these three months (and, on rare occasions, during this period) the Member State's power to regulate his residence comes to the surface, albeit still in a very limited appearance. Yet even after this period, the landscape of migrating Union citizens remains a fairly blank canvas as it is then up to the Member States themselves to regulate these citizens' stay.

With this picture in mind, however, it is worthwhile taking a closer look at what is left of a Member State's power to control the stay of these privileged migrants. The most interesting aspect of the free movement of citizens is the question of becoming a burden on the state. The idea behind the criterion of having sufficient resources and sickness insurance, as covered by Article 7, is that this will counter welfare tourism. The fear was that Union citizens would migrate to the Member State with the most attractive social welfare benefits, without ever having contributed to that Member State. For this reason, it was decided to limit the free movement of Union citizens after three months to those migrants who would not become a burden on the host state. The practical consequence of this is that 'expensive' members of society do not enjoy free movement rights for a period beyond three months. This suggests that this type of migration is designed for a select group of economic migrants, thus revealing the economic roots of

the free movement of citizens.[174] If a Union citizen does not become a burden on the host state (i.e. if he does not cost that state money), his right of free movement within the Union is almost unconditional (Article 14, paragraphs 1 and 2).[175]

This almost unconditional character of the rights of free movement implies that a Member State's power to regulate the movement of these migrants generally comes to the fore only in the event of their becoming a burden. So *when* does one become such a burden? It is important to note, first of all, that verification of this criterion is not required to be carried out systematically. Only if there is reasonable doubt as to whether the Union citizen satisfies the conditions for residence may compliance with these conditions be verified (Article 14, paragraph 2). If, therefore, a residence card (Article 10) is issued, the question of whether the Union citizen fulfils the conditions for residence will certainly be checked. After this point in time, however, it is assumed that the Union citizen continues to fulfil these conditions unless reasonable doubt arises.[176] *Here we encounter again that the law fixates a moment for a legal decision where a certain expectation of the future is created. And this expectation is also fixated till the moment of a new decision, or till the migrant actually falsifies the expectation.*

In the meantime it is perfectly conceivable that the Union citizen may lack the resources that are necessary for his residence, without becoming a burden on the state. The Court has held that it is not necessary for the citizen himself to have sufficient resources, and others may ensure that he does not have to request social assistance.[177] The question is whether he *actually is* a burden on the state, not whether there is a risk that he might become a burden, and the measures imposed should consequently be

174 Chalmers, *European Union Law*, p. 478. This has led some commentators to question the justifiability of such a system; see Chalmers for references. The question of the justification of a certain differentiation between entitlements of migrants falls outside the scope of this research. Here it is only important to observe *that* Union citizens are being privileged as economic migrants. Yet for an interesting and critical reading of the concept of time in the Citizenship Directive, see S. Mantu, 'Concepts of Time and European Citizenship' (2013) 15 European Journal of Migration and Law 447.

175 Cf. Recital 16 of 2004/38; besides the possibility for removal in the event of a threat (as discussed above).

176 The question of whether a Union citizen can apply for social benefits on the basis of equal treatment with nationals falls outside the scope of this research, which focuses solely on residence rights. Nevertheless this question is interesting, especially because the Court has allowed national legislation that demands a 'real link' between the applicant and the labour market, and this form of integration can be proven by residence of a 'certain length of time' or a 'reasonable time'. See, for example, ECJ 25 October 2012, *Prete*, C-367/11; ECJ 15 March 2005, *Bidar*, C-209/03. For my purposes, however, this does not seem to add much to the analysis of the Long-term Residence Directive or case law on Article 8 ECHR with regard to the question of time.

177 A mother (ECJ 19 October 2004, *Zhu and Chen*, C-200/02) or non-family members (ECJ 23 March 2006, *Commission v. Belgium,* C-408/03).

proportionate.[178] This can even imply, according to the Court, that seeking recourse to social assistance – so actually becoming a burden on the state – should not result in the withdrawal of his residence permit if this situation is only temporary.[179] Nor may the Member States specify a fixed amount for what they regard as sufficient resources (Article 8, paragraph 4) or ask the Union citizen to prove that he has sufficient resources for a year.[180] And as soon as these migrants obtain the status of permanent resident, their status is no longer subject to these economic restrictions (Article 16, paragraph 1).

Here we see a system of migration law governed almost entirely by economic considerations. There are no substantial criteria (e.g. fear of being persecuted, or being a family member) at stake; the only aspect that matters for residence in the territory of another Member State is money. As long as the migrant does not cost money (nor become a threat), he has the right to reside in the territory. There is only one moment at which he has to prove that he has sufficient resources to ensure he does not become a burden on the state. After that moment, there is no subsequent moment at which he has to substantiate a new expectation about the future. It is assumed that he will not become a burden in the future until such time as he *actually becomes* one. The lack of state power to regulate the residence of these migrants is very apparent here. Besides public order, the only grounds on which the state can regulate such residence is whether the migrant costs money, and even this is possible only in very limited cases.

From this I can draw an important and interesting conclusion: the time hypothesis has very little effect on Union citizens. What do you give someone who already has nearly everything? The only thing the permanent Union citizen gains after five years of residence is that, from then onwards, he can become a burden on the state and can become a more serious threat to public security without risking losing his residence entitlements. The difference between this and the situation of third-country nationals who apply for permanent residence is striking. Under Article 5 of the Long-term Residence Directive, third-country nationals have to prove that they have *stable* and *regular* resources to maintain themselves and their family, and that they have sickness insurance, while integration conditions may also be imposed upon them. After five years of residence, therefore, the state can still impose these conditions on such a migrant who applies for stronger rights. This is in stark contrast with the Union citizen, who only has to prove after three months (*at that moment*) that he will not become a burden on the

178 This also applies to sickness insurance. If someone has never been a burden on the state in the past while having spent quite some time in the host country, he cannot be denied further residence for a breach that has not cost the state a penny, ECJ 17 September 2002, *Baumbast v. Secretary of State for the Home Department*, C-413/99.

179 ECJ 20 September 2001, *Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, C-184/99, para. 44. This is also reflected in Recital 16 of Directive 2004/38. For a different outcome in a similar question, see ECJ 11 November 2014, *Dano v. Jobcenter Leipzig*, C-333/13.

180 ECJ 10 April 2008, *Commission v. The Netherlands*, C-398/06.

state, and after that point does not have to prove anything. *We consequently see that this privileged group of economic migrants falls under a very dim variant of the time hypothesis.*

However, even the most privileged migrants still gain stronger rights after lapse of time, even though it is very difficult to give them more than they already have.[181] *The most important observation in this respect is that the possibility to grant stronger status implies the possibility* ***not*** *to grant that status. From the migrant's perspective, the time hypothesis may be a route towards increasing entitlements and rights over the course of time; from the perspective of the state, however, it is* ***also*** *a way of keeping control over migrants' residence in its territory over time.* The case of the Union citizen shows that where there is only a dim version of the time hypothesis at work, there is also only a dim version of state control over the presence of migrants.

And, finally, what about the relationship between the time hypothesis and the first three months of the migrant's stay in the 'purely internal market'? If we consider the first three months of the migrant's residence as the stay in the territory of the Union's borderless internal market, it is only after three months that the Union citizen 'actually enters' the Member State for the purposes of the time hypothesis. That is to say, that is the moment at which he enters the Member State because that is when he has to fulfil the conditions for longer residence in the particular Member State. After three months, a border arises within the internal market, thus distinguishing the territory as being national. Interestingly, these first three months do count when a migrant applies for the right of permanent residence under Article 16, which makes no distinction between time before and time after the first three months. Again, we encounter a question of expectation. The first three months of stay in the territory are expected to be a 'short stay' or temporary, and therefore the migrant does not have to comply with any formalities. Yet if this period turns out retrospectively to have been the first three months of residence, or even permanent residence, in the territory of the Member State, they retrospectively count as non-temporary. The point, however, is clear: as soon as the Union citizen arrives in the national state, the clock for the time hypothesis starts ticking. *The time hypothesis is consequently linked to presence in the territory of the Member State.*

181 It is interesting to note that Recital 18 stresses that 'in order to be a genuine vehicle for integration into the society of the host Member State', the right of permanent residence should not be subject to any conditions. This is reminiscent of the discussion of the permanent resident status as being the cause or effect of successful integration, as dealt with in section 2.3. This may say more about the differentiation of the different types of migrants as being more or less privileged (for the privileged, the status is the *cause* of integration, whereas for the less privileged it is the *effect*).

6.3 When Does the National Arrive in Europe?

I ended the previous section by observing that time in the time hypothesis has a national character. This can be concluded from an analysis of the functioning of the three-month threshold, but becomes even clearer if account is taken of 'reverse discrimination'. If a Union citizen decides to reside in another Member State, the most significant sign that he falls under the time hypothesis is his right to permanent residence after five years in the host country. The situation of an individual migrating Union citizen is relatively straightforward and at that moment hardly differs from that of third-country nationals with regard to the application of the time hypothesis (albeit that the requirements for the Union citizen are more lenient).

The situation changes, however, if the issue of family reunification for Union citizens is analysed. At first sight, the rules applying here would not seem very different from those applying under the Family Reunification Directive, with the most obvious difference being that family members of Union citizens may accompany them immediately and are not hindered by the imposition of integration measures in the host country. This only underlines the privileged position of Union citizens in migration law. Yet it becomes more interesting, from the perspective of time, as soon as we start to compare the question of family reunification between two categories of Union citizens: *those who migrate within the Union and those who do not cross any border*. We then find a difference between two types of Union citizens: those who migrate and those who do not.

This has to do with the fact that EU law on the free movement of Union citizens can be invoked only if there is an interstate link connecting the case at hand with the European order.[182] A national of a Member State who resides solely in his country of nationality cannot invoke European rules. From the perspective of free movement, this rule is not so surprising: how would the right to migrate be useful if one does not migrate? In practice, however, this is more convoluted because the rights and entitlements connected to free movement of Union citizens do not relate merely to their entry to and residence in other Member States. These rights and entitlements also comprise Union citizens' right to family reunification. And, once again, the family seriously complicates the picture.

Instead of the right of free movement – which has, by definition, an interstate link – the right to family reunification can also be relevant for those Union citizens *who do not migrate* within the European Union (although obviously someone – i.e. the family member – must migrate if migration law is to be invoked). As European laws apply only to those Union citizens who actually move to another country, there can be a difference in regulations between migrating and non-migrating Union citizens when

182 ECJ 27 October 1982, *Morson & Jhanjan v. The Netherlands*, joined cases 35/82 & 36/82, cons. 15. See also, for example, Boeles and others, *European Migration Law*, p. 79 and Chalmers, *European Union Law*, p. 491 et seq.

it comes to family reunification. If the European rules on family reunification are more favourable for migrants than the national rules, non-migrating Union citizens can in practice be disadvantaged. This situation is referred to as 'reverse discrimination'.[183]

The picture, however, is further complicated by the fact that not every form of migration by a Union citizen triggers the (potentially more favourable) application of the European provisions on family reunification. Residence in another Member State must be 'sufficiently genuine'[184] to form the basis for a derived right of residence for the family member. Residence of a Union citizen for longer than three months and in conformity with the conditions of Article 7 will in any event be regarded as sufficiently genuine. Permanent residence (pursuant to Article 16) also counts as sufficiently genuine. In other words, only if a Union citizen *settles* in another Member State, can he apply for family reunification on the basis of the rules relating to Union citizenship. In this sense, the reverse discrimination applies between those Union citizens who settle in another Member State, and those nationals who do not settle outside their state of origin. Or, in the vocabulary used earlier, the residence in the other Member State must be non-temporary. The clock for the time hypothesis only starts ticking in the case of a non-temporary stay, which is the same as stating that the clock starts to tick when the migrant settles in another state. A certain durability is the prerequisite for the clock in the time hypothesis to start ticking. And this durability is a clear reference to the expectation of human time.

Another conclusion, however, can also be drawn from the above. The problem of reverse discrimination arises precisely because of the apparent divergence between the basis for the entitlements (Union law and Union citizenship) and the basis for time (residence within another Member State as a non-national). In a situation in which time was also European instead of purely national, reverse discrimination would not exist. Residence in the EU would then be the basis for the time hypothesis, while national residence would not be relevant. Only in such a scenario would the internal borders be abolished entirely. This would imply that a Union citizen could not be a migrant within the Union because there would be no difference between national residence and European residence. The borderless internal market would not just last for three months, but would be timeless. The moment someone became a Union citizen, he would possess all the entitlements and rights in the entire territory of the European Union, wherever he resided and regardless of any movement between Member States. Within the European Union, therefore, a Union citizen would never fall under the time hypothesis because he would never be a migrant within the Union. At present, the economic migrant is admitted to the internal market, but resides in the Member State. *I can now, therefore, firmly conclude that time within the time hypothesis is national, while entitlements for Union citizens are European.*

183 See, for example, Chalmers, *European Union Law*, p. 491-494.
184 ECJ 12 March 2014, *O&B*, C-456/12, para. 51.

6.4 Conclusions: Dim Time Hypothesis Implies Meagre Control

Four conclusions can be drawn on the basis of the above: the first relates to spatial presumptions of the time hypothesis, the second to the subjects of this hypothesis, the third to the relationship between the time hypothesis and the power of the state, and the fourth to the privilege to move and the time to settle.

We have seen that the Union citizen arrives in the Member State after three months. Before this moment, he floats somewhere in the internal market without ever touching any territory. It is only after three months that he firmly sets foot on the ground of a national Member State, and this is when the time hypothesis starts to function. Retrospectively, however, his three unspecified months of presence in the internal market do count – for the purposes of the time hypothesis – as durable residence in the national territory. Time in the time hypothesis is related to presence within a Member State, not within the European internal market. As soon as a Union citizen settles in another Member State (i.e. the moment he durably resides there), his time starts ticking. The difference between stay, residing and settling is clearly one of expectation and refers to human time.

The time hypothesis of the Union citizen, however, is a dim version of the time hypothesis that functions for third-country nationals. The Union citizen already has almost every right upon entry. This clearly shows the ability to distinguish between different migrants in European migration law on the basis of time: migration is much easier for the privileged, and this implies that an entirely different time regime applies to them. Since they already have almost every right upon entry, the increase in their rights over time is fairly moderate. In other words, time does not make a great deal of difference to these migrants.

However, this dim version of the time hypothesis implies not only that migrants have little to expect with regard to entitlements over time, but also that the opportunities available to the state to control the presence of these migrants in its territory are very limited. The time hypothesis turns out to refer not only to the growth of rights over time, but also to the control of the migrant's presence over time. Every time the migrant *can apply* for stronger entitlements, the state has the possibility to check whether the migrant fulfils the criteria. The lack of growth in entitlements over time consequently corresponds with lack of power to control the residence of the migrant. As obvious as it may seem, the counterpart of granting a stronger residence entitlement is to not grant this entitlement. The moment a migrant steps outside the time hypothesis, he can no longer be controlled. This will be the subject of the next chapter, where I discuss the naturalisation of the migrant over time.

Intermezzo II: Time Regimes to Differentiate between Legal Subjects

Migration law bears witness to a striking capacity to differentiate legal rules for different subjects present in the territory. We have seen that time is an important means for differentiation; different time regimes apply to its three principal subjects: the family member, the asylum seeker; the refugee and the Union citizen.

The family member's entitlements of entry and residence are based on his sponsor. It is the sponsor's attachment to the country that enables the family member to enter, and his subsequent residence entitlements remain dependent on his sponsor for five years after being granted. By contrast, the asylum seeker may enter the territory before being recognised as a refugee and may stay in the territory during the time of his procedure. If this procedure is completed quickly, only half of it counts towards the granting of his long-term resident status, whereas if it takes a long time to complete, the entire time of the procedure counts. The refugee certainly also has a privileged status because he may await the decision on his application within the territory. His status, however, is temporary. Just like the status of the family member is dependent on the prolonged existence of the family ties, so, too, is the refugee status dependent on the existence of the risk in the refugee's country of origin. This status could therefore turn out to be 'temporary' in the future. The status of the Union citizen is, from the start, the most privileged. He can freely migrate within the internal market within the first three months; after this period he can stay in the country, providing he does not become a burden on the state.

The different time regimes applying to these three principal migrants stipulate when they may enter the territory, which time in the territory counts for their stronger status, and whether their residence gives rise to any stronger status at all. As mentioned in the earlier intermezzo, the clock time makes it easy to adjust the rules applying to different subjects. Yet also the temporal qualification of the presence is an important means for differentiation: whether residence is temporary or non-temporary makes a great deal of difference in terms of the legal opportunities for prolonged residence in the territory.

It is nevertheless striking to observe that, after lapse of time in the territory, these different categories of migrants can equally apply for a permanent resident entitlement. The differences dissolve after almost the same amount of time. Both the Union citizen and the family migrant can apply for a permanent status after five years of presence in the territory of the host state, although the five years of the Union citizen may actually comprise only two and half years of physical residence in the territory. For the refugee, too, the period is also five years, except if his procedure took less than 18 months. In that scenario, only half of the time that he was present in the territory during the procedure counts for the permanent status, while the other half adds to the required five years. Roughly, therefore, I can conclude that the moment the migrant becomes present in the territory, his time starts to tick and he slowly but surely becomes individually tied to the

host country. Even the sacred refugee becomes a profane human migrant after lapse of time.

These time regimes make it clear that different migrants have different entitlements, different expectations and clearly a different freedom to move. The outline of these three archetypical subjects of migration law shows that there is a clear difference in these subjects' freedom of movement. The Union citizen is clearly the most privileged: he can easily move within the internal market, and the barrier to residing and settling in another Member State is very low. The asylum seeker may have the privilege to stay in the territory during his asylum procedure, and permanent protection awaits the refugee, but it is certainly more difficult to be 'recognised' as a refugee than as a Union citizen. The family member is possibly the least privileged of these three categories, although his position is still certainly much better than that of economic migrants without sufficient resources to stay in another country. Nowhere, however, is the difference in the freedom to move as clear as when the question of continuity under the Long-term Residence Directive is compared to that available to Union citizens. The Union citizen may be absent from the territory for half of the five-year period, while for the 'normal migrant' a period of six consecutive months or periods exceeding a total of ten months interrupt his continuous residence in the territory.

This leads to a puzzling situation. It could either be concluded that Union citizens develop roots faster than normal migrants because they only have to be present in the territory for half of the time to gain a stronger right. Alternatively it can be concluded that they receive stronger rights in order to 'develop roots faster'. Thus far, however, presence in the territory has been found to be the absolute prerequisite for the time hypothesis. So it could also be assumed that these Union citizens do not root in their host country, while they easily receive stronger rights simply because they are privileged. That would lead to the paradoxical conclusion that those who have been granted the freedom to move freely within the European territory do not root in the Member State. While those who are not privileged are condemned to stay in the territory and therefore to develop roots in the Member State. The wanted can move, while the unwanted have to stay.

Outside the time hypothesis

(chapters 7-8)

7.

Time and Naturalisation

The European Convention on Nationality

Naturalisation is the horizon of the time hypothesis – National as the being outside of time – Migrant as the temporal being par excellence – Nationality as the keystone of the time hypothesis – Eschatology

At the time of the initial analysis of the time hypothesis in the Long-term Residence Directive, the situation was still relatively straightforward. A migrant who entered a country and resided there received stronger rights after lapse of time. In the discussions of family reunification, the refugee and the economic migrant, I had to rigorously problematise this picture as different time regimes were found to apply to these three subjects. It could nevertheless be maintained that migrants generally receive stronger rights over time. This implies that they can apply for stronger rights over time, and that the possibilities to refuse them such rights diminish over time. I concluded in the previous chapter, on the Union citizen, that when there is a possibility to grant a right, this simultaneously reflects the control over the application of these criteria in the individual case.

If no further residence rights can be granted *and* the acquired entitlements can no longer be withdrawn, the migrant is no longer exposed to migration control. This is the case when the migrant is naturalised and thus becomes a national. From that moment onwards, he ceases to be a migrant because he resides in the country of his nationality. The question central to this chapter, therefore, is how does this naturalisation and the naturalised migrant (the national) relate to the time hypothesis? The focus here will clearly be on the end of the time hypothesis, as it also is in the next chapter on the irregular migrant.

Analytically speaking, the acquisition of nationality can be divided into two modalities: acquisition of nationality *at birth* and acquisition of nationality *after birth.*[185] Although the acquisition of nationality at birth plays no role in the time hypothesis as analysed above (because it is not a migrant who becomes a national), it does play an important role in the citizenship debate, as we will see in chapter 9. Therefore I briefly have to mention the two dominant principles determining acquisition at birth:

185 H. Waldrauch, 'Methodology for comparing acquisition and loss of nationality' in R. Bauböck and others (eds), *Acquisition and Loss of Nationality Policies and Trends in 15 European States Volume 1 Comparative Analyses* (Acquisition and Loss of Nationality Policies and Trends in 15 European States Volume 1 Comparative Analyses, Amsterdam University Press 2006), p. 108.

jus sanguinis and *jus soli.*[186] If the former applies, nationality is inherited from the parents, while in the latter case the mere fact of birth within the territory is sufficient for acquisition of the said status. *Jus sanguinis* reflects an *intergenerational* aspect of citizenship acquisition because the citizenship status is based on descent and pedigree. *Jus soli* clearly relates to territorial presence at the *moment* of birth.[187] We will see in chapter 9 that these principles are the focal point for the debate on citizenship, with several scholars criticising them and proposing alternatives.

In this chapter, however, I will discuss acquisition after birth, and focus on the relationship between naturalisation and time. This will not prove to be so easy in research concerning *European* migration law, given that the acquisition of nationality is obviously primarily a *national* matter. The competence to lay down rules regarding acquisition and loss of nationality remains a key competence of sovereign states and therefore lies primarily with the Member States of the Union. Finding out who a national is firstly requires an analysis of specific national laws. Whereas there are some international treaties and conventions on the question of nationality, there is no single set of rules of nationality applying to all European Member States. An examination of national laws obviously falls outside the scope of this research on European migration law, while I will also disregard the complex discussion of the relationship between international and European law on the one hand and the national sovereign power to rule on the acquisition and loss of nationality on the other hand.[188] However interesting and important such discussion is with regard to nationality law, it would not add very much to my scrutiny of the time hypothesis in European migration law. It must, however, be possible to discuss the question of nationality in general terms, and to focus on the relationship between nationality and the time hypothesis, without discussing national law or its exact relationship with European law.

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186 K. Hailbronner, 'Nationality in public international law and european law' in R. Bauböck and others (eds), *Acquisition and Loss of Nationality Policies and Trends in 15 European States Volume 1: Comparative Analyses* (Acquisition and Loss of Nationality Policies and Trends in 15 European States Volume 1: Comparative Analyses, Amsterdam University Press 2006), p. 54. Waldrauch shows that more varieties are to be discerned; see Waldrauch, 'Methodology for comparing acquisition and loss of nationality', p. 108 et seq.

187 For a concise historical overview of these two principles, see A. Shachar, *The Birthright Lottery* (Harvard University Press 2009), p. 113-123. She describes that the territorial principle of *jus soli* finds its historical roots in the feudal system of medieval England, while *jus sanguinis* stems from the Post-French Revolution Civil Code of 1803. *Jus soli* consequently links subjects to a particular land and the owner of this land, while *jus sanguinis* links citizens to each other and to their joint political enterprise.

188 See, for example, N. Cambien, 'Union Citizenship and Immigration: Rethinking the Classics?' (2012) 5 European Journal of Legal Studies 10; R. Bauböck and others, *Acquisition and Loss of Nationality. Policies and Trends in 15 European States. Volume 1: Comparative Analyses*, vol 1 (Amsterdam University Press 2006).

I will do this on the basis of a reading of the European Convention on Nationality.[189] Although this Council of Europe Convention has not been signed and ratified by all European countries, it is certainly one of the most authoritative European documents regarding nationality.[190] With regard to the question of nationality I focus solely on its acquisition and loss. The advantage of this focus, based on an analysis of the European Convention, is that I keep away from the difficult and very wide-ranging perspectives on the significance of naturalisation and nationality in the respective European societies and the European Union as a whole.[191] This is because a *substantive* analysis of nationality would have to discuss the specific political and philosophical significations (liberal, communitarian, socialist, nationalist, globalist et cetera) of democracy and the subsequent relationship between nationality and democratic citizenship.[192] Not only would that require separate scrutiny, but, most importantly, it would also detract from the focus on time. I will limit myself instead to a rather *formal* analysis of naturalisation, based on the generally accepted definition found in the European Convention on Nationality.

7.1. Becoming a National

The relationship between the migrant, the national and time can best be analysed with regard to the acquisition of nationality since that is the moment when the migrant becomes a national.

Formally nationality has been defined as the legal bond between a person and a state,[193] a definition that can also be found in Article 2(a) of the European Convention on Nationality. This definition refers to the famous *Nottebohm* case that came before the International Court of Justice,[194] and in which the concept of nationality was explored for the first time. This court defined nationality as 'a legal bond having as its basis a social

189 Council of Europe, 6 November 1997, ETS, No. 166.

190 L. Pilgram, *European Convention on Nationality and European Nationality Laws* (EUDO Citizenship Policy Brief no 4, 2011).

191 See, for example, Bauböck and others, *Acquisition and Loss of Nationality. Policies and Trends in 15 European States. Volume 1: Comparative Analyses*; R. Bauböck and others, *Acquisition and Loss of Nationality. Policies and Trends in 15 European States. Volume 2: Country Analyses*, vol 2 (Amsterdam University Press 2006); or the concise historical overview (and the further references) in Chalmers, *European Union Law*, p. 468 et seq.

192 See, for example, R. Bauböck, 'Citizenship and migration – concepts and controversies' in R. Bauböck (ed), *Migration and Citizenship Legal Status, Rights and Political Participation* (Migration and Citizenship Legal Status, Rights and Political Participation, Amsterdam University Press 2006). For a critical assessment of the relationship between the migrant and the citizen, see Bosniak, *The Citizen and the Alien*.

193 Bauböck and others, *Acquisition and Loss of Nationality. Policies and Trends in 15 European States. Volume 1: Comparative Analyses*, p. 17.

194 ICJ 6 April 1955, *Nottebohm* case, *ICJ Reports* 1955.

fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties'.[195] The definition in the European Convention on Nationality leaves aside the reference to the social fact and the rights and duties, while the specific relationship between an individual and a state, recognised by that state, is placed at the forefront.[196] This follows from the historical fact that there is no generally recognised concept of nationality as the expression of membership of a political community. Even nations with the same historical or ethnic background, or similar political communities, may adopt different criteria for national membership.[197] The rules relating to the acquisition of nationality in international law are consequently relatively limited.

When it comes to the acquisition of nationality in the European Convention on Nationality we find certain provisions on the nationality of children born in the territory (Article 6, paragraphs 1 and 2). The Convention also stresses that, for certain categories of persons, states should facilitate in their national law that nationality can be acquired (Article 6, paragraph 4). These categories include spouses of nationals (a), children (b, c and d), and migrants who lawfully and habitually reside in the territory (e, f and g). The Convention does not provide any criteria for actual acquisition in these cases, but simply stipulates that it must be possible for these categories to acquire nationality at a certain point.

It is only in certain respects that the Convention is more specific than this. Instead of merely stipulating that it must be possible for spouses and children to acquire the nationality, it stipulates that such a possibility cannot be restricted by any time criteria. Article 6, paragraph 3, states that a nationality procedure should be available for 'persons lawfully and habitually residing on its territory. In establishing the conditions for naturalisation, it shall not provide for a period of residence exceeding ten years before the lodging of an application.' The explanatory report of the Convention stresses that this provision reflects a common European standard, with most European countries already requiring a period between five and ten years of residence.[198]

7.2 Losing Nationality

Once nationality has been acquired, it is almost impossible to lose it. As a general rule, a state party's internal law must not provide for the loss of the nationality of one of its nationals, except in certain limited cases (Article 7, paragraph 1). These cases include, most notably, the voluntary acquisition of another nationality (a), if the nationality is

195 ICJ 6 April 1955, *Nottebohm* case, *ICJ Reports* 1955, p. 23.
196 Council of Europe, *European Convention on Nationality. Explanatory Report*, 1997), paras 22-23.
197 Hailbronner, 'Nationality in public international law and european law', p. 35.
198 Europe, *European Convention on Nationality. Explanatory Report*, para. 51.

acquired by means of fraudulent conduct (b), voluntary service in a foreign military force (c), conduct seriously prejudicial to the vital interests of the state party (d), and lack of a genuine link between the state party and a national habitually residing abroad (e).[199] These cases of loss of nationality resemble those of the loss of permanent residence status (see section 2.2.2). We saw in the Long-term Residence Directive that fraudulent acquisition of the status, an actual and sufficiently serious risk to public policy or public security, absence from the territory and the changed plans of the migrant are grounds for withdrawal of residence status. Nationality, too, can be lost in cases of fraud (b), the public interest of the state (c and d), lack of a link with the territory (e) and changed plans of the migrant (a).

However, whereas the categories may be the same, the actual possibilities to lose one's nationality are very limited. This difference is visible when it comes to breaches of public order, which can be a reason for loss of nationality only if the conduct of the migrant is seriously prejudicial to the *vital interests* of the state party. There is, however, another limitation that better reflects the very exceptional character of the loss of nationality. A state may not provide for the loss of nationality if this means that the person concerned will become stateless.[200] As a general rule, only a person holding a second nationality can lose his nationality. Leaving aside the technicalities of the practice of national and international law on nationality and the rules relating to statelessness,[201] I can conclude from this that it is generally hard to lose nationality.

7.3 Becoming Outside of Time

Despite the particular national diversity of the question of naturalisation, it is certainly possible to draw some general conclusions on its relationship with time. We firstly observed that naturalisation has to become available for everyone residing in the territory of a state for more than ten years. *Nationality must be the horizon that these non-nationals can reach in the future.* Yet nationality must not only be a horizon for the migrant – it must also be possible to actually acquire it in the future. *It must not take longer than ten years to be able to reach this horizon, even though other criteria can prevent the migrant from actually getting there.*

Such is the first conclusion that can be drawn on the relationship between time and naturalisation. From this rather factual observation, however, there follows a more abstract observation on the character of time in the time hypothesis. We have

199 Article 7, para. 1, also mentions the question of adoption of a child (g) and a situation in which the conditions of nationality for a child are no longer fulfilled (f).

200 Article 7, para. 3, European Convention of Nationality.

201 See, for example, L. Van Waas, *Nationality Matters. Statelessness under International Law* (Intersentia 2008).

seen so far that the time hypothesis implies a gradual, yet persisting growth of rights overtime. There are exceptions to this, given that restrictions are possible. The general idea, however, is that the migrant receives stronger rights after lapse of time. Now we see that the end of the migrant's journey is marked by his naturalisation; in other words, his full inclusion when it comes to residence entitlements. This reveals an aspect of time not previously encountered: *time in the time hypothesis seems teleological, with differences in rights and residence status within the time hypothesis being perceived as a function of time*. After lapse of time, the goal (*telos)* of full rights and the strongest status can eventually be reached. And even if, in *exceptional* cases, a person is not able to become a national, migrants can, as a *general* rule of time, reach the promised goal of full entitlements.

Yet if we look further, the issue turns out to be a bit more complex than a mere teleological perception of time. We observed that, once acquired, nationality is in general hard to lose in practice. *In this sense, nationality serves as the keystone of the time hypothesis; it concludes the progress of rights of the migrant who is being transformed into a national.* From this moment onwards, he possesses the strongest possible residence status and is equal – at least in terms of his migration status – to those people who already possessed the strongest status. Nationality is therefore not only the *horizon* of the time hypothesis – the future towards which every migrant moves – but also the *end stage* of this hypothesis.

It is at this point that we can see the time hypothesis in its full breadth, extending from the migrant who wants to enter the territory to the migrant who has become a national. Yet this leads to a somewhat paradoxical conclusion: as soon as the migrant reaches the horizon of full rights and entitlements, he steps outside the time hypothesis. From that moment onwards, his entitlements and rights will not increase any further with lapse of time. *The horizon is, in this sense, both at the end of and outside the time hypothesis. This implies a classical eschatological perspective on time: paradise at the end of time, which is itself outside of time.*

This certainly does not serve to say that the nation is, by definition, paradise, nor that nationals may never renounce their nationality. Instead, the analysis of the time hypothesis shows that naturalisation ends the growth of residence entitlements over time, *and* that these residence entitlements of the naturalised migrant are *beyond* question. If the relationship between the national and the time hypothesis is examined from this perspective, it can be concluded that the national is the person for whom the time of his presence in the territory no longer counts. The national is the person whose belonging to the territory is not *legally* questioned. *The national is not necessarily a person who has always been there (as proved by the naturalised migrant) or will always be there (no permanence, as who knows what the future may hold). Instead, the national is the person who is present outside of time.* This adds another aspect of temporality to people's presence in the territory; alongside temporary, non-temporary and permanent we now distinguish presence outside of time: ~~temporary~~ presence.

At the end of the time hypothesis is the naturalisation of the migrant. This naturalisation implies the erasure of the temporality of his presence. We will see in the next chapter that what now seems a rather mysterious statement forms the key to understanding the time hypothesis.

7.4 Conclusions: Being Outside of Time

Naturalisation forms the end of the time hypothesis, with nationality thereby being the horizon. A migrant must be able to reach this horizon in no more than ten years, although other criteria may prevent him from actually reaching it. I therefore conclude that time in the time hypothesis has an eschatological character: It is this promise of stronger rights that forms the nucleus of the time hypothesis: the national as a point on the line at the end of the time hypothesis and towards which the migrant slowly but surely moves over time.

Nationality is thus the keystone of the time hypothesis. It marks the conclusion of the progress of rights, which means that migrants who reach this stage step outside of time. Naturalisation results in the unconditioned stay *par excellence*. The horizon is therefore both the end of time, as well as outside of time. With this in mind, the national can be defined as the person whose residence is *not* temporal. Opposite to the temporary, non-temporary and permanent time of the migrant is the time of the national. The national is the person whose rights are not determined by time: neither by lapse of time in the territory, nor by temporality. His future and past do not matter, his presence is beyond question. Nationality is, to paraphrase the *Nottebohm* case, a legal bond for those who are timelessly present.[202]

202 I will elaborate more on this particular relationship between time, the migrant and the national in chapter 10, where I will show that being outside of time is not necessarily linked to nationality, and that it is perfectly conceivable to differentiate between nationals on the basis of time. A good example is the difference between indigenous inhabitants and newcomers.

8.

Time and the Unlawfully Present Migrant

The Return Directive (2008/115)

Negative of the time hypothesis – Tolerated presence – Postponement of removal – Temporary control of the subject – Ultimately lack of full control

With the discussion of naturalisation we seem to have concluded the analysis of the time hypothesis, given that we have seen how this phase functions as the final phase in the hypothesis. The national is the person characterised as being outside of time since his presence in the territory is not dependent on time. This final stage concludes the growth over time of residence entitlements for those legally present in the territory. This highlights the fundamental difference between a migrant and a national: the former's presence is temporal as the migrant came to the territory in the past and may be removed from it in the future. The return of a migrant staying unlawfully in the territory is therefore the *negative* of the time hypothesis: those who have no rights and no entitlements over time will be returned. And, more generally, migrants *may*, by definition, be returned in the future.

An analysis of the relationship between time and return is therefore indispensable for a proper understanding of the time hypothesis. As I also announced in the introduction that my analysis was not restricted to those lawfully present in the territory, it covers *everyone* present in the territory. As well as determining how the rules on return relate to time, the analysis also examines how migrants unlawfully present in the territory relate to the time hypothesis.

8.1 Time Hypothesis and the Unlawfully Present Migrant

At first sight, the relationship between unlawful presence and the time hypothesis may seem rather obvious. Only those migrants who are *allowed* to enter the territory in the first place receive stronger rights. An unlawfully present migrant would seem, therefore, to fall outside the time hypothesis, given that he is not granted the first stage of entry. Moreover, this entry will often be *explicitly refused*[203] because his application for a residence entitlement has been rejected. Such a negative outcome of the application for entitlement to reside in the territory may frequently lead to the migrant's departure, while a departed migrant certainly brings the working of the time hypothesis to an end, except when the migrant remains present in the territory without authorisation.

203 In the following I assume that unlawfully present migrants are those migrants who remain present after failing to acquire authorisation to stay or reside. Technically speaking, there may also be migrants present in the territory who have never requested any authorisation of their presence.

The analysis of unlawfully present migrants may be the case *par excellence* for demonstrating the working of the time hypothesis. After all, if even unlawfully present migrants receive stronger rights because of their presence in the territory over time, this would certainly be revealing for the functioning of the time hypothesis in that it would show that migrants even acquire stronger entitlements if they are present in the territory over time *after having been explicitly refused such rights at an earlier stage.* That would certainly show the working of the time hypothesis at its strongest.

In my analysis of Article 8 of the European Convention on Human Rights, however, I found that unlawfully residing migrants could only receive residence entitlements under exceptional circumstances. The reason why only a very dim version of the time hypothesis applies to these persons is their very lack of permission to be present in the territory. While it is acknowledged that unlawfully present migrants may develop ties during the time they are present in the territory, these will almost never outweigh the state's interest in controlling the entry and residence of people in the territory. I concluded, however, that while sovereign power to regulate the entry and stay of migrants in the territory remains intact, the fact that the state does not use this power to enforce its own standards over time provides an argument for eventually granting entitlements to the migrant, given that this changes something for the migrant. The fact that the migrant's presence is *tolerated* enables him to develop ties and, in exceptional cases, could gradually change his expectations.

But what does 'tolerated presence' mean? And how does this relate to legal control? Tolerating such presence would seem to constitute legal authorisation of presence. Is tolerated presence a legal category, alongside legal presence and illegal presence? In the following I will analyse the Return Directive in order to examine the legal rules regarding the removal of migrants. In doing so, I will focus on this question of tolerated presence, and on how exactly it relates to the time hypothesis.

8.2 The Key Rule of the Return Directive (2008/115)

The Return Directive creates common standards and procedures for Member States of the European Union wishing to return illegally staying migrants. Recital 4 of the Directive stipulates that 'clear, transparent and fair rules need to be fixed to provide for an effective return policy as a necessary element of a well managed migration policy.' This is the obvious aim of the Return Directive and highlights that a 'well managed migration policy' has regulations for the return of migrants, alongside its rules regulating entry and stay. Exclusion is the inevitable counterpart of inclusion, given that control over presence in the territory implies both rules regulating entry and stay *and* rules on return. It is clear from the outset that the Return Directive attempts to regulate the

return of unlawfully present migrants from the territory as this is an indispensable part of any effective migration policy.

Technically speaking, the Directive applies to third-country nationals, who are defined as 'any person who is not a citizen of the Union (…) and who is not a person enjoying the Community right of free movement.' Union citizens and persons enjoying the right of free movement are thus exempt from the scope of the Directive, and can reside in the territory of other Member States without being subject to many restrictions. Whereas it is possible that Union citizens may stay illegally in the territory of another Member State, this will not happen frequently. The vast majority of migrants staying illegally in Europe will, therefore, indeed be third-country nationals.

In the case of this latter category of migrants, the Return Directive stipulates, under its definitions in Article 3, that 'illegal stay' means the 'presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry (…), stay or residence in that Member State'. Illegal stay is, so to speak, a legal category in the system of the Directive. This does not mean, however, that illegal stay is legally accepted as such. The notion of illegal stay must be seen in the context of Article 6, which contains the key rule of the Return Directive. Article 6 (1) stipulates that Member States shall issue a decision to return the migrant who stays illegally in their territory. Such a return decision is an administrative or judicial decision declaring the stay of a migrant to be illegal and imposing an obligation to return. The moment a migrant's stay ceases to be legal, a return decision is issued and the migrant is under an obligation to return. It is this obligation to leave the territory that is the pivot on which the Return Directive turns. Here, legal presence is endorsed by the absolute prohibition on illegal presence. This absolute prohibition does not seem to leave open the possibility of tolerated presence as a third category.

This becomes clear if we look closer at the key rule in the Directive. This obligation to leave the territory in the case of an illegal stay is an absolute rule, leaving no room for derogation. The exceptions provided for in paragraphs 2-5 of Article 6 are exceptions to the rule that a return decision will be issued, not exceptions to the absolute rule that lack of authorisation to stay implies the obligation to leave. Paragraphs 2 and 3 merely stress the possibility that a person can be returned to another Member State rather than to his country of origin, either because he has a legal entitlement in that other Member State (Article 6, paragraph 2) or because another Member State takes him back in order to expel him (Article 6, paragraph 3). In both cases, the central principle – that only lawful presence is allowed, while illegal presence must be abolished – is upheld. Just like in situations where authorities provide a residence permit or authorisation to stay on compassionate, humanitarian or other grounds (Article 6, paragraph 4), and where unlawful presence thus becomes lawful presence.[204]

204 I will return to this possibility of regularisation in section 11.3.2.

Based on the key rule, the situation seems clear. There are two options in this legal system: either the migrant is lawfully present in the territory, or he lacks authorisation to be present in the territory and is therefore obliged to leave. So far, therefore, there is no sign of any toleration of unlawful presence.

8.3 Reframing the Temporal Character of Presence

In general, the determination that a migrant is staying in the territory illegally is accompanied by an obligation to return. Since a return decision is often adopted at the same moment as the decision to end the legal stay or reject the admission (Article 6, paragraph 6), the absence of legal permission to stay usually equates to an obligation to leave the territory. And as soon as the migrant leaves the territory, he is prohibited from returning. The obligation to leave is regularly accompanied by an entry ban, thus prohibiting the migrant's re-entry to the territory (Article 11, paragraph 1). Absence of illegally staying migrants is the final goal of the legal system. If this is achieved, its finality is emphasised by the migrant's obligation to remain absent.[205] The illegal migrant is absent and must remain absent in the future.

Most of the time, however, the return decision does not take place at the same moment as the actual return of the migrant. Migrants do not just evaporate the moment a legal decision is issued. As obvious as this may seem, it is rather crucial for my analysis. Systematically speaking, a return decision may, in the abstract, leave no room for misunderstanding – lack of authorisation to stay equals absence. The decision still, however, has to be effectuated; the subject must comply with the legal decision, and this always takes some time. During the time between the return decision and the actual return the migrant would seem to reside unlawfully in the territory. What, however, is the precise status of this time in the territory?

In order to fully appreciate this presence in the territory I will analyse the temporality at work. Just as the temporary (or non-temporary) residence status is a matter of expectation, this return decision also implies an anticipation, i.e. the expectation that the migrant will leave in the future. The only question is when precisely will the migrant be gone? The first answer to this question can be found in the form of voluntary departure. The Return Directive stipulates that the migrant is first granted a short period for voluntary return. Voluntary departure means 'compliance with the obligation to return within the time-limit fixed for that purpose in the return decision' (Article 3, paragraph 8). As this voluntary return should be prioritised over forced return, there should be a time limit of between seven and thirty days for voluntary departure

205 I will not take into account the difference in the length of entry bans as this is only proof of another way to use time regimes as a means of achieving certain policy goals by way of temporal differentiation.

(Article 7, paragraph 1).[206] During this period allowed for voluntary departure, however, the migrant stays unlawfully in the territory since he has no legal entitlement to stay. His obligation to return is merely postponed. Is this a clear example of legally tolerated presence?

The notion of postponement is crucial here: the unlawful migrant's return is a matter of time as the fact that he has no right to be present in the territory remains uncontested. This becomes even more apparent if we look at the example of the postponement of the *return decision* (the final exception to the issuing of a return decision in Article 6). Article 6, paragraph 5, deals with the situation in which the return decision is postponed in the case of a pending procedure for renewal of a migrant's residence permit or authorisation to stay. On first sight this seems to be an obvious recognition of illegal presence in the territory. In such cases, the migrant has no legal entitlement to stay, while the return decision will not be issued until his pending procedure has ended. This nevertheless confirms that at the moment the procedure ends, the person either has a new residence title or immediately receives a return decision. This is similar in the case of voluntary departures: if a migrant returns independently, order is restored; and if he does not return voluntarily, he will be forced to do so.

Voluntary departure is only a *temporary* legal acknowledgment of a migrant's unlawful presence. There remains no future for that migrant in the territory. The unlawful presence is temporarily tolerated so as *to enable the return of the migrant.* Here we see reiterated the legal attempt to qualify time by temporalising these migrants' presence in order to control their entry, residence and return. This temporalisation of their unlawful presence means that their presence is legally tolerated *at this moment*, but remains prohibited in the future. This means that the time for voluntary departure is perceived as a *long present*. The migrant must leave *now, but this legal moment stretches out over a period of up to 30 days.* The law creates a legal moment at which the migrant must leave because he has no future in the territory.

I can consequently conclude that time first constitutes a problem (legal decision and effectuation do not coincide) and then a solution (the migrant is now present only unlawfully, has no future here and will leave sometime soon).

8.4 Ultimate Control of the Subject of Illegality

By now, my analysis has found on several occasions that the legal expectation of the future may turn out to be utterly wrong. A migrant may be legally expected to reside temporarily, but the expectation will prove to be false if he changes his mind and obtains a non-temporary permit, or the other way around. And while the migrant

206 A. Baldaccini, 'The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive' (2009) 11 *European Journal of Migration and Law* 1, p. 8

can change his future, the law's influence on the migrant's future should also not be underestimated. Certainly the question of whether a migrant is allowed to enter and stay in the territory influences what he will do with his future. Although the granting and refusal of residence entitlements are consequently important means of control, control is ultimately expressed by the *enforcement* of the rules on the subject.

This force of law becomes apparent in migration law if we focus on those migrants who do not depart voluntarily. Despite being obliged to leave the territory, migrants often stay. They do not cooperate with their own removal, their expulsion may simply be impossible, or the migrant may abscond from the public realm. A migrant who stays in the territory in defiance of an explicit obligation to leave clearly undermines the legal control of the admission of migrants to the territory. Non-temporary, illegally present migrants are clearly at odds with the Directive's aim to establish an effective return policy. How then should we keep or regain control over people who do not fit the admission system with their unlawful presence in the territory?

One possibility is to detain them 'in order to prepare the return and/or carry out the removal process' (Article 15). According to the Return Directive, detention for the purposes of removal is especially appropriate if there is a risk of absconding, or if the migrant refuses to cooperate or hampers his own removal. Such detention will be as short as possible, according to the Directive, and will not normally exceed a period of six months. Only if the migrant refuses to cooperate or the necessary documentation from third countries is delayed can the period of detention be extended by another 12 months (thus to a total of 18 months). This detention is thus framed in the same manner as postponement of the return decision or actual removal: detention is possible only for the purposes of removal. So again we see the same gesture: in the wake of the detention, the central principle of legal presence is restored because the migrant will be removed immediately after the detention. Unlawful presence is again reframed as *temporary unlawful presence*.

Detention, however, adds something to the situation of postponement: full control over the illegally residing migrant. There is possibly no situation in which the state has more control over its subject than in a case of detention. And this control is explicitly meant to prepare the return or carry out the removal process (Article 15 (1)). This removal is in fact not only the purpose of detention; indeed, the prospect of removal is the *conditio sine qua non* of detention. If a reasonable prospect of removal no longer exists, the migrant will immediately be released (Article 15 (4)). In this sense, detention is the *ultimum remedium* for controlling the presence of migrants in the territory[207] or, in other words, the ultimate opportunity for the state to remove the migrant under its full control. And, obviously, this is often a successful way to restore order.

207 According to the Return Directive, detention *must* also be the *ultimum remedium*: if other suitable, less coercive measures are available to ensure the removal of the migrant, these must be applied first (Article 15, para. 1).

This leads to an important observation: control of the presence of people in the territory ultimately rests on the detention and forced expulsion of those unlawfully present. The state obviously has the power *not to grant* the entitlement to enter, or *not to grant* a stronger residence entitlement, but if this power has no further consequences whatsoever for the presence of people in the territory over time, it erodes the state's legal control. If the state cannot *enforce* its time regimes (i.e. the temporal differentiation between different subjects of migration), these regimes make no difference. And if it does not matter, for the amount of time he will stay in the territory. whether someone is legally allowed to stay temporarily, the legal control has no force. Therefore the system of residence entitlements and the time regimes are ultimately based on the removal of the migrant from the territory. After all, as mentioned in the introduction to this chapter, the major legal difference between a migrant and a national is the possibility for the former to be removed. Ultimately, therefore, the enforcement of the time hypothesis rests on the enforcement of the unlawful migrant's return.

8.5 From Control with the Clock to Control of the Human (or Human Time)

With the detention of the unlawfully present migrant, law enforcement is now entirely directed at the individual migrant (and his body). The return decision merely stipulates the general obligation to return, an obligation deriving from the central principle that a person can only be present in the territory lawfully. This return decision, as such, had nothing to do with the individual characteristics of this particular migrant. The figure of postponement already had some individual characteristics, with the length able to be adjusted to the circumstances of the case (Article 7, paragraph 2), while the state can even refrain from a period of voluntary departure in exceptional circumstances (Article 7, paragraph 4). As a general rule, however, every migrant is granted a period of between seven and thirty days for voluntary departure. The return decision, therefore, is based solely on clock time.

As long as the legal order is framed solely in the general terms of the return decision for a migrant who is allowed a period for voluntary return, the *individual* legal subject plays no crucial role. In that sense he is not yet an individual subject in terms of the Return Directive: he simply plays his role as a passive law-abiding subject, with a general obligation to leave the territory. It is only when the period for voluntary departure has passed[208] that the individual characteristics and choices make this general

208 Or if there is a risk of absconding, if the application for stay was manifestly ill-founded or fraudulent, or if there is a risk for public security (Article 7, para. 4). In these cases, however, the reason for making an exception to the general rule of voluntary departure relates to the subject of the removal. In this sense, his personal circumstances play a crucial role and he therefore becomes an active subject.

subject into an individual subject within the scope of the Return Directive. If the migrant leaves the territory of his own accord within the period set for voluntary return, the law is enforced by the voluntary action of the migrant. If, however, the migrant remains in the territory after the period set for voluntary return, he is clearly obstructing the order and may be detained.

This subject may be kept in detention only in order to prepare for his return and to carry out his removal process, particularly if there is a risk of absconding or if the migrant avoids or hampers preparation of the return or the removal process (Article 15, paragraph 1). Here it becomes apparent that the individual characteristics of the migrant must be assessed with regard to the question of detention. In practice, not every migrant without legal entitlement to stay will be detained. The Court of Justice has held that the assessment of the risk that the person concerned will abscond must be based on an individual examination of that person's case.[209] With regard to the question of cooperating with his return, the Court held that the actual behaviour of the migrant has to be analysed.

'If the removal of the third-country national is taking, or has taken, longer than anticipated for another reason, no causal link may be established between the latter's conduct and the duration of the operation in question and therefore no lack of cooperation on his part can be established.'[210]

In other words, lack of cooperation is not something that can generally be derived from the duration of the return procedure. It takes an individual assessment. Just like the question of whether the detention can be prolonged.[211]

A crucial shift is at work here. With detention, the enforcement is entirely directed at the individual migrant, who is from that moment onwards within the full control of the state. With detention, temporary illegal presence is also *enforced upon a subject.* This full control will often lead to successful enforcement of the migrant's return. However, this full control of the individual migrant has, as a side effect, a requirement to treat the migrant humanely and with full respect for his human rights. According to the second recital in the Directive, such migrants must 'be returned in a humane manner and with full respect for their fundamental rights and also their dignity'. Following this principle, the Court of Justice stated that the Return Directive 'sets out specifically the procedure to be applied by each Member State for returning illegally staying third country nationals and fixes the order in which the various, successive stages of that procedure should take place'.[212] Detention is the *ultimum remedium*, the last stage of

209 ECJ 6 December 2012, *Sagor v. Italy,* C-430/11, para. 41.
210 ECJ 5 June 2012, *Mahdi v. Bulgaria,* C-146/14, para. 82.
211 This review is subject to judicial review, Article 15, para. 3 Return Directive.
212 ECJ 28 April 2011, *El Dridi v. Italy*, C61-11, para. 34.

the procedure since it is the most far-reaching restriction of someone's rights (besides torture, inhuman and degrading treatment, and capital punishment). As a consequence of this *ultimum remedium* character of detention, there are no other measures to enforce the return if the detention does not result in the migrant's successful removal from the territory.

Two related conclusions can be drawn from such detention, both of which relate to time. The first conclusion is that because detention is the most far-reaching enforcement measure available in the Directive, and this Directive should be enforced with full respect for the fundamental rights and the dignity of the migrant, detention cannot be endless. *Detention is a temporary measure to enforce the return.* This not only follows from the basic principles in the Directive, but is also explicitly mentioned in Article 15, paragraphs 5 and 6. The maximum period of detention is six months, which can be prolonged, in certain strictly defined circumstances, by a further twelve months. It is important to see the double gesture of detention: detention enforces a temporary illegal presence on a subject, while – because of his being a human subject – this subject can only be exposed to this force temporarily. In terms of time, this means that, based on the general and abstract reference to clock time in the return decision, the full control of the individual in detention relates to human time. *It is this human time that is not simply an abstract measure for calculating the amount of time to provide for any voluntary departure; the time in detention is the time of someone, and time that is not simply endless and able to be calculated at will.*

The second conclusion reveals the same gesture. Detention may be a successful final stage for the returning of migrants in some cases; if it fails, however, the presence of this migrant in the territory will inevitably have to be tolerated. Since detention is the last stage in the return procedure, it cannot be replaced by another measure to demonstrate the unlawful presence in the territory (by way of making it temporary). If a reasonable prospect of removal no longer exists, detention ceases to be justified and the person concerned shall be released immediately into *illegal presence (*Article 15, paragraph 4).[213] The Court of Justice has stressed that Member States should provide written confirmation of their situation to migrants who are staying illegally, but who cannot (yet!) be removed.[214] This confirmation constitutes written approval of the tolerated presence. Although the migrant may still be under an obligation to leave the territory and nothing precludes his subsequent detention, there is nothing in the system

213 In Dutch this release of the non-returnable migrant into illegal presence is called 'klinkeren' (or putting a released prisoner onto the 'street cobbles'). This could possibly also be translated as 'being bricked', which, according to the Urbandictionary.com, means 'To render your computer useless, as useless as a brick. Usually the result of tampering with the insides and doing irreversible damage'. As such, therefore, a rather accurate description of the relationship between such illegally present migrants and enforcement at this point.

214 ECJ 5 June 2012, *Mahdi v. Bulgaria,* C-146/14, para. 88.

at that moment to show that his presence is illegal.[215] After all these efforts, the state clearly admits at this point its lack of full control over the presence of migrants on its territory.

8.6 Conclusions: Postponed Removal and Temporary Full Control

The removal of unlawfully present migrants from the territory is the negative of the time hypothesis since those whose presence is not lawful will be removed from the territory and will not be able to continue spending time there. Moreover, the legal differentiation in time regimes for subjects of migration law presumes that if permission to stay and reside in the territory is *not* granted, this will have consequences for the presence in the territory. The legal differentiation ultimately rests on the removal of the unlawful migrant.

In order to control the presence of migrants in the territory, migration law therefore principally leaves open two options: either the migrant is lawfully present in the territory, or he lacks authorisation to be present in the territory and is therefore under an obligation to leave. As such, there seems no room for tolerated but unlawful presence.

This obligation to leave, however, is left firstly to the migrant himself. Generally he will be granted a period for voluntary return, during which time he remains unlawfully present in the territory. Yet this does not count as tolerated presence since the period is clearly restricted by a time limit of up to 30 days. In this sense, the removal of the migrant is merely postponed as it is left up to him to leave the territory. Voluntary departure is only, therefore, a temporary legal acknowledgment of a migrant's unlawful presence. In this way, the legal present is stretched to a period of 30 days as there remains no future for the migrant in the territory.

After this period, the migrant can be detained and will therefore fall under the full control of the state. This detention is the *ultimum remedium* or, in other words, the final opportunity for the state to remove the migrant. Because detention is one of the most far-reaching restrictions of someone's rights, it can only be imposed temporarily. Detention is therefore a temporary measure for enforcing the return because time spent in custody is not just any general clock time, but the time of someone, i.e. it is human time.

215 On this occasion I will not discuss the work of De Genova, who argues that the constant threat of detainability and deportability disciplines illegal migrants into a productive, invisible and well-behaving working force. However convincing this claim may be, it does not add to the analysis of the relationship between *time* and control here; N. De Genova, 'Migrant "Illegality" and Deportability in Everyday Life' (2002) 31 *Annual Review of Anthropology* 419.

A final conclusion is that because detention is the *ultimum remedium* and can only be imposed temporarily, the failure to return the migrant becomes immediately apparent as soon as he is released from prison. At this moment he is released into unlawful presence and provided with written confirmations of his non-removable status. In other words, from this moment onwards his presence in the territory is tolerated.

Intermezzo III: Conclusions about Time In European Migration Law

The time hypothesis is at the basis of and clearly spelled out in the Long-term Residence Directive. Properly phrased, it entails stronger rights over time for migrants who reside in the territory of a Member State of the European Union. This principle can be found in almost every European directive on migration law and is also visible in the case law on Article 8 of the European Convention on Human Rights.

Analytically speaking, this principle consists of four elements: migrant, territory, rights and time. These four axes correspond with the four questions of who, where, what and when? The precise meaning of the time hypothesis depends on the respective answers to these questions, as elaborately discussed in the previous chapters. I concluded that different time regimes apply to different subjects in migration law, and that these regimes stipulate the working of the time hypothesis for the respective subjects. Time has a completely different meaning and effect for family members, for refugees, for Union citizens, and for nationals and illegals.

These time regimes bear witness to the extensive possibilities to control the presence of migrants in the territory. Yet despite this differentiation, migrants clearly receive stronger rights, in general, over time. In this sense, I discerned two different patterns in the functioning of the time hypothesis: time can be a means of controlling the presence of migrants in the territory, while migrants generally gain stronger rights over time. This latter observation implies that there are fewer possibilities for control after the status has been granted. Let me summarise in the following the most important conclusions relating to these two patterns.

Manipulation of Time

At first sight, time – just like space – seems a fairly clear criterion to work with in law. Clock time is, after all, rather obvious: determining what five years of residence means requires us merely to look at the clock from the moment the permit has been granted. Upon closer scrutiny, however, time seems not to be so straightforward. Indeed, I found that time can be manipulated to a great extent, depending on the specific policy objectives.

Time in the Long-term Residence Directive, for example, is not simple clock time. Only five years of time that are legal, continuous, non-temporary and immediately prior to the application count for the purposes of long-term resident status. Migrants without a residence permit cannot apply for a long-term residence permit. Nor can migrants who have stayed in the territory for a total of five years if this period has been interrupted by intervals of longer than six months. And if the period of five years was not immediately prior to the application, such time does not count towards the five years, while migrants whose residence is deemed to be temporary do not even fall under the scope of this Directive. The question of what constitutes continuous time also differs

from an ordinary understanding of such a notion (continuous is non-interrupted). Some forms of interruption do not count as an interruption (i.e. periods shorter than six months outside the territory and less than a total of ten months), with the result that these intervals contribute to the five-year period. Other forms of interruption count as an interruption, but do not break the continuity (i.e. the clock does not start ticking again), while intervals outside the territory also do not add to the five-year period.

The best example, however, of the ability to manipulate time is the situation of migrants who have resided legally in the territory for study purposes. As mentioned before, the time they spend on their studies does not count because that residence is deemed to be temporary. Yet if they gain a non-temporary residence permit (e.g. for work) after their studies, half of the previous time of residence during their stay will count retrospectively towards the five-year period (similar rules apply to refugees and the time taken to complete their procedure).

There are many such examples, and these show that while clock time is perceived to be an objective and non-discriminatory standard, it can easily be adjusted and used for a variety of different policy goals because there is no requirement for a link between time and what happens in time.

Legal Expectation

Only migrants who settle in the country fall under the time hypothesis. Yet what exactly does it mean when we state that time is perceived as temporary or permanent? From an ordinary language perspective, this would suggest a post facto perspective on time: the time of the migrant became temporary when the migrant left the territory. Yet such an understanding of temporary is useless as a legal category seeking to make a distinction between groups of migrants who still reside in the territory. The question of temporary and non-temporary residence is therefore necessarily a question that relates to the future, not to the past. It implies an expectation of the future, which is constructed (since the future cannot be proved) on the basis of the intention of the residence. This clearly reflects the human time hidden in the legal time of the time hypothesis.

In the case of this constructed intention, the subjective intention of the migrant plays only a minor role, simply because such an intention can easily change in the future. After all, a migrant who intends to stay at a certain moment may later decide to leave because of a changed plan. Just as a migrant who intends to stay only temporarily may change his mind after a while. So the subjective intention is not a useful category for predicting the temporary character of the residence: what is non-temporary can become temporary after lapse of time, and the other way around. Law therefore constructs the temporary character of the residence on the basis of a reasonable expectation of the future, while the migrant can always change this future.

Such an expectation is primarily based on the objective of the residence. If the end of the stay is implied in the goal (e.g. study), or if the objective of the stay is still uncertain (i.e. if the migrant is still in the procedure), it is expected that the migrant will leave in the future. Another ground on which the expectation can be based is actual lapse of time. If a migrant has actually resided in the territory for some years, this is taken as a testimony of the expectation that he will remain in the territory permanently. That is precisely what happens when the long-term residence permit is granted after five years of residence. This stronger status is granted because the lapse of time during which the migrant did not leave the territory substantiates the expectation that he will not leave the territory in the future. And with this stronger residence permit, the law permits the migrant to stay indefinitely. Permanence should therefore be defined as expected and allowed permanence, being a description of an imagined future on the basis of some past time.

While the constructed expectation is workable as a means for differentiation (between temporary, non-temporary and permanent), it is also fragile, given that every expectation of the future can be falsified in this very future.

Legally Relevant Moment

As already implicit in the construction of expectation, this construction presumes the creation of a legally relevant moment. It is from the legally relevant moment in time that past and future are perceived. Yet what constitutes a relevant moment can be manipulated. In an ex tunc assessment, the initial legal decision on the application is the relevant point in time for assessing past and future, while under an ex nunc assessment it is the actual moment of the legal procedure (e.g. the appeal). We have seen in the case of the asylum seeker that the moment of time can even be extended to a period of three months, during which time he can reunite with his family.

Material and Individual Time vs. Formal and General Time

We have seen that legal time not only refers to clock time, but also to human time (i.e. the finite time of someone who lives in a present, thus implying a past and a future). Time in the time hypothesis does not merely relate to formal lapse of clock time, but clearly also to what happens in the human time spent in the territory. This difference implies that two, ultimately mutually exclusive approaches to time can be discerned. Formal and general time, or material and individual time.

In the case law on Article 8 of the European Convention of Human Rights we encountered the working of the time hypothesis, albeit in a much more complex

manner than under the Long-term Residence Directive. This complexity is the result of a crucial difference in the appreciation of time between the Long-term Residence Directive and Article 8. In both, time is related to the development of roots or ties. In the former, however, time is qualified in a formal and general manner, while time in the latter is used in a material and individual fashion. In a formal perception, a certain lapse of time (i.e. five years) is the proxy for the general assumption that individuals have developed roots or ties over time. The general aspect lies in the circumstance that it is not necessary to substantiate this general assumption in every individual case. The formal aspect is the reference to the standardised clock time and the obligation to comply with some formal criteria (continuity, non-temporary and legal). These formal criteria are meant to ensure that only non-temporary residing migrants can apply for the stronger status. If a migrant meets these formal criteria, his residence is expected to have become permanent. Yet if qualified time has a material signification, as in the case law on Article 8, everything depends on an individual assessment of the circumstances of the case.

In this material qualification of what happens with the migrant over time, the actual assessment of the ties in the individual case plays a significant role. The migrant's human time is pivotal for such an analysis. A description of the importance of different types of ties is endless. Indeed, almost any generality seems to be lost when time is qualified in a material manner. Yet generality seems a crucial element of the time hypothesis since time generally leads to stronger entitlements. Indeed, I was unable to find any single material description of ties that always lead to stronger entitlements. Although a general tendency can be seen in Article 8 that longer residence leads to stronger entitlements, it is largely impossible to qualify it in general material terms.

Although I found that time can be approached in both a formal and a material sense, both lose something in their reference. In the former, the specific individual circumstances of the case are lost, while in the latter any generality fades away. Nevertheless I concluded that the time hypothesis is observable in both perceptions.

Rationale Behind the Time Hypothesis

Despite all these problems and peculiarities, one thing remains evident: migrants generally receive stronger rights and entitlements after lapse of time under European migration law. Probably the most difficult question to answer in this respect is why? In other words, what is the rationale behind the time hypothesis?

Three arguments can be found explicitly and implicitly in the legal documents (directives, treaties, case law): integration, equality and expectation. Actually a fourth argument – rootedness – can also be found, but it was entirely unclear how this should be distinguished from integration. Therefore I chose not to address rootedness separately, but instead to start with the last of the three: expectation. Migrants receive stronger rights

because they are expected to stay longer after lapse of time. Such an argument leads to all sorts of temporal questions. Why can expectation be based on a past? Can expectations grow over time, and must rights increase in line with such growing expectations? When precisely is an expectation sufficiently substantiated to justify granting stronger rights? And, finally, the most persistent question: why must a migrant who is expected to stay here permanently be granted stronger rights in the first place?

Integration and equality could constitute answers to this latter question. The most obvious integration argument is the claim that because migrants integrate over the course of time, they should receive stronger rights. Integration functions as a condition for stronger rights. Yet rights and integration have traditionally been used the other way around: stronger rights have been seen as facilitating integration. We have thus seen that the relationship between a migrant's rights and integration after lapse of time are used in two contradictory ways: integration both as a cause and as an effect. We have even seen, in the case of family reunification, that integration can be the precondition for the development of rights over time.

In any case, the integration argument fails specifically in what it is presumed to provide: in other words, it fails to provide an argument for the growth of rights that clearly relates to lapse of time. The integration argument does not address the question of time as it remains unclear how integration relates to time. When a migrant is integrated is still unclear: is this a function of time, or does it require an individual assessment of the circumstances of the case? Moreover, reducing the question of integration to an individual and material assessment would suggest that migrants can be fully integrated before they arrive (i.e. time would not be a category in the assessment).

The equality argument faces the same problems. It is claimed that, over time, migrants become more equal to nationals. Yet how does this relate to time? Is this always the case? Do all migrants become more equal after progress of time? And, if so, when precisely is this the case? Or does it require an individual assessment? In that case, the link with time is entirely lost, since what would happen if a migrant were to arrive fully 'equal' at the border?

The problems relating to ties and roots are similar to those put forward for the rationale. Although all these arguments can function as arguments for providing (or not providing) stronger rights to migrants, they are not arguments of time. Indeed, these arguments can be put forward at any moment, while it remains unclear how they relate to actual lapse of time. The expectation argument, in turn, entirely fails to provide a reason for granting stronger rights to migrants.

National at the End of Time and Outside of Time

The national forms the end of the time hypothesis, thus making nationality the horizon. A migrant must be able to reach this horizon in no more than ten years (according to the European Convention on Nationality), while other criteria may prevent him from actually reaching it. From this I can conclude that time in the time hypothesis has a teleological character: the growth in migrants' rights and residence status is perceived as a function of time. It is this promise of stronger rights that forms the nucleus of the time hypothesis. At the end of the migrant's journey we find the national, who is the end of the time hypothesis. It is this nationality towards which each migrant proceeds over time. This does not serve to say that all migrants will inevitably become nationals, but merely that all migrants should have the possibility to apply for naturalisation after a certain lapse of time.

This makes nationality the keystone of the time hypothesis; it concludes the progress of rights, which means that migrants who reach this stage step outside of time. From that moment onwards, the rights of this person are no longer dependent on, nor even related to, the time hypothesis. This brings the eschatological character of time in the time hypothesis to the fore, with the horizon being both the end of time and outside of time (just as paradise in a Christian perspective of time). With this in mind, the national can be defined as the person present in the territory outside of time, and whose presence is consequently atemporal. The national is not necessarily the person who has always been there (as the naturalised migrant proves) or who will always be there (who knows what the future may bring?). Yet the national is the person present without temporality. The proper antonym of the temporary or 'permanent' stay of the naturalised migrant is the ~~temporary~~ presence of the national. This leads, however, to a rather complex problem: how can a migrant step outside of time to become ~~temporal~~?

This also shows that the question of time can be used to differentiate between people by bringing their temporality to the fore. Legally speaking, migrants are the temporal subjects par excellence. Their presence in the territory is characterised by its temporal character: a migrant is the person who has come here (or his or her parents have come here) and who consequently was not always here (past), or who mayt eventually be removed from the territory on the grounds that his status is potentially temporary (future). It is in this sense that migrants are distinguished from nationals, whose presence is characterised as being beyond question and outside temporality.

Obviously the national, as such, is not necessarily the person outside temporality; possibilities to withdraw nationality exist, and this is a realistic option, at least in the case of people holding double nationality. Moreover, it is possible to extend the opportunities for withdrawal or even to make distinctions between different groups of nationals more explicit in law. Think of the distinction between indigenous inhabitants and newcomers, or the Dutch terms 'allochtoon' and 'autochtoon'. The point, however, is that this

temporal distinction between migrants and nationals is obvious in contemporary European migration law. Time is a powerful means for differentiation. But how can a migrant – as the temporal being present par excellence – become someone outside of time?

Two Contradictory Patterns – Grasping and Slipping

The above conclusions lead to a more general observation on two seemingly contradictory patterns that can be discerned in the treatment of legal time. On the one hand, time can be a means of control: formal time criteria can be manipulated; the legal construction of expectation can be a means for differentiation; the use of material or formal, individual or general criteria can make a great deal of difference, and the fixation of the legally relevant moment is a effective way to control the flux of time.

On the other hand, something seems to slip away in every attempt to control time. A formal time criterion does not evaluate the material characteristics of the individual migrant, while a material criterion does not ultimately include a reference to lapse of time. An expectation can be falsified by subjective intention or other circumstances that change in the very future they refer to. And the legally relevant moment can create control at that moment, while losing the ability to deal with new aspects (and endless possibilities to bring in new facts would diminish the control and fail to close the case).

In the following philosophical part of this book I will argue that the reason why migrants generally receive stronger residence entitlements after lapse of time essentially boils down to two persistent questions: What happens with the migrant over time? And why should the law include the changed migrant? I will show that the answer to these questions is to be found in a closer scrutiny of precisely these two contradictory patterns: the fact that in every attempt to grasp time, something inevitably slips away.

Part Two - A Philosophical Understanding of Time, Law and the Migrant

'That is where the question of hospitality begins: must we ask the foreigner to understand us, to speak our language, in all the senses of this term, in all its possible extensions, before being able and so as to be able to welcome him into our country? If he was already speaking our language, with all that that implies, if we already shared everything that is shared with a language, would the foreigner still be a foreigner and could we speak of asylum or hospitality in regard to him? This is the paradox that we are going to see become clearer.'

Jacques Derrida, Of Hospitality, p. 15

As might be the fate of every serious scrutiny, analysis of the time hypothesis in European migration law resulted in more problems than those with which I had started. I began by putting forward a hypothesis (the longer a migrant resides in the territory of a state, the stronger his legal residence entitlements will become) and tried to show that this hypothesis plays a central role in contemporary European migration law. The eventual aim of this enterprise was to unravel the meaning of time in European migration law in order to find the rationale behind this general tendency to grant stronger rights over time.

However, we encountered two seemingly contradictory patterns in the treatment of time in migration law. In every attempt to control the enduring presence over time of migrants in the territory by means of time, something slips away. Migration law bears witness to plenty opportunities to control time but in every attempt to grasp time something seems to slip away.

I found these two contradictory patterns at work in the time hypothesis by focussing on the relation between time and control. Yet, I was also looking for a convincing rationale behind the time hypothesis. In fact, these two problems (the relationship between time and control and the rationale behind the time hypothesis) are interrelated, as I will argue in this philosophical part. Let me already briefly introduce the interrelation between time control and the rationale behind the time hypothesis.

I concluded that the three most important arguments that could be indicated as rationale behind the time hypothesis – equality, integration and expectation – failed to address the relation to lapse of time I was explicitly seeking. The argument of expectation in itself failed to address on what this expectation would be based. While the arguments of equality and integration could be the reason behind the changed expectation, both failed to address lapse of time. If being equal to a national is deemed to be an argument for stronger rights for migrants, it remains unclear how this argument for inclusion precisely relates to lapse of time. How do migrants become more equal over time and, moreover, is it possible that migrants are equal upon arrival or, on the contrary, never become equal?

The same problems arise with the argument of integration. Moreover, the problem of the material/formal conception of time is probably nowhere as apparent as with the question of integration. If one takes a formal conception of the relation between time and integration we would assume that migrants generally integrate over time, whereas such a statement seems not to be based on sociological evidence, nor on any other convincing argument. Moreover, it remains unclear how such a stance relates to individuals or groups that do not integrate over time. However, the moment we bring in material criteria into the equation, we start losing the link with time, since a material conception of integration can be met at any moment.

Yet, there is another question relating to the equality- and integration-argument that has not been raised before. Why would they constitute an argument for stronger

residence entitlements at all? The equality-argument stresses that migrants become (eventually) equal to nationals and should therefore be treated equally. This does not only raise the question what becoming equal to a national means, but importantly introduces a distinction between law's fixation of the facts and the changed facts after lapse of time. The argument not only assumes that a migrant changes over time into a being equal to a national, it also puts forward that law should 'follow' or mirror this changed reality. After all, the argument is that a certain legal difference (migrant – national) must be eliminated because these individuals have become equal and should therefore legally be treated equally as well. How can one argue that migrants have become equal while they differ at least on one important aspect with nationals: their legal status?

This double assumption is also apparent in the integration-argument. Not only does the argument assume that migrants integrate over time, it also supposes that this should be awarded with stronger legal entitlements. Apparently the presumption is that the national is someone who is integrated. Yet, how would such an understanding relate to the finding that the national is the one who is outside time?

These latter observations point towards two problems, in both the argument of integration as well as in the argument of equality, which will turn out to be pivotal in my analysis. First, what is the relation between time and the migrant? This will be the focus of the analysis in chapter 10, as it will be discussed as a problem of time and identity. What changes over time and what remains the same? And is it possible to find a rationale for the time hypothesis that does justice to the complexities we have encountered in the previous chapter?

The second problem is about the relationship between this "changed migrant" and law. If the migrant has indeed changed, why would the law acknowledge this? This philosophical part aims to address these two recurrent problems, which I will dub *the two persistent questions*.

These two general problems – what changes over time and why should the law follow this? – structure the philosophical part of this research. In chapter 10 the focus will be on the consequences of time for the migrant. We see that the question of identity and time is difficult for it presumes a complicating relation between change and sameness. I analyse this on three different levels of abstraction. First, I analyse the *experience* of time and contrast it with the *understanding* of it. Subsequently, the relation between language and time will be discussed, followed by a scrutiny of the relation between time and human identity. Eventually, I endeavour to situate the experience of time in the heart of narrative identity by means of proper understanding of the relation between time and language.

In chapter 11 the focus will be shifted from the migrant to the question of legal inclusion of these migrants. I will endeavour to postulate a non-normative argument for the legal inclusion of migrants who reside over time on the territory, by focussing on the

relationship between time and legal control. We see that legal control is based on the categorisation of the subject and therewith the fixation of his past and future. Therefore, the law can only deal with lapse of time by creating a new legal moment in which change is legally allowed. It is in the relationship between the changing identity of the migrant and the legal attempt to keep control over the presence of migrants in the territory, that such an argument for legal inclusion is to be found. It turns out that the paradoxical relation between time and legal control will be the key for finding the rationale behind the time hypothesis.

Before commencing with the philosophical analysis of the rationale behind the time hypothesis, however, in chapter 9 I describe and analyse the existing literature on the central question of this research. In the first part of this research I have merely focused on the directives and case law of European migration law in order to find the time hypothesis, its rationale and the meaning of time. Literature has only been dealt with as far as it clarified aspects from European migration law. The scholarly debate on the question of citizenship is, however, promising to further my analysis of time and stronger rights.

9.

The Contemporary Debate on Time and Stronger Rights

The migrant and the citizen – Becoming rooted – Normative arguments – Arbitrary time criteria – Common understanding of time – Jus nexi – Shifting centre of interest – Experience of citizen – Indefinable character of rootedness – Intergenerational stability

The scholarly debate on questions relating to citizenship is vast, yet only some of the issues stemming from these discussions can be of relevance for my analysis. In the introduction I stated that I use 'citizen' and 'national' as synonyms; however, the relationship between these two terms is an important aspect of the citizenship debate itself. Let me therefore first pinpoint precisely which aspects of citizenship could be of importance for the analysis in my book.

In her book *The Citizen and the Alien*, Linda Bosniak distinguishes three different questions relating to citizenship (what, where and who?), two of which fall outside the scope of this book. I will not deal with the substance of citizenship (*what* citizenship is), nor with the domain or location in which citizenship takes places (*where* citizenship takes place), but I will focus on the subjects of citizenship (*who* is a citizen).[216]

The reason that the substance of citizenship is not discussed is that the focal point in my analysis is European migration *law*. Citizenship is traditionally a political term in the first place,[217] and for this reason falls outside the scope of the present study. Obviously, Union *citizenship* plays a role in European migration law, yet the complex relationship between European citizenship and the various national citizenships in European Union is itself enough for a separate analysis.[218] Just as the question of what this European citizenship precisely means is too difficult a matter to discuss within the scope of this analysis.

For similar reasons, the question of *where* citizenship takes places is not included. Bosniak suggests that, traditionally, this question relates to the political domain in which citizenship is situated. Moreover, she stresses that citizenship traditionally presumes the nation-state and that this must certainly be questioned and criticised from the perspective of post-national trends. As mentioned in the introduction, however, my analysis takes contemporary European nation states and the current European Union as

216 Bosniak, *The Citizen and the Alien*, pp. 12-36.
217 Ibid, p. 20.
218 For example, Balibar, *We the People of Europe: Reflections on Transnational Citizenship*.

a given. It thus fits the traditional perspective of citizenship, which takes the nation state as its starting point.[219]

The *who* of citizenship, however, certainly is of relevance. After all, the time hypothesis is about the growth of residence rights of migrants over time, amongst them the eventual possibility of non-citizens (migrants) becoming citizens (nationals).[220] It is not so much the question of whether migrants should also be treated as citizens before their naturalisation that is of importance, but the relationship between the migrant and the traditional citizen (national) over time which is at the core of my analysis.

9.1 Time and naturalisation

As observed in chapter 7, the analysis of the time hypothesis coincides with the acquisition of citizenship *after* birth. After all, if someone receives citizenship status *at birth* he never becomes a migrant in the first place and falls outside the scope of the time hypothesis. So it is about the acquisition of nationality *by a migrant*, and my focus is primarily on naturalisation after a period of residence.[221]

Just as the analysis of the time hypothesis related both to lawfully *and* unlawfully resident migrants, the discussion in the citizenship debate focuses on both categories. In fact, the arguments for the inclusion of unlawful migrants often coincide with the inclusion of long-term resident migrants, although legally speaking they are not in the same category. In other words, their inclusion relates to a different step in the time hypothesis. For unlawfully resident migrants, it is the entry and lawful stay that is granted; for long-term resident migrants, it is their naturalisation that is at stake. As we will see, the time-related arguments for both categories are similar, however, and so I analyse both debates.

If one takes the above limitations of the citizenship debate into account, the focus can be shifted again to the two persistent questions related to the time hypothesis: what changes with the migrant over time and why should the law acknowledge this? The central argument that interests me is what Shachar has dubbed the 'ascending citizenship model': the idea that 'the longer the person resides in the polity, the deeper

219 In this sense the present analysis cannot avoid what Bosniak and others have called 'methodological nationalism', but this is not because I particularly agree or disagree with the current situation. Rather, it is simply because the nation-state is still a given in current European migration law. See Bosniak, *The Citizen and the Alien*, p. 5.

220 As described in the introduction, I use 'citizen' here as synonym for 'national' – a form of methodological nationalism that is criticised by Bosniak. Clearly, for Bosniak the 'who' question of citizenship reveals that not only nationals can be citizens and is therefore broader than my conception of it. However interesting they may be, methodological nationalism and postnational trends, as discussed by Bosniak, fall outside the scope of this study.

221 For other forms, see Waldrauch, 'Methodology for comparing acquisition and loss of nationality', p. 109.

his or her ties to its society, the stronger the claim for inclusion in the membership'.[222] In this formulation, not only does the overlap with the formulation of the time hypothesis become immediately apparent, but it is also evident why this would count for both irregular migrants as well as for those who do have permission to reside in a territory. In such an argument, the growth of ties seems to be a mere function of lapse of time, no matter what the legal status of the presence in the territory is.

In this chapter I analyse the most important protagonists of this ascending citizenship model. And I structure their arguments along the lines of the two persistent questions.

First, Carens will be discussed as a state-of-the-art general argument related to time. Carens' argument is situated in the debate on the regularisation of unlawfully present migrants; he pleads for the inclusion of these people because of their becoming rooted over time. Yet his normative account brings to the fore practically all the aspects we have encountered in the analysis of European migration law. It is particularly helpful for this reason, as it underscores that the elements I have identified are also important in the scholarly debate. It turns out that the discussion on the inclusion of those migrants who are explicitly excluded clearly brings to the fore the time-related elements of the granting of stronger rights.

In section 9.2 I introduce the stance put forward by Shachar, who pleads for a *jus nexi*, or a genuine connection criterion. Shachar argues that this not only solves the problems of overinclusion and underinclusion in the *jus sanguinis* and *jus soli* principles, but it also shifts the focus towards an emphasis on *actual* political and social relationships or membership as a ground for citizenship.

In section 9.3 we see how Bauböck relates the question of temporary residence by lawfully resident migrants to the acquisition of citizenship status. In this section I discuss and criticise *jus domicilii* as a basis for the acquisition of citizenship.

Finally, in the conclusion I summarise the similarities between this scholarly debate and the findings from the analysis of European migration law. We will see that the arguments put forward are certainly compelling in their own right, even though they cannot help us further with the two persistent questions of the time hypothesis. They do not provide an account that clarifies its precise relationship with lapse of time, *and* they all put forward *normative* arguments for the inclusion of migrants in the citizenry. Moreover, it will become apparent that even Shachar's stance leads to a form of underinclusion.

For these reasons I conclude that a perspective that focuses solely on the role of time has something to add to the present scholarly debate on the rights of migrants over

222 Shachar, *The Birthright Lottery*, pp. 168-169. Others have dubbed this 'citizenship as affiliation': H. Motomura, *Americans in Waiting. The Lost Story of Immigration and Citizenship in the United States* (Oxford University Press 2007) and J.H. Carens, 'On belonging: What we Owe People Who Stay' (2005) 30 Boston Review .

time. When clarifying the relationships between time and identity (in chapter 10) and between time and control (in chapter 11), not only will I be able to deal with the two persistent questions properly, but I will also try to resolve the time problems we have encountered in the legal analysis (intermezzo III) and in the subsequent discussion of the scholarly debate.

9.2 Carens as a State of the Art of the Debate

Joseph Carens has long been hailed as *the* protagonist of open borders.[223] Recently, however, he has published a book in which he explicitly discusses the aspect of time in immigration law and takes immigration control and frontiers as his starting point.[224] This work, although rather concise, provides an excellent overview of the most common and frequently used arguments in the discussion on irregular migrants who have resided long-term in a country. It is particularly appropriate as an overview of the debate, not least because several experts in the field respond briefly to Carens' argument at the end of the work .

9.2.1 What happens to these migrants over time?

Carens starts his plea from distress with the treatment of irregular migrants and asks how liberal democracies should respond to their vulnerability. Central to his argument is the proposition that the length of time a migrant has spent in a territory affects his claim to remain. The longer the migrant stays, the stronger his *moral claim* is. This is based on the central preposition that human beings who have been raised in a democratic society become members of that society.[225] 'Most people', Carens stresses, 'form their deepest human connections where they live – it becomes home'.[226] Also, marriage creates deep ties and living with one's family over time creates deep ties with the place where one lives. Moreover, Carens asserts, '[w]e sink deep roots over [time]'[227].

Particularly beautiful about this essay is that it serves as a state-of-the-art exposition of the important arguments and elements in the discussion on time and the laws governing migration, both regular and irregular. He stresses that *migrants change*

223 For example, J.H. Carens, 'Aliens and Citizens: the Case for Open Borders' (1987) 49 The Review of Politics 251.

224 J.H. Carens, *Immigrants and the right to stay* (The MIT Press 2010); in a more recent work, J.H. Carens, *The Ethics of Immigration* (Oxford University Press 2013), he again comes to the conclusion that democratic values of freedom and equality ultimately entail a commitment to open borders.

225 Carens, Immigrants and the Right to Stay, p. 11.

226 Carens, *Immigrants and the right to stay*, p.12.

227 Ibid, p. 17.

over time, they *grow deep roots* and, if they stay for a very long time or arrive at a young age, *their social formation* has in large part taken place in the host country. This reminds us of the arguments put forward in the case law of the Strasbourg Court on Article 8 of the European Convention on Human Rights.

Moreover, Carens more or less explicitly addresses some time problems related to his argument. Most notably, the *arbitrary character of time criteria*; he stresses that at some point a threshold is crossed, yet it is impossible to find a strict answer to the question of *when* this happens. He holds that the growth of a moral claim is continuous, whereas this continuity is broken the moment someone commits a serious *criminal offence*. Furthermore, he discusses the *difference between time and ties*: is it about ties or about time? Although Carens does not explicitly make this point, he seems to underscore my observation that a formal and material criterion for the assessment of ties seems to be time-exclusive. If it is about actual ties, then this implies a material assessment of those ties, which in turn implies that the unambiguous reference to time is lost. If it is merely about time, then the link with the individual's actual ties is problematic because, in general, it can be concluded that someone will have developed ties after a certain period of time.

Carens avoids this problem by stating that the growth of ties is what time *normally* signifies and that this refers to a *common understanding* of the way people settle into societies. Moreover, he refutes the possibility of a more material understanding of the relationship between time and ties because he holds that government officials would then have to assess those ties on a case-by-case base – something they are incapable of, since *it is impossible to determine precisely how deeply a person 'belongs'*. This might therefore lead to arbitrariness and abuse of power by these government officials.

This *indescribable character* of the 'growing of roots', combined with the problem that time criteria are general whereas everyone seems to 'root' at his own pace, means that Carens explicitly uses individual and rather tragic stories to endorse his argument. And it is indeed difficult to disagree with him when faced with such stories of vulnerable people. But how do they relate to the time problem? Whatever the answer, Carens points to an aspect of the time problem that we have also encountered in my analysis of Article 8 of the European Convention of Human Rights: the role of stories in developing ties and roots.[228] The narrative aspect of rootedness is at the core of the analysis in the next chapter.

228 Many authors who call for the regularisation of irregular migrants make much use of tragic cases. See, e.g., Motomura, *Americans in Waiting. The Lost Story of Immigration and Citizenship in the United States*, but also Shachar, *The Birthright Lottery*, pp. 118/119.

9.2.2 Why should they be legally included?

Still, becoming a 'social member' of a national community is not in itself an argument for stronger rights. Carens, too, distinguishes the two problems we have also encountered: something changes over time (according to Carens, migrants become 'social members') and, while this is not enough as such to justify legal inclusion, further arguments are needed to explain why these persons should not be included legally. Carens highlights two arguments for their legal inclusion. The first is that not recognising 'social membership' is *'cruel and unjust'*: 'It is *morally wrong* to force someone to leave the place where she was raised, where she received her social formation, and where she has her most important human connections, just because her parents brought her there without official authorization.'[229] This is unjust because people who live, work and raise their families in a society become members of that society, *whatever their legal status is*. This *actual* social membership should be recognised legally, claims Carens.

His second argument is that, over time, the circumstances of entry grow less important. And eventually they become irrelevant, because social membership outweighs the government's interest in controlling the legal entry of migrants. With the lapse of time, the harm of being excluded from legal residence becomes out of proportion to the initial wrong of illegal entry (perhaps even by the person's parents).

The relationship with time is apparent in these two arguments: the moment of the initial entry should not be fixed, as this would imply that none of the time after this moment would be taken into account. Rather, the *actual* moment should be pivotal in the assessment of who does and does not deserve citizenship.

Summarised like this, the similarities with the analysis of the time hypothesis in European migration law are quite obvious. We again encounter the problem of material, individual or formal, general time. Furthermore, one recognised the *assumption* that migrants change over time and that it is precisely this change (social membership, rootedness, integration, equality, belonging) which is the reason for their stronger rights. Just as in European migration law, this changing migrant is presented as if he is a self-evident phenomenon. Carens acknowledges that putting forward an assumption on the relationship between time and social membership as such is begging a question, yet he avoids this problem by referring to a 'common understanding' or 'normal signification' of time. Interestingly enough, this common understanding is due not just to a lack of proper research into the meaning of time; in fact, the 'normal signification of time' is indefinable, for it cannot be included in a list of material criteria (and nor should it be, because of the power that would put in the hands of government officials).

229 Carens, *Immigrants and the right to stay*, p.11.

Carens' analysis is particularly helpful, therefore, for it reiterates the central issues related to the question of time and stronger rights we see in European migration law. Moreover, he brings together several arguments also put forward by other scholars.[230] Nevertheless, these arguments are still susceptible to the two problems we described in the previous part of this book, and Carens brings us no further towards a solution to them. The problem of how his arguments relate to time remains pertinent. Is it really impossible to analyse and describe the 'growing of roots' or 'becoming a social member' in relation to the lapse of time? And, with regard to the recurrent second problem, is there any argument to be found for the issue of the changed migrant and the alleged necessity of law to acknowledge the notion that *not* granting rights to irregular migrants after a period of time is 'cruel and unjust', 'immoral' or 'simply unacceptable, on liberal democratic grounds'?

9.3 Shachar, *Jus Nexi* or Earned Citizenship

Ayelet Shachar has proposed 'a new theoretical framework that emphasises the importance of *rootedness* as a basis for a legal title'.[231] She argues that '*jus nexi* reflects the idea of democratic inclusion, according to which those who are habitually subject to the coercive powers of the state must gain a hand in shaping its laws, if they so choose.'[232] Before I analyse the substance of this *jus nexi,* let us first see how Shachar situates it in the citizenship debate.

In the first place, she clearly relates it the 'who' question of citizenship. *Jus nexi* would solve two problems that are the result of the reliance on *jus soli* and *jus sanguinis* in citizenship matters. The latter two principles, she argues, include in the citizenry people who should not be included and exclude others who should be included. On the basis of *jus soli*, after all, the children of people who have no intention of residing in a territory might be granted its citizenship just because they happen to be present there at the *moment* of birth. The opposite is true of *jus sanguinis*, as it grants citizenship to people who may have never set foot in the territory of the state. Shachar argues that these are clear and problematic examples of overinclusion, while migrants who have resided long-

230 Compare, e.g., H. Motomura, *Immigration Outside the Law* (Oxford University Press 2014); R. Rubio-Marín, *Immigration as democratic challenge. Citizenship and Inclusion in Germany and the United States* (Cambridge University Press 2000); Bosniak, 'Being Here: Ethical Territoriality and the Rights of Immigrants'.

231 A. Shachar, 'Earned Citizenship: Property Lessons for Immigration Reform' (2011) 23 Yale Journal of Law and the Humanities , p. 113. This article seems to be an application of her theory, as developed in *The Birthright Lottery*, to the specific US debate on the regularisation of unlawful migrants. One important aspect of her analysis (in both the book and the article) is an analogy with property law which, however interesting, I must leave aside here.

232 Shachar, *The Birthright Lottery*, p. 179.

term in the territory –for example, because they arrived shortly after their birth – form cases of underinclusion. Such people might have lived much or nearly all of their lives in the territory and yet they are still not granted its citizenship.

Secondly, Shachar's argument equally applies to unlawful migrants and long-term residents.[233] Just like lawfully resident migrants, those who have not obeyed the immigration rules might over time become rooted and thereby gain a claim for inclusion. Shachar observes that this contemporary debate on the legal status of irregular migrants has reached a stalemate. On one side she discerns the 'nation-of-laws camp'[234], which maintains that people who have breached the country's immigration laws by entering without permission can never overcome this 'original sin'. On the other she finds the 'nation-of-immigrants perspective', which stresses that 'if America is to remain an open and welcoming nation, it must create a path for undocumented migrants to emerge from the shadows and gain legal status as part of a comprehensive – and humane – immigration reform project'.[235] These positions are irreconcilable, she holds, because an emphasis on compassion and human dignity is unlikely to convince the hard-line restrictionists who make up a section of the nation-of-laws camp. Shachar aims to find a way out of this impasse by focusing on rootedness, which she claims is an existing legal basis for defending a regulated path to earned citizenship. How does her stance relate to the two persistent questions?

9.3.1 What happens to these migrants over time?

Shachar's position is closely related to Carens'. Just as in Carens' analysis, descriptions of some tragic individual cases of irregular migrants who have spent many years in America set the stage. Moreover, she puts forward a non-conclusive definition of rootedness similar to that presented by Carens. Her position is more elaborate when it comes to the temporal dimension of the argument, however, while it also differs on one important point. Whereas Carens aims to provide a convincing *moral* argument for inclusion, Shachar seeks to find arguments already present in the existing legal structures – an approach which is more obviously promising for us as it uses a method similar to that adopted in this book.

Indeed, the similarities between Shachar's analysis and the results of my own scrutiny of the time hypothesis in European migration law are apparent. Citing

233 Ibid, pp. 184 et seq.; Shachar, 'Earned Citizenship: Property Lessons for Immigration Reform'.

234 She uses this terminology in her article. In her book she dubs the former position 'the resurrect-the-border position' and the latter, more loosely, 'a vision of global citizenship'. Shachar, *The Birthright Lottery*, p. 184. Cf. Motomura's 'immigration-as-contract' and his 'immigration-as-affiliation' position: Motomura, *Americans in Waiting. The Lost Story of Immigration and Citizenship in the United States*, pp. 9 et seq.

235 Shachar, 'Earned Citizenship: Property Lessons for Immigration Reform', p. 113.

the Nottebohm case, she stresses that the social fact of attachment and the real and effective link between an individual and a nation are the basis for membership of it. She immediately acknowledges the individual character of these criteria and the difference in weight and importance which should be attached to them, yet attempts to come up with a *non-conclusive* list of factors. , Quoting the Nottebohm case, she calls these the 'centre-of-interest test'. Among these factors are family ties, habitual residence, attachment shown to the host country and its inculcation into the migrant's children, length of residence, evidence of value and service to the community, employment history, the degree of hardship which might be incurred by the migrant or his family if deportation were to take place, age, health, ability to travel, good moral character, volunteering on school boards, contributing to the work of religious organisations, *et cetera*. Shachar clearly tries to find material criteria to define rootedness, and her findings are related to those from the case law on Article 8 of the European Convention on Human Rights. And just as with that jurisprudence, her criteria are very casuistic and individual. But how does she relate the proposed criteria to lapse of time?

Shachar refers to US court decisions that put forward the argument that long-term legal residents are presumed to have developed stronger ties and affiliation over time. She then goes on to argue that if this principle is at work in the law regulating the status of legal migrants, then it must also apply to irregular ones. Furthermore, she refers to the work of Motomura and stresses that rootedness is an '*incremental process* in which one's *center of life-gravity shifts*'.[236] As time lapses, one's centre of life gradually changes, so the longer one resides somewhere, the more it will become the place of habitual residence. Without further describing how precisely this mechanism works, she points out, by quoting Motomura, that such a focus on rootedness has the advantage that it takes into account time 'by acknowledging and giving legal meaning to what has *already* occurred'.[237] With this quote, Shachar acknowledges the problematic relationship between the passage of time and the law's attempt to fix this to a certain moment. It seems unavoidable that the law either predicts the future or retrospectively accepts a certain change. Although her argument is persuasive in its own right, it thus remains puzzling how it relates to time: how precisely does this incremental process of becoming rooted relate to the *lapse of* time?

Whereas notions such as 'rootedness' and 'integration' relate intuitively to something that happens as time passes – in which respect they differ from the seemingly more static equality argument, which holds that someone *is* equal at a certain moment

236 Ibid, p. 131.

237 Ibid, pp. 131-132, emphasis in original. Motomura, for his part, does draw the important distinction between a retrospective and a prospective sense of time in an article on time and the family in migration law, but he does not then describe *how* this incremental process takes place over time; see Motomura, 'We Asked for Workers but Families Came: Time, law and the Family in Immigration and Citizenship'

– it is precisely their time aspect that remains unclear. Both Shachar and Motomura claim that rootedness takes place over time, or that the centre of one's life shifts, but they do not say why this is so or how precisely it occurs as time unfolds. On the basis of Shachar's analytical framework, it remains feasible for someone to fulfil these criteria the moment he arrives in a new country – or never. And why should this 'rooting' be an incremental process? Why is it not possible for someone to change back, or just 'fall back'? The focus on good moral conduct clearly leaves open the possibility that some people do not root even though they stay for a long time. After all, legally resident migrants can lose their residence status – just as irregular migrants might never gain a residence permit – because they have committed crimes. Have they become unrooted then, or have they just never started to root? And what remains of the statement that we are dealing with an incremental process if it applies only to certain 'well-behaved' people (an incremental process only for those migrants for whom the process is incremental)? In summary, then, Shachar's argument fails to overcome the formal, material problem I identified in the previous part of this book: by leaning on a material conception of 'becoming rooted', it does not address the relationship with the lapse of time.

9.3.2 Why should they be legally included?

If someone's centre of life indeed has shifted, and this has become convincingly apparent, the question remains as to why this migrant should be legally included. Interestingly enough, Shachar's argument for inclusion also relates to time. Citizenship is not granted as an act of charity, she argues, but arises from the existence of existing *real* and *genuine* ties to the *political community, established over time*. This *jus nexi* implies that there 'must be a *point in time* in which the nexuses between right and duty, *actual participation and membership status, social connectedness and political voice*, gain weight and sway'.[238] Such an analysis 'offers an improvement to the present setup: it accounts for the significance of an immigrant's *actual* community membership and the *social fact* of her *attachment to the nation*, rather than simply relying on the *initial moment of entry* that fails to account for *subsequent immersion* and *changed expectations over time*'.[239] It is in this double sense that Shachar relates her position to time. First, it is not the *moment of entry* which is decisive for the growth of rights and entitlements, but the situation at the *current* moment. And second, in the meantime the migrant has changed and became rooted. This *actual* rootedness must be the focal point for inclusion, according to Shachar.

Moreover, Shachar argues that rootedness is in fact one of the basic assumptions of the legal system – a finding to which I can subscribe on the basis of my analysis of the time hypothesis in European migration law. In her plea for the regularisation

238 Shachar, 'Earned Citizenship: Property Lessons for Immigration Reform', p. 116.
239 Ibid, p. 116, emphasis added.

of irregular migrants, however, she cannot follow the same approach because the fact that the existing law *does not* apply this principle to irregular migrants is the reason she started her analysis in the first place. She therefore seeks other arguments, which again eventually bring her position very close to that of Carens. 'Categorically denying long-term residents even a chance at establishing eligibility for membership fails to serve this *democratic ideal*. It further risks transforming settled migrants into pariahs, thus eroding the *very preservation of the society at large as a community of equals.*'[240] She goes on to relate this situation to the painful history of exclusion from citizenship on the basis of race and gender which persisted in different forms for almost two centuries in the history of the US. 'In this way, *jus nexi* reflects the idea of democratic accountability within a bounded political community, according to which those who are continuously and habitually subject to the coercive powers of the state must eventually be given the opportunity to gain a hand in shaping its laws'.[241] These are normative arguments: they relate to a democratic ideal and to the equality argument which I also found at the basis of the time hypothesis in European migration law.

Shachar puts forward another interesting (and familiar) argument by drawing an analogy with property rights. 'If the authorities have chosen to turn a blind eye to the "adverse possession" by *millions* of unauthorized migrants who settled within their territory (after crossing the border without permission or overstaying their visas), then there must be a point in time when they are estopped by their own inaction; in other words, the unauthorized entrants ought to gain immunity from deportation and removal, in addition to being offered an eventual route for legalizing their status.'[242] There must be a point in time when they are estopped because they do not enforce their own rules, an argument I have also found in the case law of the European Court of Human Rights.

The importance of Shachar's contribution to the citizenship debate can hardly be overstated. Her plea for *jus nexi* is appealing, and elaborate when it comes to its temporal dimension. She argues that, over time, a migrant's centre of interest slowly but surely shifts and that the law should simply acknowledge what has already occurred. That is, it should privilege the current moment over the initial moment of entry, since those who are continuously and habitually present and subject to coercive laws should eventually gain a hand in shaping these laws. In this way, Shachar solves the problems of overinclusion and underinclusion which are the result of the *jus soli* and *jus sanguinis* forms of citizenship.

240 Ibid, p.134.

241 See also chapter 3 of Motomura, *Immigration Outside the Law*. Cf. S. Benhabib, *The Rights of Others. Aliens, Residents and Citizens* (Cambridge University Press 2004).

242 Shachar, *The Birthright Lottery*, p. 186.

What also makes Shachar's analysis compelling is that she persistently tries to overcome some of the temporal problems I have identified in the previous part of this book. She stresses that her analysis focuses on the *experience* of *being a citizen*, thus trying to avoid the problem of posing charged questions of normative identity and belonging to assess the substance of membership of a national community. This clearly relates to the formal material problem of time, which she tries to overcome by stressing that 'there can be no substitute' for this experience of citizenship – a formulation that *alludes to the indefinable character of rootedness*. Yet at the same time she does provide a list of relevant circumstances to assess this 'indefinable' rootedness.

Moreover, she holds that the principle of rootedness creates a presumption of inclusion on the part of those whose life centre has already shifted. 'What is required here is not mere physical presence in the territory, but also the experience of will to become a full member'. The migrant must *earn* his citizenship; not everyone qualifies simply by their mere presence in a territory.[243] Shachar here introduces a normative criterion to distinguish between two types of experience through time (experiences that earn citizenship and experiences that do not). It remains unclear, however, whether those migrants who have not earned citizenship have in fact rooted but do not deserve citizenship for other reasons (their subjective intention or other integration criteria) or whether earning citizenship is part of her definition of rootedness. In other words, is her concept of rootedness a descriptive or a normative concept?

Whatever the case, Shachar refutes the position that everyone is simply incorporated *ex lege* based on mere passage of time.[244] That is not enough, and nor is mere presence in a territory. It is what *happens in the time spent in the territory* which is crucial in determining whether someone should receive stronger rights. This is also the crux of the argument put forward by Motomura, who stresses that immigrants can, over time, earn 'an imperfect approximation of equality as they establish ties'.[245] But he

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243 Such a pure territorial position – time should not matter – is defended by Linda Bosniak in Bosniak, 'Being Here: Ethical Territoriality and the Rights of Immigrants'. In fact, this stance is closely related to the open-borders argument Carens defends in Carens, 'Aliens and Citizens: the Case for Open Borders' – the moment one is in a territory, he should receive strong rights. This position will not be discussed here, since the starting point for my endeavour is the finding that time *does* matter. Another version of the time-does-not-matter stance is what Motomura calls the 'immigration as contract' position, in which it is fundamental that immigrants do not belong to the host society because the terms of belonging should be seen as part of the original understanding associated with the non-citizens' arrival. Motomura, *Americans in Waiting. The Lost Story of Immigration and Citizenship in the United States*, p. 151.

244 As we will see in the following paragraph, Ruth Rubio-Marín makes a similar argument for long-term residents to become citizens automatically, since the imperative of democratic inclusion of all subjected to the laws overrides migrants' rights to choose between alternative citizenship statuses. Rubio-Marín, *Immigration as democratic challenge. Citizenship and Inclusion in Germany and the United States*.

245 Motomura, *Americans in Waiting. The Lost Story of Immigration and Citizenship in the United States*, p. 89.

acknowledges that they do not attain complete equality, because that would imply that they have gained citizenship status itself. Immigrants build ties over time and become affiliated with the host country and its society, and this makes them *fairly equal* to its citizens and deserving to be treated accordingly.[246] In other words, if the only difference between a citizen and a non-citizen is their actual citizenship status, then both should be treated equally. What is important in Motomura's argument is that the unequal treatment of citizens and non-citizens is not unacceptable as such, but it is unacceptable if it is *not* temporary. The key, according to Motomura, is *eventual* access to equality: the possibility that, with the lapse of time, migrants will come to be treated equally with citizens.[247] As I explain in the following section, this issue once again boils down to the problem of ties and time as I identified in the formal, material assessment of time.

Unfortunately, I cannot use Shachar's argument to answer the two persistent questions. Firstly, it leaves open the question of what precisely the relationship is between the migrant – and their shifting centre of interest – and time. Secondly, I have set myself the task of finding an argument for legal inclusion that relates to time without being normative, whereas Shachar's stance is ultimately grounded in normative assumptions about democratic ideals.

9.4 Bauböck, jus domicilii and intergenerational citizenship

Bauböck's argument is situated in the debate on the inclusion of long-term residents as fully fledged citizens. His stance is interesting because he focuses not on what changes with migrants over time, as was clearly part of Shachar's and Carens' analyses, but instead analyses the nature of the relationship between time and citizenship. He does so by first unpacking time, as I have described in the introduction. Bauböck discerns different ways of establishing whether residence is deemed temporary, distinctions which have been helpful in my analysis of the Long-Term Residence Directive.

In his subsequent analysis he refers to results from migration studies which hold that 'there is nothing more permanent than temporary foreign workers'[248]. The idea is that, if it is impossible to come back to the host country, people will not return to their country of origin in the first place. Moreover, employers will attempt to retain temporary workers who perform well or to recruit new workers within the family or personal network of these migrants. And reunification with their families will consolidate the settlement process of temporary migrant workers. Consequently, Bauböck claims that it

246 Ibid, pp.88-89.

247 Ibid, p. 152.

248 P.L. Martin and M. Ruhs, 'Numbers vs. rights: trade-offs and guest worker programs' (2008) 42 International Migration Review 249, as cited in Bauböck, 'Temporary migrants, partial citizenship and hypermigration', p. 671.

is 'therefore much more likely that more migrants will stay only temporarily where such legal conditions and constraints are largely absent and migrants can freely enter, take up jobs and remain indefinitely'[249].

Stronger rights with the aim of making residence temporary is certainly a refreshing insight in the debate. Bauböck asserts that, '[t]his has been, by and large, the experience with free movement of workers from other member states in the European Union.'[250] Interestingly enough, such a free-market perspective (if taken literally) seems to be radically at odds with the time hypothesis or an underlying rootedness principle, although Bauböck does not claim this as such. The presumption seems to be that, if one gives a migrant a strong entitlement which enables him to enter, leave and return to the country at will, spent time in its territory will no longer be a relevant proxy for a future expectation. At any moment, a migrant with a strong entitlement might leave the country if the job market elsewhere seems more promising or other compelling reasons encourage him to do so. This implies that such a rational decision is the same *at any moment*: the fact that someone has spent a long time in a certain country in which he has developed ties and has become a member of society does not seem to matter. We have already encountered this paradox in the chapter on Union citizens.

Bauböck is not unaware of it, either, and in a thought experiment explores what would happen if we lived in a world of hypermigration where most residents are non-nationals. The problem would be that the existing proxies for making an expectation of the future (*jus soli* and *jus sanguinis*) would no longer work. The *jus soli* principle is based on the assumption that people born in a certain territory are attached to it and have the right to return there. With free movement for everyone in the hypermigration world, this right of return would become meaningless, argues Bauböck, since people would not be attached to the territory of their birth. And the *jus sanguinis* principle would become even more problematic as a proxy for the future, because it 'would lead to an even stronger disconnection between territorial population and citizens by descent, most of whom would be born abroad and would never take up long-term residence in the territory of the state whose citizens they are. Citizenship acquired by descent would become just a label derived from one's family tree rather than an allocation mechanism for a status that unites citizens across generations.'[251]

The only plausible rule to determine the citizen in such a scenario, Bauböck claims, would be *jus domicilii*: citizenship would be acquired automatically after a short period of residence, and also lost automatically when moving to another state. The most radical proponent of such a *jus domicilii* principle has been Rubio-Marín, who has argued that, after a certain time, resident migrants should automatically become citizens without applying for naturalisation, without having to renounce prior nationality and

249 Bauböck, 'Temporary migrants, partial citizenship and hypermigration', p.671.
250 Ibid, p. 671. This claim is not substantiated with evidence in this particular article.
251 Ibid, p. 685.

irrespective of whether their residence had been legal or illegal.[252] Milder versions of *jus domicilii* might only allow lawful residence and demand a request for naturalisation instead of citizenship being granted automatically. It is interesting to contrast this *jus domicilii* principle with Shachar's *jus nexi*, for the two options seem to correspond with the formal-material distinction I have identified. In a pure *jus domicilii* principle, as put forward by Rubio-Marín, the only important point would be lapse of time. Once the time threshold had been met, citizenship would be acquired without additional requirements. With a pure *jus nexi* principle one would have a non-conclusive list of material criteria, yet ultimately this would imply that the link with time has been lost. After all, it is quite possible that one's centre of interest is already linked to a particular territory *before* one arrives there – because of family ties or work, for example. On the other hand, it is perfectly conceivable that one's centre of interest would *never* shift; after all, every material criterion which assesses the status of a migrant excludes some who do not meet it.

As Shachar has observed, the principles of *jus soli* and *jus sanguinis* lead to forms of overinclusion and underinclusion. I must add, however, that *jus domicilii* and *jus nexi* lead to similar problems as well. The most important advantage of these latter principles is that they incorporate lapse of time, since the acquisition of citizenship is not limited to the moment of birth. But as the analogy with the material, formal problem shows, these two principles generate their own problems of overinclusion and underinclusion. A pure *jus nexi* principle might include those migrants who have actually become members of the society, or participate in it in the 'right' manner, but those who have failed to do so are not included. That this form of underinclusion is not just a theoretical problem is shown by the critical debate on integration measures in Europe.[253] *Jus domicilii*, by contrast, might lead to forms of overinclusion, since a pure-time criterion does not assess ties or actual membership of society but simply includes everyone after a certain period of time.

Bauböck has put forward another critique of pure *jus domicilii*. He stresses that national populations would 'become "casual aggregates" of migrants who happen to reside currently in any given territorial jurisdiction, but each of whom knows that most others around had not been here for a long time and are not likely to be here in a few years.'[254] This would be problematic, argues Bauböck, because such aggregates would not form a sufficient basis for self-governing democratic polities 'whose citizens authorize the making of laws to which they will be subjected and agree to long-term

252 Rubio-Marín, *Immigration as democratic challenge. Citizenship and Inclusion in Germany and the United States*, pp. 102 et seq.

253 See, e.g., De Vries, *Integration at the Border. The Dutch Act on Integration Abroad and International Immigration Law*; Van Oers, Ersboll and Kostakopoulou, *A Re-definition of Belonging*; Groenendijk, 'Legal Concepts of Integration in EU Migration Law'.

254 Bauböck, 'Temporary migrants, partial citizenship and hypermigration', p. 685.

public investments for the sake of future generations.' Citizenship, according to Bauböck, is created as a form of life-long membership of a national community that is acquired at birth and passed on across generations through descent or birth in the territory. This principle would be severely disrupted if migrants could simply take up citizenship by mere residence. 'Intergenerational citizenship is thus characterized not only by automatic birthright acquisition but also by the absence of strict *jus domicilii.*'[255] Bauböck's point that intergenerational stability is at risk in cases of hypermigration is interesting, and his assumption that such stability might be at the basis of contemporary societies could be promising, yet for several reasons it cannot answer my questions. First, stating that intergenerational stability is at risk in a world of hypermigration is one thing, implying that this stability is at the basis of our current state of migration is something else entirely. Why, in such a scenario, would the reason for granting stronger rights to those migrants be found in the urge to seek intergenerational stability? Bauböck clearly claims that stronger rights might result in more migration, which is another reason that intergenerational stability cannot be the rationale behind the time hypothesis. After all, if stronger rights lead to more migration, they must lead to less intergenerational stability.

Upon closer scrutiny, Bauböck's argument is not actually very far removed from those of Shachar and Carens, even though they adopt an entirely different stance as to whether the current system of citizenship is appropriate. Shachar and Carens call for the lifting of birthright citizenship or for open borders, whereas Bauböck stresses that intergenerational stability is 'morally defensible and indeed functionally required for the formation of stable political communities with a potential and comprehensive self-government.' Despite this difference, all three authors share the view that long-term residents should be able to become national citizens after a period of time. In Bauböck's view, as for Shachar and Carens, the lapse of time is the proxy for the formation of a genuine link between the individual and the state. Not because this is the only possible system – one in which migrants receive strong rights as soon as they enter is perfectly conceivable in theory, and in the EU is already operating in practice – but because, according to Bauböck, some form of genuine tie is indispensable for intergenerational stability.

9.5 Conclusions

In the preceding analysis of the existing debate on stronger rights for migrants (irregular as well as regular), I have identified practically all the elements that had been found in

255 Ibid, p.667.

European migration law. The problem, however, is that the precise interrelationship between all of these elements and time remains unclear.

We have again seen that *stories* about the individual lives of migrants play a role, and that it matters *what actually happens* during the time migrants spent in a territory. The time hypothesis cannot be explained simply by reference to lapse of time, and it remains unclear what exactly the *relationship is between lapse of time and migrants' actual experiences*. Scholars in this field either confess to making *presumptions*, suggest that 'rootedness' is *indefinable or* state that it is simply impossible to determine precisely how deeply a person 'belongs'. Whilst Shachar's analysis, especially, shows that there should be a proper place for the *experience of the migrant*, it remains to be determined *why* it is so difficult to address the relationship between such experiences and time.

It seems impossible to overcome the material-formal problem I identified in the legal part of this book: in the material dimension we eventually lose the relationship with time, whilst in the formal we fail to address the migrant's actual experiences, his development of ties and his *actual* rootedness. And this leads to new forms of overinclusion and underinclusion. For example, a material assessment of what has happened in the time the migrant has been in the country risks underinclusion because of the exclusion of those who have not been participating enough, have not been successful or have not been able to develop the right ties. And a formal assessment might lead to overinclusion, since it does not evaluate the migrant's *actual experiences*.

There is yet another problem that I have identified, in both the legal analysis and the scholarly debate, but was unable to solve: the question of equality. The argument here is that once migrants have become *equal* to nationals, with the *only difference being their legal status*, they should be included legally as well. This argument is at the heart of my analysis, since it relates clearly to both persistent questions. It proposes that migrants have becomes equal to or the same as nationals, despite the difference in their legal status, and that *for that reason* the legal discrepancy should be eliminated.

In the scholarly debate, it has become apparent how precisely this argument relates to time in the discussion on the inclusion of unlawfully resident migrants. There, *the initial moment* of illegal entry can be contrasted clearly with the *current* moment, at which the migrant has become a member of the society. The 'original sin' of not complying with the immigration rules should not be held against the migrant forever,[256] goes the argument for their inclusion. Yet this begs the question as to what relationship exists between time and the law. Is it not conceivable that the law is based on the fixation of moments and the freezing of time in order to gain control over the presence

256 Luigi Corrias has pointed out to me the Christian vocabulary at work here; if taken seriously, this would make the restrictive position a Christian stance – a human never overcomes the original sin of eating from the forbidden fruit – which implies that those in favour of the inclusion of migrants are either atheists or, perhaps more accurately, blasphemers.

of migrants? If that were the case, then the difference between the initial moment of entry and the current moment would be no reason to allow their inclusion. Quite the contrary, in fact: it would be the very reason for their *exclusion*. Or, to put it in terms of the equality argument, what if control over the entry and residence of migrants were based on differentiation over time – on the fixed categorisation of migrants? In this light, the persistent legal difference between the migrant and the national is not so much an argument for the former's inclusion as proof of the legal control over the presence of migrants in a territory.

With these observations, I have paved the way for the next two, philosophical chapters. In chapter 10 I address the relationship between the migrant's identity, his experiences and time. And in chapter 11 I analyse the relationship between legal control and time, along the lines just sketched. Finally, in chapter 12, I put forward an underlying rationale for the time hypothesis that addresses the question of rootedness and integration, the problem of equality, the material-formal problem, the question of expectation, the externalisation from time and the manipulation of time, whilst acknowledging that the law seeks control over time by allocating people to certain fixed categories.

10.

Time, Experience and the Migrant's Identity

Bergson: time as a line and flowing time – Derrida: rescue what one loses in a word – Ricoeur: idem and ipse identity – Narrative to solve the time enigma– Temporal understanding and experience of identity – Durable human identity – Keeping oneself different over time

Several terms have been used in law and in the scholarly debate for what happens to migrants over time. Migrants become 'integrated' or 'affiliated', they become 'equal', they 'grow (genuine) ties', their 'centre of interest shifts', they become 'socially connected', they become 'rooted' and so on. What I attempt to find out in this chapter, however, is not necessarily linked to one of these labels. Nor do I commence with an analysis of the particular differences and relationships between these terms. Instead, I start from the previous conclusion that all these different labels fail to address the lapse of time as they do not incorporate succession and merely focus on a certain moment. As suggested by Shachar, however, the temporal experience within the territory will turn out to be the starting point for an understanding of what happens to migrants over time.

All of the above terms resonate a deeper philosophical problem, which I also address in this chapter: the relationship between time and identity. The migrant seems to undergo a change, and this is the reason for the subsequent growth of his rights. But who does he become, and how does this changed identity relate to his previous one? It seems that, despite the change, he also remains the same. After all, he remains identifiable as the same person. Moreover, there seems to be a complex relationship with the society, the country, the community or the territory with which the migrant becomes socially connected, the other people with whom he grows ties and so on. Is it necessary that this society remains the same, while the migrant changes and subsequently becomes 'equal' to it? That certainly begs the question of what the relationship is between change and sameness (of the migrant, of society or of both).

In any case, what all these notions and relationships seem to have in common is the assumption that something changes over time (while something else remains the same) and that this very change is the reason for stronger entitlements. We have seen in the legal part of this book that the lapse of clock time and of human time are difficult to relate to one another. The latter presupposes a momentaneous stance on time, with a future and a past contained in this one moment. It is this stance, with its constructed expectation of the future and assessment of the past, which I found to be dominant in law – and to have a problematic relationship with the lapse of clock time. It is therefore necessary to further analyse the relationship between the progress of time and human

time. Is there a conception of human time that takes into account progress of time or, to be more specific, that takes into account *succession*?

This search will drift away from the distinction between clock and human time, as I have used it so far, precisely because they cannot clarify succession. As explained in the introduction (section 1.4.2), I will bring the human capacity for temporal experience into the equation: the ability to *experience* the passage of time. Just as temporal understanding is part of human time, so this temporal experience is characteristic of human temporality. The complexity, however, is that they are mutually exclusive. In this chapter I try to situate both aspects of human time in the understanding of the relationship between time and identity. And I analyse all the time aspects of this changing human identity over time in order to find a *rationale* behind the time hypothesis. In the conclusion I relate my findings to the distinction between clock time and human time.

Therefore I work in this chapter my way down from a very abstract philosophical analysis to the concrete question of the migrant and the rationale behind the time hypothesis. My analysis starts from an abstract and general discussion of the problem of time (Bergson), from where I subsequently focus on the (still abstract) problem of time and language (Derrida). After that I shift my attention to specific question of human identity through time (Ricoeur). With these three levels of scrutiny (time, time and language, time and human identity), I will have the tools needed to answer the central question of this chapter.

Bergson sets the stage for the analysis (section 10.1). When one thinks of time, he asks rhetorically, does one not secretly bring space into the equation, as well? After all, we often think of time as a series of moments which succeed each other in the form of a line. Bergson argues that such a conception of time might be useful or even necessary in social life, but that it contradicts the direct experience of time in our consciousness. That experience is a form of constant change, while our common perception of time fixes the movement (and hence makes identity possible). If one looks at the question of time and identity, one cannot neglect these two different perspectives on human time.

Bergson suggests that the problem of time experience is also a problem of language. The moment we put our sensations and feelings into words, we fix them and so lose what is elementary: their moving or streaming character. Using Derrida's notions of 'iterability' and 'restance', I further analyse this problem in section 10.2. What is the relationship between words and time? Words seem to have a general character, as they can refer to an endless variety of singularities and have a different meaning in every new context. What is this relationship between generality and singularity, time and repetition for a durable form of signification in language? In fact, these are all questions of time and identity, albeit on a semantic level.

Once I have approached the question of time and identity as a problem of fixation of what streams (Bergson) and as a problem of every linguistic utterance (Derrida), the

time is right to focus on the question of time and *human* identity. After all, in this chapter I am not interested so much in the problem of the durable signification of words as in seeking an understanding of durable human identity. Bergson's two perceptions of time are at the heart of the problem of identity, as Ricoeur also acknowledges. With Ricoeur, in section 10.3 I introduce the question of human identity as the problematics between *idem* – that which remains the same – and *ipse* – that which is one's own.

Between these two poles of identity, there is a tension – how can we speak of a person who is 'same' but not 'himself', and vice versa? – which, I argue in section 10.4, Ricoeur tries to 'solve' via narrative. It is in narratives that we give our life coherence, while these narratives in turn have temporal elements. In the plot of a narrative, the singularities of a life become a coherent and meaningful unity with a certain temporal direction. However, these narratives do not *represent* a 'real identity'; rather, it is out of the web of entangled stories that a person's identity arises time and time again. Someone's identity, as we will see, is a being entangled in stories. This implies that there is a crucial role for narrative in this analysis, and hence for language .

At this point it is time to return to the question of the migrant. How does a migrant's identity persist over time, changing into something else whilst also remaining the same? Ricoeur does not elaborate on how certain change 'persists' over time in identity, yet with Derrida's notion of iteration I can propose – in section 10.5 – a reading of identity that does justice to change and sameness, in a lasting manner. It is therefore necessary to disentangle Bergson's homogeneous understanding of time (which I will refer to as temporal *understanding*) from his heterogeneous conception of time (which I will refer to as temporal *experience)*. As we will see in the next section, the homogeneous conception of time has a spatial character: it is time perceived as points on a line, all perceptible at once. And it implies a cognitive understanding of time that, according to Bergson, changes the flux of time into a momentaneous homogeneous perception of it. A heterogeneous form of time, by contrast, focuses on the human experience of time *as it happens*. In such a conception, moments cannot be perceived as points that stretch out neatly in a line; rather, the different perceptions constantly permeate each other and cannot be distinguished one from the other without changing their streaming character.

I argue in section 10.5.1 that the migrant's life in a territory is structured by these two perceptions of time. In particular, I try to situate the temporal experience at the heart of human identity, thereby pursuing the direction Shachar has pointed at with her focus on the *current* experience of the migrant. I also argue that a migrant first tries to grasp his experiences and to order them by bringing them in the realm of the same. After a while, however, this *understanding* of his environment and others slowly loses his attention and he gains an immediate experience of them. In section 10.5.2 I situate this double perception of his life at the heart of his narrative identity, arguing that his identity gains a certain durability on a conceptual level by way of forgetting

singularities of his life, to which it nevertheless refers. I call this the process of becoming *selbstverständlich*.

10.1 Bergson's Two Perspectives of Time

'[L]anguage requires us to establish between our ideas the same sharp and precise distinctions, the same discontinuity, as between material objects. This assimilation of thought to things is useful in practical life and necessary in most of the sciences. But it may be asked whether the insurmountable difficulties presented by certain philosophical problems do not arise from our placing side by side in space phenomena which do not occupy space, and whether, by merely getting rid of the clumsy symbols round which we are fighting, we might not bring the fight to an end.'[257] With these words, Henri Bergson commences his dissertation *Essais sur les données immédiates de la conscience* (1889), published in English translation as *Time and Free Will* (1910). In *Time and Free Will,* Bergson argues that our common conception of time is in fact 'nothing but the ghost of space haunting the reflective consciousness'.[258] Alongside this conception, Bergson puts forward an understanding of time that is not governed by space, which he calls *durée*. His analysis of time sets the stage for our own scrutiny of the role of time in migration law, because many of the problems we have encountered so far might also have arisen from a simplification of time.

Bergson contends that this common understanding of time is implicitly based on a conception of space, because we imagine time as a series of points stretched out in space. This is the homogeneous conception of time I referred to in the introduction. We think of a moment (now) that is *preceded* by another moment, while *after* this particular moment another moment quickly arrives. This implies the simultaneous perception of these moments: we perceive them in a line and we see this entire line all at once. The line is a continuity, a chain, the parts of which touch without penetrating one another. Bergson stresses, however, that we can only think of such an *order* when we first *distinguish* between the terms and then compare the places which they occupy, 'hence we must perceive them as multiple, simultaneous and distinct.'[259] Bergson's challenging insight is that, by drawing such distinctions to make an order of succession, we imply the representation of time in space.

Bergson is well aware of the complexity of his argument and provides several examples to elucidate it. To understand how time is perceived as spatial and how Bergson distinguishes between two perceptions of time, the following example probably works

257 Bergson, *Time and Free Will. An Essay on the Immediate Data of Consciousness*, p. xix.
258 Ibid, p. 100.
259 Ibid, p. 102.

the best. Imagine a straight line of unlimited length and on this line a moving point. 'If this point would be conscious of itself, it would feel itself change, since it moves: it would perceive a succession; but would this succession assume for it the form of a line?'[260] Bergson stresses that it would be possible to see the succession in the form of a line, yet for this the point should rise above the line to perceive it as such. Therefore, the different positions should be perceived *at once* simultaneously and in juxtaposition. In other words, to perceive it as a line, it would be necessary to take a position outside it, to take account of the void that surrounds it and hence to think of it in spatial terms.

Along with this homogeneous conception of time – one characterised by simultaneous, distinguishable points stretched out as a line – Bergson also tries to find a heterogeneous conception. Such 'pure duration' would be the form in which the succession of our conscious states is not separated into distinguishable and so spatial mental states. Rather, as we will discuss, it is in a 'stream of consciousness', as William James has put it, that we live. Without the outsider's perspective, without a perspective that transcends it, the point will not perceive itself as moving linearly. 'Its sensations will add themselves dynamically to one another and will organize themselves, like the successive notes of a tune by which we allow ourselves to be lulled and soothed'. This is what Bergson calls 'duration', being 'nothing but a succession of qualitative changes, which melt into and permeate one another, without precise outlines, without any tendency to externalize themselves in relation to one another.'[261] Only when we start to divide this stream into singular moments do we secretly bring space into the equation. '[I]t is enough that, in recalling these [mental] states, it does not set them alongside its actual state as one point alongside another, but forms both the past and the present states into an organic whole, as happens when we recall the notes of a tune, melting, so to speak, into one another.'[262]

Bergson's reference to music in the above quotation is no coincidence: the understanding of time that grasps the movement of it is often related to rhythm and music.[263] It is only with the musical metaphor that Bergson can clearly illustrate what he is looking for. 'Might it not be said that, even if these notes succeed one another, yet we perceive them in one another, and that their totality may be compared to a living being whose parts, although distinct, permeate one another just because they are so

260 Ibid, p. 103.
261 Ibid, p. 104.
262 Ibid, p. 100.
263 For example, Augustine, *Confessions* (Oxford University Press 2009), chapter 11, where he discusses the duration of a sound; F. Nietzsche, *De geboorte van de tragedie of Griekse cultuur en pessimisme* (De Arbeiderspers 2009), where this is done through the duality of the Apollonian and Dionysian. A. Schopenhauer, *Die Welt als Wille und Vorstellung* (Deutscher Taschenbuch Verlag GmbH & Co 1998) sees music as the highest form of understanding. Bergson often illustrates his *durée* with reference to music or the sound of a clock. And more recently there is H. Rosa, *Resonanz. Eine Soziologie der Weltbeziehung* (Suhrkamp Verlag GmbH 2016).

closely connected? The proof is that, if we interrupt the rhythm by dwelling longer than is right on one note of the tune, it is not its exaggerated length, as length, which will warn us of our mistake, but the qualitative change thereby caused in the whole of the musical phrase. We can thus conceive of succession without distinction, and think of it as a mutual penetration, an inter-connexion and organization of elements, each one of which represents the whole, and cannot be distinguished or isolated from it except by abstract thought.'[264] The tones of music mutually penetrate each other and thus cannot be distinguished, because they are part of the melody. In a 'stream of consciousness', the mental states or images of reality permeate each other, spill over and provide a streaming impression of reality which is at odds with the spatialised conception that is presumed in our punctual understanding of time.

It is crucial to see the conceptual difference in exteriority and succession, which is central to Bergson as it also was to Augustine one and a half millennia earlier. The point is, as Augustine states, that we measure time from the instant it began until its end. 'For the very space between is the thing we measure, namely, from some beginning unto some end.'[265] Take a sound again, for example. How, Augustine asks, could we measure that? The point is that we can measure from the instant something started to the instant it ends, yet the paradox is that 'a voice that is not yet ended, cannot be measured, so that it may be said how long, or short it is; nor can it be called equal to another, or double to a single, or the like. But when ended, it no longer is. How may it then be measured?' An instant has no presence, since it immediately ceases to exist. The possibilities of dividing the instant into smaller portions are endless, but we will not find a solid ground of presence. 'And yet we measure times,' Augustine argues, 'but yet neither those which are not yet, nor those which no longer are, nor those which are not lengthened out by some pause, nor those which have no bounds. We measure neither times to come, nor past, nor present, nor passing; and yet we do measure times.'

This is what Bergson means when he says that, when focusing on moments, there is immediately a certain exteriority. Because of this spatialisation, however, there is no succession; there is only the 'now' in which we perceive *this particular moment, as it is distinguished from earlier and later moments*. As we have seen in the example of the conscious point on the line, if the point perceives itself on a line, it must take a position in which the points are perceived *at once*. This implies that there is no succession. Every position of the point on the line implies a *new* perception of all the spatial positions, the precise position of the point itself and the line on which all the positions touch each other. Movement and succession are excluded in every fixating view.

In our stream of consciousness, on the other hand, there is succession since our mental states permeate each other in a constant, indistinguishable flow. This implies a

264 Bergson, *Time and Free Will. An Essay on the Immediate Data of Consciousness*, pp. 100-101.
265 Augustine, *Confessions*, chapter XI.

constant movement, yet there is no exteriority in such a stream. Only if we *distinguish* do we create a distinction between certain states and hence space and exteriority. 'We can thus conceive of succession without distinction, and think of it as a mutual penetration, an interconnexion and organization of elements, each one of which represents the whole, and cannot be distinguished or isolated from it except by abstract thought.'[266]

Later, we will see that it is crucial for a proper appreciation of the time hypothesis that these two different modes of time can often hardly be separated from one another. Bergson stresses that we naturally reach a symbolical representation in which the two modes of appreciation are combined. '[I]n a series of identical terms, each term assumes a double aspect for our consciousness: one aspect which is the same for all of them, since we are thinking then of the sameness of the external object, and another aspect which is characteristic of each of them, because the supervening of each term brings about a new organization of the whole.'[267] This is what we do when we look at a flock of sheep: we reckon with both identity and difference at the same time. 'No doubt we can count the sheep in a flock and say that there are fifty, although they are all different from one another and are easily recognized by the shepherd: but the reason is that we agree in that case to neglect their individual differences and to take into account only what they have in common.'[268] *We neglect the differences in order to count what the sheep have in common.* This is the same argument as in the example of a point on a line, as it implies the simple intuition of a multiplicity of parts or units which are absolutely alike. Just as we need separated and similar points to see a line, so we need separated and identical parts to count. The point, however, is that as soon as we fix our attention on the particular features of objects, individuals or sheep, we can of course make an enumeration of them, but not a total: a list but not a sum. For our understanding of the question of time and identity, both homogeneous *and* heterogeneous perception are of vital importance.

This process of double perception is in fact at work in our perception of the external phenomenon which takes for us the form of motion. Here, we have a series of identical terms, since it is always the same moving body. We need this identity of sameness to be able to grasp the continuity. Simultaneously, though, we need the synthesis of our consciousness to connect the current position and what our memory calls the former positions. And in this synthesis these images permeate and perpetuate one another. *We constantly use this double perception in order to grasp the streaming reality*.

Bergson discerns two aspects of the self along these lines. '[B]elow the self with well-defined states, a self in which *succeeding each other* means *melting into one another* and forming an organic whole. But we are generally content with the first.'[269] Nevertheless, Bergson dubs this 'the shadow of the self projected into homogeneous

266 Bergson, *Time and Free Will. An Essay on the Immediate Data of Consciousness*, p. 101.
267 Ibid, p. 124.
268 Ibid, p. 74.
269 Ibid, p. 128, emphasis in original.

space'. This self is refracted, 'and thereby broken to pieces', yet precisely because of this, Bergson admits, it is much better adapted to the requirements of social life in general and language in particular. Still, he calls the other aspect of the self the 'fundamental self', as if it is the more important, the more vital aspect of one's ego. I will not here dive into a discussion of which aspect of the self is more significant, however; for my enterprise it is merely important to discern these two perspectives as different modes to approach the question of time and identity.

What can be taken from Bergson for my quest to find a rationale behind the time hypothesis? Bergson has shown that we can, analytically speaking, discern two very different ways of perceiving time, both of which are aspects of a conscious life. On the one side we find the most common perception of time, with its *distinguishable parts* perceived *simultaneously*. This is the time that presumes a spatial concept, with its separable positions and point-like moments. Movement in this perspective can only take the form of a line, given that the different points in time are perceived simultaneously as if the conscious point were *transcending its position*. On the other side we find the position of a moving point that is conscious of itself, yet does not rise above its location to see its own movement. From the position of the moving point itself, it would only see mental images that *constantly permeate* each other. In the words of Bergson, 'conscious life displays two aspects according as we perceive it directly or by refraction through space.'[270]

What I seek to find in this chapter is a perception of time and identity that does justice to both these perspectives, the direct lived experience as well as the perception of time that is mediated by space and, as I will further elaborate, by language.

10.2 Time and Language

'Vergeet het verschil
en je zult identiteit vinden'
Mustafa Stitou[271]

'In short, the word with well-defined outlines, the rough and ready word, which stores up the stable, common, and consequently impersonal elements in the impression of mankind, overwhelms or at least covers over the delicate and fugitive impressions of our individual consciousness.'[272] In the previous section we saw that time can be perceived in two seemingly contradictory manners: as a stream in which there is succession but no

270 Ibid, p. 136.
271 'Forget the difference/and you will find identity', M. Stitou, *Tempel* (De Bezige Bij 2013), p. 58.
272 Bergson, *Time and Free Will. An Essay on the Immediate Data of Consciousness*, p. 132.

exteriority, or in space where there is exteriority but no succession. Yet Bergson readily admitted that it is difficult, if not impossible, to have a proper sense of pure duration. Pure duration is a sensation, a perpetual state of becoming. And this state of becoming relates very tenuously to the fixing force of language, with its rough and ready words with well-defined, impersonal elements and outlines. The question of time as put forward by Bergson is therefore marked by the problematics of language.

Bergson stresses that, in our inner consciousness, we have neither identical sensations nor multiple tastes, 'for sensations and tastes seem to me to be *objects* as soon as I isolate and name them, and in the human soul there are only *processes*.'[273] When we give a name to a sensation, we thus turn it into an object and so fix what is floating. The duration of sensations and feelings is constantly on the move and changing. One can only say that one has the 'same' feeling when the feeling is first identified and so isolated and distinguished. Bergson claims that when we say that we have the same feeling, this says more about language than about the sensation itself. The question of whether something is identical presumes the usage of a well-defined word that isolates and abstracts from the sensation, hence making its identity possible. 'What I ought to say is that every sensation is altered by repetition, and that if it does not seem to me to change from day to day, it is because I perceive it through the object which is its cause, through the word which translates it.'[274] In other words, when we say that we have the same feeling, we confuse the feeling with the word that we used to identify it with.

With this formulation, Bergson does put us on the right track but he does not help us any further. He has brought us to the point where we can distinguish between homogeneous and heterogeneous time, and has shown us that a heterogeneous perception of time such as pure duration cannot be grasped using words, because those very words will make identical what has already changed. Is this not true for every word used, and not merely for our description of the stream of consciousness?

Like Bergson, Nietzsche stressed that, in our attempt to understand, we try to fix an ever-moving reality; we want to pin it down even though it keeps moving. In this respect, Nietzsche referred to Heraclitus' famous saying that one cannot step twice into the same river. He thereby touched upon the age-old problem of becoming and being, in which Bergson's analysis should also be situated. We have created concepts and words to fix certain meanings and to distinguish the right description of reality from the wrong one, yet Nietzsche stresses that this fixed understanding cannot take into account the fact that reality is constantly on the move. In fact, every concept comes into being by the equation of the non-equal. Why, for example, would one assemble every individual variety of tree into the single concept 'tree'? '[O]ne may certainly admire man as a mighty genius of construction, who succeeds in piling an infinitely complicated

273 Ibid, p. 131.
274 Ibid, p. 131.

dome of concepts upon an unstable foundation, and, as it were, on running water. Of course, in order to be supported by such a foundation, his construction must be like one constructed of spiders' webs: delicate enough to be carried along by the waves, strong enough not to be blown apart by every wind.'[275]

This problem is of primary interest to Jacques Derrida as well, albeit that he approaches the question from the other side. Rather than starting his analysis from a stream of consciousness which is transformed the moment it is put into words, he stresses that every word loses precisely what it refers to in every utterance. This is because of the same problem: the relationship between time and the usage of words. Or, more pompously, between time and the usage of linguistic tokens.

Jacques Derrida uses the term 'iterability' to indicate that every linguistic token should be repeatable in order to function as a token. In this sense, every word is in itself already repetition: the moment it is used presupposes that it has been used earlier and might be used again.[276] Derrida often reflected upon this problem, most notably in *Signature, événement, context,* relating to the singularity of a signature, in his quarrel with John Searle in *Limited Inc.,* and also in *Shibboleth* on the recurrence of a 'date'. Language exists by the grace of a general concept that can be used repetitiously in different situations and circumstances. This generality, however, has a price; in that, Derrida agrees with Nietzsche and Bergson. The linguistic token necessarily conceals the singularity of what it refers to, by the very attempt to show it in general terms. This might sound more obscure than it is. A word is singular because it refers to the specific situation and context of the moment at which it is used. At the same time, however, the language used for this very utterance is general and this generality necessarily exceeds the limits of the specific context. When I say 'look at that tree', the word 'tree' is general and certainly exceeds the limits of the situation in spring when I see it on my daily stroll through the park while it is blossoming. Yet it is this very generality of the concept which makes possible such a simple and comprehensible statement. Derrida says cryptically that the iterability of a word annuls what it rescues from oblivion. It supposes a minimal remainder, a *restance*, for the identity of the *selfsame* to be repeatable and *identifiable in view of its alteration*.[277] In other words, because of the change it is necessary to fix a certain identity, as otherwise any communication using words would be impossible.

The text *Shibboleth* serves as a good example of this point. Derrida tries here to describe, or 'circumscribe', by way of a reading of the poetry of Paul Celan, the unutterable atrocity of the Holocaust, without frequently using that word (it occurs

275 F. Nietzsche, *On Truth and Lie in a Nonmoral Sense* (CreateSpace Independent Publishing Platform 2015).

276 J. Derrida, 'Signature, Event, Context' in J. Derrida (ed), *Margins of Philosophy* (Margins of Philosophy, The University of Chicago Press 1982), and G. Groot, 'Nawoord' in J. Derrida (ed), *Sjibbolet* (Sjibbolet, Van Tilt 2015).

277 J. Derrida, *Limited Inc* (Northwestern University Press 1989), p. 53.

only two or three times in the entire piece). Derrida is hereby attempting to underline that not only is the word 'Holocaust' an endless generalisation for what it intends to signify but also that the very word itself might, especially after the lapse of time, gain an entirely different meaning in other contexts. It is in this sense that the usage of general terms presupposes the forgetting of the singularity, which it nevertheless 'rescues from oblivion' by this very act. In the ideality of a concept it becomes readable, constantly the same, and yet in doing so the difference is forgotten.[278] For this readability a certain *restance*, a certain continuity of meaning, is a prerequisite.

The problematics of signification as it comes to the fore in Derrida's figure of iterability are reminiscent of Bergson's analysis of time: both seem to rescue what they lose. Just as Bergson admits that every attempt to put a heterogeneous conception of time into words loses precisely what it seeks to do, with Derrida's iteration one must accept that the singularity a word refers to is forgotten in its every utterance. Still, for both it counts that in the very attempt to do so – describe heterogeneous time, refer to singularity with a word – one also rescues what one is seeking to do, albeit it in a dim version or a *restance*. Moreover, both agree that we cannot do otherwise.

It is in this aporia, this unsolvable problem, that the question of time and identity is situated. Having discussed the two perceptions of time with Bergson, and approached the problem of time from the side of language with Derrida, it is now time to address the question most central to this chapter: that of human identity.

10.3 The Problem of Human Identity Through Time

> *'De premisse dat alles iets anders verhult (en dus: onthult!) dan zichzelf wortelt in een religieuze manier van denken die het sap en het bloed uit de dingen haalt. Wie onder elk blad, elke vacht, elke jurk, elke broek, elke huid, elk gezicht, een essentie zoekt, houdt niet van dat blad, die vacht, die jurk, die broek, die huid, dat gezicht.'*
> Charlotte Mutsaers[279]

The etymological roots of 'identity' can be traced back to the Latin *identitas*, which means 'sameness' and stems from *idem*. Such sameness is what is normally conceived of when we think of human identity. 'I am myself', that seems certain, and not only

278 J. Derrida, *Sjibbolet* (Van Tilt 2015), p. 57.

279 'The assumption that everything conceals something other (and thus: reveals!) than itself is rooted in a religious manner of thought which drains the juice and blood from those things. Someone looking for an essence in every leaf, every fur, every robe, every pair of trousers, every skin, every face, does not love that leaf, that fur, that robe, those trousers, the skin, that face.' C. Mutsaers, *Kersebloed* (De Bezige Bij 2009), p.39, my translation.

in a Cartesian tradition of thought; certainly, it is the presumption of our everyday understanding of identity. If one looks closer, however, this perspective begins to seem shaky – just as a homogeneous conception of time starts to look shaky upon closer scrutiny. Why would I be the same as I was yesterday? There will be many similarities, yes, but when we look carefully we will find plenty of differences as well. If the time span is short, the changes might be minimal or meaningless (different clothes, a host of new cells in one's body, a different mood, *et cetera*), but when we refer back to an older self the question of sameness as the basis of identity becomes more problematic. When it comes to physical similarities with myself as a four-year-old boy, in the end there are more differences than resemblances, and my temper and other characteristics are also likely to be entirely different.

Such problematics of identity over a long period of time could be 'solved' by arguing that this presumes an uninterrupted form of identity. Every minor change that occurs might threaten the resemblance, but it does not destroy identity. This, after all, is how we look at pictures of ourselves over time. Such a perspective on identity is beautifully visualised when we view time-lapse videos of children whose picture is taken every week over a period of years. We are looking at the same person, but we see a sequence of differences in time. Still, why is this the same person? What holds together all these differences?

These are the problems which Paul Ricoeur addresses in the fifth and sixth parts of *Oneself as Another*. He stresses that a perspective of identity that focuses on sameness in fact merely poses the question 'What am I?' This is based on an idea of identity as substance or as sameness of matter. Along with 'What am I?' – the *idem* of identity – Ricoeur also brings to the fore the question 'Who am I?', the *ipse* or selfhood of identity, which distinguishes human identity from general identity. After all, if we were to discuss the identity of a stone, to name a random material object, we would be brought no further if we were to distinguish between the questions *what* and *who* is this stone. The point being that we can only speak of the identity of a stone abstractly; we cannot ask the stone itself how it thinks or experiences its own identity. This is the crucial difference: the question of human identity is reflexive. A human experiences his identity, or maybe *is* his identity, and can also reflect on it. This reminds us of Bergson's description of the moving, conscious point on a line, which can experience its movement directly or by thinking about itself. If it transcends itself, it starts to reflect and so can look at itself *as another* does, not as itself but *as if* it were another. In other words, it looks at itself *as if* it were outside itself. Such an objectified perspective is the only one we have from a stone, the point being that the stone does not have a conscious perception of itself (we assume), either direct or mediated by an outsider's perspective, whereas a human being does. A stone is a stone is a stone is a stone, but *who* is a human?

Having discussed Bergson, one might suspect that the *ipse* of identity is as difficult to grasp as the direct experience of *durée*. Both concepts seem to suffer the same

problem: with *ipse* Ricoeur tries to take into account difference and change, just as *durée* attempts to grasp succession. Ricoeur therefore has to make circuitous manoeuvres to describe what he is looking for. He provides two examples, promise and character, both of which pose a challenge to time. If I promise something, Ricoeur points out, I remain responsible for what I *now* promise to do or be in the future. This presumes that I cannot evade this responsibility by claiming that I have entirely changed and am no longer the person I used to be. The point of promising is precisely the opposite: whatever changes, *I keep my promise* and in this I neglect change. A nice illustration of this can be found in *The Shot*, a short story by Alexander Pushkin.[280]

A duel between two men is called off because one of them shows a lack of respect to the other during the confrontation (he is eating cherries while his opponent holds him at gunpoint). The contender asks for a deferral and waits for several years until the moment his opponent is about to marry. He then returns and asks for the duel to be continued. His opponent does not hide behind the drastically changed circumstances of his life, but instead keeps his promise (after which the contender leaves). That he keeps his promise is certainly telling for his identity, yet it is puzzling to situate it in terms of sameness and selfhood. It is a form of self-constancy that it is determined not by sameness but by difference. After all, he is no longer a young man without obligations; he is about to become a husband. Ricoeur would stress that what holds together the identity in such an example is the very promise. It is the keeping of his word in which his identity over time takes shape, because he shows self-constancy in this very act.

Such a distinction is also apparent if one considers notions like 'self-imposed' or 'self-control', where the self seems to oblige a person to do something other than he might possibly want to. In such a situation, there is a split in the same person between the self and the I. For my question of the rationale behind the time hypothesis, however, this is not that helpful. What is typical about the figure of promise is that everything about a person might have changed, yet only his old promise remains. But in my search for a temporal understanding of rootedness, I am looking for what remains in someone's *selfhood*, his *ipseity*.

For this reason, Ricoeur's second option, the figure of character, is more revealing. Character consists of the distinguishable features which make it possible for us to recognise someone as a particular person because of his habits or acquired traits. In this sense, the *idem* and *ipse* of identity become indiscernible; instead, they coincide because what is most distinctive or typical about the person is what remains the same in his character. '[M]y character is me, myself, *ipse*; but this *ipse* announces itself as *idem*'. Or, as Ricoeur puts it, 'Character is truly the "what" of the "who"'. It is because of character that we can say that 'someone was not himself', thereby distinguishing a certain behaviour or statement from his 'real self', his actual character.

280 A. Poesjkin, 'Het schot', *Verzameld proza en dramatische werken* (Van Oorschot 1957).

Yet the question most relevant to us is not *what* a character is at a certain moment, but *how* it comes into being. It was Aristotle who argued in his *Ethica* that character (êthos) is the result of habit (*ethismos*). We acquire a certain character because we first practise it, just as we do with the acquisition of technical skills. What we first have to learn to do, says Aristotle, we in fact learn by doing. By building houses one becomes a builder, by playing an instrument one becomes a musician.[281] These habits give character a history. Ricoeur argues that if we identify with what we have achieved in the past, a habit becomes a trait. The same goes for norms, ideals, models and heroes with whom a person identifies; over time, such identification can become part of their identity.

Ricoeur tries to pin down the precise relationship between habit and repetition by pointing out that habits are the dispositions we hold on to over time, those which do not change. In habit, Ricoeur states rather cryptically, the sedimentation of certain deposits prevails over the innovations thereof. However, this formulation leaves open the question of how precisely such a process takes place over time. How does innovation sediment, and what is 'sedimentation' in the first place? After all, becoming rooted somewhere implies certain innovations, certain changes, which after a while become 'sedimented'. Or, to use another metaphor, sedimentation seems to be solidified change. But how does an identity sediment or solidify and what is the particular relationship with time?

10.4 Narrative Identity to Solve the Temporal Problem

These problems could be brought back to the issue of succession. It is one thing to say at a certain moment what the particular character of someone is; it is something else entirely to describe how a certain character comes into being. The moment we fix it, we give it a certain substance and exteriority, to put it in Bergson's terms, but at the same time we also lose succession. When we have succession, however, we have not succeeded in describing any particular trait or aspect of one's character.

Ricoeur has been conscious of these problems: it is for such reasons that he does not believe that we find our identity simply by way of introspection. Such a Cartesian perspective would assume that, behind one's appearance and words, there is indeed a *real identity* that can be found or traced. Unproblematic introspection would also assume that we could easily access this 'stream of consciousness' and put it into straightforward words. Ricoeur, by contrast, suggests that the answer to the question 'Who am I?' can only be sought through the mediation of stories. Instead of seeing language as the problem, as Bergson does, Ricoeur sees it as the only way out. Interestingly enough, the

281 Aristoteles, *Ethica Nicomachea* (Historische Uitgeverij 1999), chapter 2.

notion of 'stream of consciousness' has become best known as a *narrative* mode. Authors such as James Joyce and Virginia Woolf attempted to create stories as '*monologues intérieurs*', streams of more or less coherent thoughts that provide the reader with an impression of the world of the protagonist. Yet it is clear that, even with such attempts, we cannot escape the paradox described by Nietzsche and Bergson: when we put this streaming identity into words, we lose what is most characteristic about it, 'because language cannot get hold of it without arresting its mobility or fit it into its commonplace forms'.[282]

If we want to address the question of identity – and that is not only the task I have set myself in this chapter, but also what we do in our lives on an everyday basis – we simply cannot escape this paradox entirely. Because of these problems, our *Zusammenhang des Lebens*, to use an expression coined by Wilhelm Dilthey, has a *narrative* character. The stream of consciousness might not be verbal, but our everyday understanding of identity is certainly mediated by narrative. This is not to say that our life *is the same as* a narrative, though – there are certainly important differences, a crucial one being that 'there is nothing in real life that serves as a narrative beginning; memory is lost in the hazes of early childhood; my birth and, with greater reason, the act through which I was conceived belong more to the history of others – in this case, to my parents – than to me. As for my death, it will finally be recounted only in the stories of those who survive me. I am always moving toward my death and this prevents me from ever grasping it as a narrative end.'[283] One's life story has always already begun, and it will be ended for you.

Consequently, the configured life story relates to earlier stories and subsequently plays a role in the world of action.[284] There is a complex relationship between earlier stories (of others or of oneself), the actual configuration of a life story at a particular moment and the effect this subsequently has in one's life. Earlier stories resonate in every life story, and every new attempt to grasp one's identity inevitably continues or follows up those stories, told or untold. It is difficult, perhaps even impossible, to fully disentangle this complex relationship because we will never find a fundamental or first story and our attempts to do so immediately become part of this web of stories. Human beings

282 Bergson, *Time and Free Will. An Essay on the Immediate Data of Consciousness*, p.129. For a Bergsonian thinker like Deleuze, not much is left of the subject. His 'nomadic subject' is merely a singular moment in which someone's life expresses itself as 'a life', a singularity in which the univocity of life simply illuminates for a moment after which it immediately expires. See, e.g., G. Deleuze, *Verschil en herhaling* (Boom 2011), and for a critical discussion of the Deleuzian subject, M. De Kesel, 'Ze komen zonder noodlot, zonder motief, zonder ratio. 'Nomadisme' in Deleuze en in het deleuzisme' (2006) De Witte Raaf 2006).

283 P. Ricoeur, *Oneself As Another* (Chicago University Press 1992), p. 160.

284 This relationship between narratives and the world consists, according to Ricoeur, of three 'mimetic moments'. See Ricoeur, *Time and Narrative. Volume 1*, pp. 52 et seq.

are, in the words of Wilhelm Schapp, entangled in stories ('*in Geschichten verstrickt*').[285] Unravelling one's identity does not therefore lead to a final, solid or true identity, but it does in its own turn have an effect on one's subsequent self-understanding. At such moments we do not merely recount who we are, Ricoeur claims, we identify ourselves with these stories and in this interrelationship our identity comes to the fore. When we talk about ourselves, we do not represent ourselves through these stories; rather, we continue the stories in which we are woven, thereby changing the very object of our description along the way.

But what is particularly important for my purposes is that such narratives have, in their own turn, temporal aspects as well. It is in the plot of a story that the different components of action are turned into a complete and coherent narrative. Ricoeur recalls Aristotle's *Poetics* when he stresses that a story is not a random enumeration of different events, because the events described are related to each other in time and structured by the plot. The story becomes a unity because of the plot and that unity has a beginning, a middle and an end.

For Ricoeur, narrative thus plays a crucial role in the dialectics of *ipse* and *idem* precisely because, with the plot of a narrative, we can attempt to grasp an ever-moving reality. The plot functions as an ordering principle to connect internal or underlying tensions or incoherencies. The multitude of motives, characters, actions, passions, events and circumstances of one's life are a threat to the orderly course presumed by a narrative. A narrative restrains these divergent elements to form a coherent story, which thereby transcends its disparate components. The paradox of the plot, however, is that it *retrospectively* declares the elements of the narrative as necessary steps to reach the conclusion of the plot. Events that could have turned out otherwise become indispensable elements of the story through the plot. This structure of the story also applies to the history of one's life.

The coherence of one's life story functions along the same narrative lines, Ricoeur stresses. Self-understanding is therefore only possible in a narrative manner. But what do we gain when we suggest that the elements constituting a story can only be understood correctly when we have, to use Frank Kermode's expression, 'the sense of an ending'? Is looking back on the facts any different from pinning down the movement of one's life to the point of view of a certain moment? Ricoeur's perspective is a bit more sophisticated than this: an individual attempts to deduce his identity from the totality of his life story, *while at the same time* this unity is constantly threatened by unforeseen new developments and events. Identity is not, therefore, a substance hidden under one's life story; rather, it is the configuration of the life story itself, which is constructed *time and time again* for different occasions and situations. In this sense, identity has a virtual character and does not exist before or outside narrative, nor is it ever caught in

285 W. Schapp, *In Geschichten verstrickt. Zum Sein von Mensch und Ding* (Klostermann 2004), pp. 103-106.

one single narrative. One's identity truly is a being entangled in stories, retelling all of which would take a lifetime – and would still not entirely capture one's identity, Bergson reminds us, because one's direct experience of one's own life can never be fully grasped in narrative. This, however, does not diminish the value of narrative identity, Ricoeur argues, as the meaningful coherence thereof is intensely experienced and lived by every one of us.

Still, if identity only arises out of a web of stories constructed 'time and time again' and different for every situation, do we then lose all 'sameness' along the way? How do we address the durable aspect of identity? How do parts of an identity 'sediment', or recur, in all those different stories we tell on an everyday basis? Whereas Ricoeur stresses that the durable aspects of one's identity are assembled in the figure of character, he does not elaborate on how these aspects come into being in the never-ending process of narrative identity formation. Yet he does put forward an understanding of identity and time that is certainly promising for my purposes. In addressing the question of change and sameness, he holds that character and habit are formed by way of repetition through time and that identity is formed by or arises out of a web of stories. It is now time to try to address durable identity by taking Ricoeur's notion of narrative identity, doing justice to Bergson's questions of succession and exteriority, and by situating Derrida's notion of iterability at the heart of narrative identity.

10.5 A Temporal Understanding and Experience of Durable Identity

> *'In afwachting van morgen bewegen grote mensen zich in een heden waarachter een gisteren ligt of een eergisteren of hoogstens een vorige week: aan de rest willen ze niet denken. Kleine kinderen kennen de betekenis van gisteren of eergisteren niet, en evenmin die van morgen, alles is dit, nu: dit is de straat, dat is de voordeur, dit zijn de trappen, dit is mama, dit is papa, dit is de dag, dit is de nacht.'*
>
> Elena Ferrante[286]

The starting point for this entire theoretical exercise is the presence of a migrant in a territory over a certain period of time. After all, I am endeavouring to find a convincing argument for the stronger entitlements the migrant apparently receives in European law

286 'In anticipation of tomorrow, grown-ups move in a present behind which rests a yesterday or a day before yesterday, or at most a previous week: they do not want to think of the rest. Little children do not understand the meaning of yesterday or the day before yesterday, nor of tomorrow, everything is this, now: this is the street, the front door, those are the stairs, this is mummy, this is daddy, this is the day, this is the night.' E. Ferrante, *De geniale vriendin* (Wereldbibliotheek 2015), p. 24, my translation.

because of this extended presence. It is therefore the migrant's presence in the territory that serves as point of departure for this analysis, and Bergson's two perceptions of time will be my vantage point. Since their precise interrelationship will turn out to be crucial to a durable understanding of identity, let me first recapitulate them here.

Young children, as Elena Ferrante suggests in the above quotation, certainly do have a different experience of time. With Bergson one could say that they experience time directly, as in a stream in which mental states constantly permeate each other. The difference from grown-ups, who clearly divide this stream in time units, is obvious. I have in fact noticed the transition of time experience with my eldest son, and so a description of that might be helpful in pinpointing precisely what is at stake here.

First, my son tried to 'grasp' time by dividing it in the number of times he went to bed. In the morning, tomorrow was two bedtimes away because he still slept in the afternoon. After a while he started to introduce a difference between sleeping in the light and sleeping in the dark, which enabled him to deal more accurately with his expectations. After all, such differentiation of time into frequency of going to bed was only relevant when he tried to understand how long it would take before something happened. His system enabled him to look ahead, yet no longer than one or two days. Different, too, was his own usage of time in sentences: for a while he called every moment 'tomorrow'. Only by his correct usage of the past, present or future tense could the listener discern whether this specific tomorrow was situated in the past, the present or the future. When he went to primary school he started to learn the days of the week, first by a song. If asked what day it was today, he would enquire what day it was yesterday and then start to sing. It took a while before he understood that his song could also tell him what day it was today if someone would only reveal what day tomorrow was going to be. Nowadays, he often knows off by heart what day it is in the morning, and he is starting to gain a sense of weeks and even seasons (months are still too big a unit). Currently, he is learning to *read* the clock. He is now five and almost a grown-up when it comes to temporal understanding.

Since nobody comes into this world with the capacity of language, human beings acquire such a temporal understanding as they learn to speak. We first have to learn general concepts (the days of the week) in order to be able to distinguish between different well-defined moments in the streaming perception of time. During the period when my son could only tell you what day it was by singing his song, his understanding of time was right in between direct and clock time. He did not yet understand that the days of the week were single entities, separated from each other in a strict order. For him the days of the week were only related to this song. The moment he internalised the order of the days was when he embarked upon his *temporal understanding* of reality.

The conceptualisation of streaming time into words is the prerequisite for a temporal *understanding* of reality, according to Bergson. It is this *understanding*, with its

well-defined concepts, that enables us to *think* of time and also to fulfil its social ordering function. When addressing the homogeneous conception of time, it is important to use the words *understanding, thinking* and *grasping* consistently and accurately. After all, it is the attempt to rationalise our experience of the world which distinguishes the streaming perception of it into well-defined, orderly parts. We have seen that it is this conceptualisation which enables the common *temporal understanding* of reality, an understanding we learn as a child and which is connected to language. It is important to see that this temporal understanding is not restricted to the division of our experience of time into minutes, hours and days of the week. It is not merely the understanding of time as clock time. As we will see below, in every form of temporal understanding we need to divide and distinguish in order to recognise the reality as the same and as different, not merely to read the clock: I discuss how one acquires a temporal understanding of a place and of others by distinguishing the streaming perception of it into 'same experiences'. It is in making that 'same' that language has a crucial role to play and Derrida's iteration becomes important.

As we learned from Bergson, however, this homogeneous conception of time is opposed to a direct perception of the streaming reality in a heterogeneous conception. Even though grown-ups have learned to understand time, they have not lost their ability to experience it directly. The point is simply that it becomes hidden under that ordinary experience of time or it becomes very difficult to disentangle the two. With Bergson, however, one can analytically distinguish between a direct *temporal experience* of reality and a *temporal understanding* of it. The former is the streaming experience of reality in which conscious states (a term already suggesting a distinction) constantly permeate 'each other'. When I refer henceforth to the attempt to encompass the *temporal experience* as well, let me use the German word *Verstehen*, which is difficult to translate in English. According to Gadamer, *Verstehen* means a form of comprehension of the world that is not merely cognitive or linguistic. Gadamer stresses that, besides signifying 'to grasp' something, *Verstehen* also connotes a more practical notion of understanding – an ability or capacity.[287] If one knows how to ride a bike, this is certainly more a practical capability, a skill or a practice, than a form of cognitive knowledge.[288] And I will argue that such practical capabilities should also be taken into account. To be sure, *Verstehen* is to be used to show that I am not merely seeking a temporal *understanding* of reality, but this does not mean that *Verstehen* is the exact parallel of *understanding*. Understanding

287 In this *Verstehen* there is, Gadamer stresses (in line with Heidegger), always an implied self-understanding. It is always someone who understands something, and therefore one is always implicit in his understanding. In this sense, understanding is always a form of self-understanding (*Selbstverständnis*). See also, including for the precise relationship with Heidegger, J. Grondin, 'Gadamer's basic understanding of understanding' in Dostal R.J. (ed), *The Cambridge Companion to Gadamer* (The Cambridge Companion to Gadamer, Cambridge University Press 2002), pp. 36-51.

288 For this reason the 'awareness' in self-awareness is not a suitable term, either, since this suggests that one is aware of these skills: that one is conscious about what should be done.

does not relate to a homogeneous conception of time in the way that *Verstehen* relates to a heterogeneous conception. Neither full understanding nor a complete *Verständnis* of this heterogeneous time is possible, because in both one changes the immediate stream of consciousness.

Finally, I will use the word 'living' when I refer to both these perceptions of time: the understanding and the experiencing of time. I am endeavouring to understand what happens to a migrant when he *lives* in a certain place for a certain amount of time, and I therefore need to unravel how a migrant *experiences* and *understands* his life through time. Once this has become clear, in the next section I can see how it relates to his identity.

Starting from the two perceptions of time I have described, I will then try to answer the question of how a migrant's temporal experience and understanding become durable.

10.5.1 A Durable Temporal Experience *and* Understanding

> *When he said, as he'd been saying for years, that in a funny way he guessed he would miss old Knox when he quit, he meant of course that it was the people he would miss ("I mean hell, they're a pretty decent crowd; some of them, anyway") and yet in all honesty he could not have denied a homely affection for the place itself, the Fifteenth Floor. Over the years he had discovered slight sensory distinctions between it and all the others of the building; it was no more or less pleasant, but different for being 'his' floor. It was his bright, dry daily ordeal, his personal measure of tedium. It had taught him new ways of spacing out the hours of the day – almost time to go down for coffee; almost time to go out for lunch; almost time to go home – and he had come to rely on the desolate wastes of time that lay between these pleasures as an invalid comes to rely on the certainty of recurring pain. It was part of him.'*
>
> Richard Yates[289]

Let me start with an example, this time from Bergson himself. 'When I take my first walk in a town in which I am going to live, my environment produces on me two impressions at the same time, one of which is destined to last while the other will constantly change. Every day I perceive the same houses, and as I know that they are the same objects, I always call them by the same name and I also fancy that they always look the same to

289 R. Yates, *Revolutionary Road* (Vintage Publishing 2007), p. 80.

me. But if I recur, at the end of a sufficiently long period, to the impression which I experienced during the first few years, I am surprised at the remarkable, inexplicable, and indeed inexpressible change which has taken place.'[290] We clearly see the two perceptions of time are at work here. We constantly have both of these experiences, albeit that the solidified version is more dominant. 'We instinctively tend to solidify our impressions in order to express them in language', Bergson asserts. One could say, to use the words of Elena Ferrante, that we simultaneously experience both as a grown-up *and* as a child. We experience our environment as the same, as solidified, and yet, upon closer scrutiny, if one turns one's attention to the environment, if one starts to look around, one will see endless differences.[291] It is, however, not always easy to distinguish these two different experiences. Let me analyse this 'getting around' in a strange place a little further.

If a migrant tries to grasp the streaming reality, he will inevitably start to organise his experiences by recognising what he has experienced before. If he did not do this, he would remain totally lost. And is this not precisely what happens if one enters a city, a village or even a house for the first time? One looks for points of reference, points of recognition which enable one to categorise the experience as a 'same experience'. We make this the 'same' through a conceptual reference in language, just as we make the experience of successive days and nights temporal by calling them the names of the days of the week. This is Derrida's iteration at work. I recognise a certain street as the same street I have been in before by the conceptual reference in words. For example, I might after a while recognise this street in Amsterdam, with the fire station on the corner, as Rozengracht (at its junction with Marnixstraat). Whilst this conceptual reference makes possible repetitive usage in different contexts, however, it certainly does an injustice to the specific singularities of that place (at a certain moment). The point being that, even if one has not yet found words to describe a specific location, its mere recognition presupposes that has been brought into the realm of the *same*. I recognise the building because I have seen it before and recognise it as the same building. The first step in finding your way, therefore, is to recognise a place and so inevitably bring the experience of it into the realm of the same. The moment I can clearly describe a place without being there, or even recalling its defining name (Marnixstraat), I have further conceptualised my experience. And it is this conceptualisation which is one of the ways in which remembering is enabled.[292]

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290 Bergson, *Time and Free Will. An Essay on the Immediate Data of Consciousness*, p. 130.

291 Is this not the momentaneous experience which participants in a mindfulness course are expected to have? Mindfulness is an attempt to become a child, in the words of the distinction made by Ferrantes. One might also have such an experience when returning home after a long holiday; at such a moment one's own house can be experienced as strange and suddenly certain details can strike one's attention, never previously having done so (e.g. the front door needs to be painted, the table is positioned oddly in the living room, *et cetera*).

292 The other senses, e.g. a smell or sound, can invoke memory as well. See D. Draaisma, *Vergeetboek* (Historische Uitgeverij 2010).

The real point, however, is that, if I can find my way in a certain place, this is not just because I have made my experiences of that place into 'the same'. Finding my way is not merely a cognitive process, mediated by language, it is a process of distinguishing the stream of consciousness. I might have a *feeling* that I have to go in a certain direction, because I have recognised a certain corner. After all, when cycling to work every morning I do not *recognise* every corner as the same corner as yesterday. I have become accustomed to the route and do not need to *think* about it (that is what makes cycling such a mindful exercise, and *Alzheimer* a terrible disease). This is an example of Bergson's double experience: I have a certain *Verständnis* and *understanding* of the route – I can cycle it without thinking *and* I can explain it if asked to.

But what is crucial for my purposes is: how does this happen? How does an alien city in which I am cycling for only the first or second time, and where I have to find my way with the help of a map, become a place in which I 'know my way'? That, in a nutshell, is the central question of this chapter. It is first important to see that there is a peculiar reversal at work in this situation. First, one has to recognise the place, trying to remember every corner by bringing them all into the realm of the same. This enables one to draw a map, or to name all the streets one is passing. In other words, one first has to make the experiences homogeneous in order to be able to recognise the route. Once that stage is reached, however, this *knowledge* seems to sink away, or to 'sediment' if you will. In order to find one's way through the place, it is no longer necessary to be thinking about the route, for a full knowledge of the itinerary to be present and one's attention directed to it.

The same goes for the recognition of other people. In order to recognize someone, my neighbour for example, it is first necessary that I identify him as the same person I have seen before. It often happens that we encounter the same person without knowing it. I might have seen the person who happens to be my neighbour several times in my street without realising that I have seen him before, let alone that he lives next door to me. So again we see that these experiences first have to be ordered and brought into the realm of the same in order to make the recognition possible. And it is this 'making the same' which enables my temporal understanding of the experience of meeting a human being on several occasions. Because I recognise him as the same person, I understand that I have met him *before* and might meet him again in the near future. After a while, however, I no longer recognise my neighbour as the same. Obviously, his being the same person is still the precondition for my recognition of him, but I do not consciously recognise him as such. Just as I do not recognise the person next to whom I wake up every morning as 'the same person'. The point here is that my recognition of a person slowly moves into the background the more often I see him and the more I become accustomed to him.

We thus first need to organise our experience by bringing it into the realm of the same, this being necessary for identification and our temporal understanding of

it. If we then have this same experience more often, if we are repeatedly exposed to it, our knowledge of it slowly sinks or move into the background because our attention is not directed at it. We no longer have a conscious knowledge of this person (who is the same person we saw yesterday), being my neighbour; we simply have a *Verständnis* which originally began with a first identification (as him being the same), although that becomes forgotten after a series of encounters.

Living implies both remembering and forgetting in this way; they seem to be the corollary of our double experience of time. It is, as Nietzsche writes, impossible to live without remembering and forgetting. 'Imagine the most extreme example, a person who did not possess the power of forgetting at all, who would be condemned to see everywhere a coming into being. Such a person no longer believes in his own being, no longer believes in himself, sees everything in moving points flowing out of each other, and loses himself in this stream of becoming. He will, like the true pupil of Heraclitus, finally hardly dare any more to lift his finger. Forgetting belongs to all action, just as not only light but also darkness belongs in the life of all organic things. A person who wanted to feel utterly and only historically would be like someone who had been forced to abstain from sleep or like the beast that is to continue its life only from rumination to constantly repeated rumination. Moreover, it is possible to live almost without remembering, indeed, to live happily, as the beast demonstrates; however, it is completely and utterly impossible to live at all without forgetting.'[293]

This is also beautifully exemplified by Borges' story of 'Funes the memorious', about a poor man who is incapable of forgetting. He perceives reality in full detail and remembers it all. For example, he can recall the shape of clouds at all given moments, as well as the perceptions (muscular, thermal, etc.) he associates with each moment. But, Borges concludes, he is incapable of Platonic ideas, of abstraction. His world is one of intolerably uncountable details. Consequently, Funes cannot *think,* because '[t]o think is to forget differences, generalize, make abstractions. In the teeming world of Funes, there were only details, almost immediate in their presence.' As a result he finds it very difficult to sleep, since 'to sleep is to turn one's mind from the world'. And indeed, as Borges once said, his story of Funes is the description of the experience of someone who suffers from insomnia. We can say that someone without the capacity to remember or to expect, but unable to forget, would be someone without a temporal experience of time,

293 F. Nietzsche, *On the Use and Abuse of History for Life* (Richer Resources Publications 2010), p. 17; translation from http://individual.utoronto.ca/bmclean/hermeneutics/nietzsche_suppl/N_use_abuse_01.htm).

someone who does not experience *human time*.[294] Living is remembering and forgetting, and we will see in the next chapter that the law does justice to both of these.

I will conclude this section by saying that the repetitive encounter of a migrant with 'others and the outside world', to borrow a phrase from the European Court of Human Rights, has a twofold consequence. The moment he starts to recognise things or others, he brings them into the realm of the same in order to be able to identify them. This identification is the precondition for his 'getting around' in the place where he is. The next phase, however, is that he gains a *Verständnis* with others and the outside world because he 'knows his way around'; he *versteht* the others, and this implies that his 'knowledge' sinks into the background of his streaming consciousness. It is the remembering and forgetting which are the necessary preconditions to live one's life.

10.5.2 Durable Human Identity

Noem mij, bevestig mijn bestaan,
Laat mijn naam zijn als een keten.
Noem mij, noem mij, spreek mij aan,
o, noem mij bij mijn diepste naam.
Voor wie ik liefheb, wil ik heten.
Neeltje Maria Min[295]

The above description should have answered the question of how a migrant makes sense of his life over a time in a new territory. He first orders his experiences into 'same' and 'different', after which this very cognitive knowledge fades away as a guiding tool for his actions. The question I now address is how this influences his identity. After all, the matter of what holds that together, given all these complex experiences, remains unresolved. I will try to situate this process in narrative identity.

It is important to underscore immediately the parallel here with the double perception of time, which I called temporal experience and temporal understanding,

294 The most famous example of a human being with a well-nigh absolute memory is Solomon Sherashevsky, as depicted by the Russian neuropsychologist Alexander Luria. See A.R. Luria, *The Mind of a Mnemonist* (Jonathan Cape 1968). Douwe Draaisma has pointed out that Luria's study of Sherashevsky can be seen as the experimental parallel of Borges' fictional story of Funes, and that together they can be read as a beautiful double portrait of a memory from which no forgetting seems conceivable: D. Draaisma, *Why Life Speeds Up As You Get Older. How Memory Shapes Our Past* (Cambridge 2004).

295 'Name me, acknowledge my existence. / Let my name be as a chain. / Name me, name me, speak to me / O call me by my deepest name / For who I cherish, I will be called. N. M. Min, 'Mijn moeder is mijn naam vergeten', *Voor wie ik liefheb wil ik heten* (Bakker 1966), my translation.

and with narrative identity. Human identity is also described in words – thereby fixing, homogenising and distinguishing it – but can still be experienced intensely. Albeit that, in doing so, one always attaches or continues certain narratives; the moment one narrates, one couches one's own experiences in a particular form guided by the plot required for the specific occasion. Such a narrative might subsequently play its role in later stories about the self, and thereby in one's self-understanding. But how is this narrative identity influenced by living in a territory over time? Answering this question will entail stepping beyond Bergson's view – which implies a conscious perspective of a single person – to Ricoeur's narrative identity, which implies a being interwoven into stories of oneself and others.

It is clear that *my* identity is, to an important extent, influenced by my experiences and understanding of the events in my life. When I start to live in another city, my repetitive encounters with the new place and environment and with other human beings will immediately find their way into my life and thereby into my attempt to configure my identity. I will try to find my way in the new place and to meet new people, which implies that I am seeking to identify and organise my experiences. This attempt to grasp my new life will slowly but steadily start to influence the narratives about my identity, and after a while they might become a new chapter in my biography. Because I try to gain a temporal understanding of my new life in this new setting, I soon distinguish certain places and identify certain people in order to recognise them in the future. After a while, the streets and the neighbourhood, my neighbours and the cashier in the grocery store will become the habitual residents in my experiences. They are no longer new and I start to focus on other experiences.

What is crucial, and this is typical for narrative identity, is that not only my own experiences count: more and more, I become part of the narratives of others as well. My repeated appearance in their lives gives them an impression of me as well. An impression that slowly turns into recognition, because others identify me as the same person. After a while I become a habitual resident in their stories as well. My identity becomes more and more interwoven with the stories of others. Just as the environment, the place, becomes more and more an integral part of my narratives about my own life.

Gradually, these iterative encounters with others and the environment, and my narrative attempts to order these experiences, start to entangle with the stories out of which my identity is compiled. Moreover, at the same time I more and more become a character in the stories of others. And that, inevitably, will subsequently influence my identity. This interrelationship with others, this becoming entangled in stories, is crucial for narrative identity, and yet within it lies a difficult problem. This is because the question of *when* others and the environment become a *durable* part of my identity implies that I also take into account *when* I have become a durable part of the narrative of others. Let me try to describe this abstractly, seeking a temporal, theoretical

understanding of the situation rather than attempting to state in substantial terms *when* it might happen (e.g. when one has a sufficient understanding of the language).

For my attempt to gain a durable understanding of human identity, it is crucial to see how the above problem of iteration operates. In every narrative about identity, after all, words have a conceptual meaning referring to endless singularities that are not explicitly stated, and yet to which that meaning points nevertheless. This becomes most visible in the relationship between one's name and one's life. My name – Martijn Stronks – functions as the conceptual reference to 'me', and thereby endlessly separates this name from the singularities to which it nevertheless refers. In my name my life is forgotten, because of which I become identifiable. My name might be the most simple answer to the question 'Who are you?', or at least it functions as such when I have to introduce myself in a new environment. It is the token which refers to a life that can only be addressed in subsequent stories. As such, then, my name is the conceptualization on a general level of all the singular aspects out of which I am made, and which can only be addressed in narratives. When my name is used in the stories told by others, for example, it has precisely this conceptual signifying function. It would be impossible to start to tell all kinds of stories every time one wants to refer to a person.

In these narratives about my life, more names circulate, but they are not as individualising as my personal name. Other nouns might refer to me – man, lawyer, philosopher, neighbour, father, Dutch, white, *et cetera*. The difference, however, is that these only refer to *aspects* of my identity *and* they are already *general concepts in themselves*. Not only am I more than a lawyer, there are also more lawyers than just me. In other words, being a lawyer will not distinguish me *in general* from others. The point, however, is that, philosophically speaking, these names fulfil the same function. They reiterate aspects of my life, referring to endless singularities on a conceptual level, and so they simplify this life, forgetting aspects of it and yet remembering or repeating them in this very reference. If I say that I am a philosopher, this name functions as a reference to a whole series of stories and narratives in which the *plot* is that *I am philosopher* (e.g. I studied philosophy), or stories in which I play my part as a philosopher. Yet the same goes for what is deemed to be my character, for example my trait of being stubborn. This word then refers to all the different occasions and instances when I behaved stubbornly. The point, then, is that the word refers to all these events, while by this very reference all the details thereof are forgotten and can only be addressed narratively by making a new attempt. This is what Ricoeur means when he says that 'character has a history which it has contracted'. These names refer to a history that has been contracted and can be redeployed only by narration.[296]

296 Ricoeur, *Oneself As Another*, p. 122.

It is obviously important to see that these conceptual references have just as fragile a character as every word that is being iterated. The point being that they exist in the interrelationship between others, and they exist in narratives I tell to others or others tell to me. It is crucial to keep in mind that narrative identity presumes a being interwoven into stories; the durability I seek is therefore necessarily an interrelation durability. It is in this interrelationship that certain words gain a *restance,* in the words of Derrida. And it is this 'minimal remainder' that is a prerequisite of every linguistic utterance, and so the necessary condition for every successful communication. It is important to see the role of repetition here; only through the repetitive use of certain words can their meaning gain a certain *restance*. Yet, this *restance* will never become present; it will never gain a substantial definite meaning that would invite the audience to 'rest on one's laurels or to take it easy'.[297] In the repetitive use of a word, its meaning can simply subside a bit, or slowly sediment, or at any moment it could lead to new misunderstandings in a different context.

I can now say that 'durability' is what resonates at a general, conceptual level of the singularities to which it refers. These are the unproblematic names and words in the narratives about my life *and* that of others. Just as with *restance*, this durability should not be confused with permanence; this durable identity has no stable *presence*. It refers to that what has become implicit and *goes without saying*.

Let me refer to this fragile durability of identity as that which *becomes selbstverständlich.* I will use this German word because, unfortunately, there seems to be no adequate English translation for it and yet it seems to address precisely the paradoxical aspect I am looking for. Not only does *selbstverständlich* signify 'needless to say', 'of course', 'it goes without saying', 'without doubt' and 'self-evident', it also means 'understandable from itself' ('*von selbst, aus sich selbst zu verstehen*'). Particularly beautiful about the term is that it refers to the 'self' (*Selbst*). It is related etymologically to *Selbstverständnis* which means 'self-awareness' or 'sense of self'. Moreover, *selbstverständlich* implies immediately intelligible (*ohne weitere Erklärung verständlich*).

It is important to repeat here that the German *Verständnis* is related to *verstehen*. *Verständnis* implies a direct, unmediated understanding of which one can be unaware, and which cannot always be put into words. When it comes to the reiteration of words, *Selbstverst*ändlichkeit is the unmediated *Verständnis* of a certain conceptual word. It is in this sense that the singularities *resonate* in the conceptual term, without being present there. It is the *Verständnis* of a word that is not explicit, that is implied, that goes without saying and is unproblematic since it is understood by everyone (at that moment). It is therefore impossible to render explicit, because that would immediately make it susceptible to criticism and discussion. And such an explication would entail an explanation of the reference of the word to the singularities. One could say that

297 Derrida, *Limited Inc*, p. 53.

the word 'table' refers to 'a piece of furniture that consists of a flat top supported by legs', as the dictionary would have it. Such a word would indeed in many situations be '*selbstverständlich*', and yet it is certainly possible that a misunderstanding might arise ('I thought you meant that desk'). Either because it is a 'strange' table or because one is referring to another meaning of the word ('table of contents'). The point of successful communication, however, is that most of the words used are '*selbstverständlich*' in the sense that we all have the same sense of what they mean, which is what enables us – and here I am referring to this other connotation of *Verstehen* – to '*hear*' one another. When it comes to the linguistic plane of meaning, this *Selbstverständlichkeit* does not add much to what Derrida defines as 'restance', the minimum continuity of meaning that enables successful communication. Yet I am not looking for continuity at the semantic level, but for succession in narrative identity. Let me therefore preserve *Selbstverständlichkeit* for continuity of identity.

What precisely would such *Selbstverständlichkeit* signify at the level of narrative identity? It would mean the awareness of the self that is immediate, understandable from itself, presupposed in every story about oneself and difficult to put into words without losing *precisely* what one wants to address. It is that aspect of one's identity, of one's *Selbstverständnis*, that *goes without saying*. These are the stories of singularities that resonate in the general reference to my identity. What we have seen as *restance* – a minimal remainder – on the plane of semantics applies also at the level of narrative and is therefore at work in the heart of narrative identity. It could be that if one hears my name, one immediately thinks of 'that guy who studied law'. Such a connotation would itself be a singular reference to my life (there could be endless others), which in its turn entails several general concepts further referring to singularities (e.g. about me studying law). *It is therefore the unproblematic reference at a general level of certain singularities – that which is presumed and comes along without pointing to it.*

Since there is no single author of identity – it arises out of a web of stories – what becomes *selbstverständlich* is not a simple result of introspection. Certainly it is possible that I repeat certain things about myself all the time, in all different environments – 'I am utterly humble' – but if this narrative does not coincide with the image others have of me, they might start to challenge it or simply ignore it. Or, even worse, start avoiding contact with me. Consequently, this conceptual reference to my modesty loses its *Selbstverständlichkeit*. *Selbstverständlichkeit* is therefore always a matter of the interrelationship between a narrator and listener(s). And it is this very interrelationship which constitutes its fragile character; it has no presence and it is ultimately questionable.

We have such a fragile continuity of identity because of the two modes of time perception in which we live. One needs a certain rational attention to gain a temporal understanding of reality; one has to distinguish and recognise the streaming singularities so as to bring them into the realm of the same. First you distinguish a building, the next time you recognise it, and after a while you stop paying attention to it so that

it sinks away in your streaming perception of reality. If I repeatedly encounter new environments and people, both inevitably become part of the stories of my life. And if I repeatedly meet other people who, after a while, start identifying me, I inevitably become part of their experiences as well.

We cannot live by constantly paying attention to everything that remains the same, *nor* can we live solely in a streaming consciousness without making any rational distinctions, as that would imply that we grasp nothing of it. Instead, therefore, we constantly shift between these two forms of perception. If we focus on the one we see difference, if we focus on the other we see identity. *Selbstverständlichkeit is the unproblematic relationship between the two: those singularities which come with a certain identity.* The singular differences can sink into oblivion for a while, until the moment someone reawakens them by asking, 'What do you mean by that? I just don't understand you' or 'Who are you really?'.

10.6 Physical and Legal Exclusion of Migrants

In the previous sections I have sought an understanding of a migrant's identity over time as the possible rationale behind the time hypothesis. But before I relate this *becoming selbstverständlich* to the time hypothesis in the concluding chapter, it is first necessary to briefly discuss the question of whether law can prevent the presence of a migrant in a territory *becoming selbstverständlich*. After all, I have so far argued that it is an inevitable consequence of repeated experiences of others and the outside world that – in order to find his way around – a person will order his experiences by bringing them into the realm of the same. As a result of which, I further argued, they gain a *Verständnis* of others and the outside world that is no longer determined by mere knowledge, but instead by a *selbstverständlich* relationship with them. Moreover, I have suggested that this is an inevitable consequence of our way of living, since we cannot live in a constant state of remembering. As Borges would say, our minds have to 'go to sleep' from time to time. Over the course of time, our temporal experiences become a *selbstverständlich* part of our identity. But is this a process entirely detached from law, and are there no legal possibilities whatsoever to prevent or influence it?

As made apparent in the first part of this book, the question of *physical presence* is of utmost importance in the functioning of the time hypothesis in European migration law. This is probably most obvious in the case of asylum seekers. As we have seen, asylum seekers have certain important rights because they are *potential* refugees. Since refugees may not be sent back to their country of origin (because of the prohibition of *refoulement*), potential refugees benefit from this strong right as well. It is important to realise that such rights are attached to their presence in a territory; as long as an asylum

seeker is outside the territory, they cannot be invoked. And this can be a major problem for refugees, since they first have to reach the territory (or more precise, the jurisdiction) of the European Member States before they can apply for asylum.[298] Once they are physically present on European soil, however, they do generally have the right to file an asylum claim in a proper procedure with all kinds of entitlements attached to it.[299]

At the same time, though, we have seen that, because of the split-personality of the asylum seeker, certain restrictive measures can be imposed on him as well. A good example is border detention, imposed upon a migrant because he is expected *not* to be a refugee. Since it is assumed that his claim for asylum will not be successful, he is not allowed to enter the country. But this is not the only legal restriction – *every* asylum seeker in the formal procedure is excluded to a certain extent while it is under way. Because it is uncertain whether asylum seekers have a future in their host country, their *legal* access to that country is limited.[300] Although they might be allowed to physically enter its territory, whilst there they are legally excluded to a large extent. In general they have only limited access to the labour market, education, political rights, social welfare provision, *et cetera*. It is this deprivation of the opportunity to work, study, participate and so on which prevents their interaction with *others and the outside world*. They might be present in the physical sense, but their opportunities to *live* in the territory are legally restricted.

Such exclusion is even harsher for those asylum seekers who are not yet in the procedure, but residing in refugee camps awaiting a procedure (or their expulsion). This could be in UNHCR refugee camps in Africa or Turkey, but also in makeshift camps in countries like Greece. In these places they are not admitted to the asylum procedure and therefore have basic rights withheld.[301]

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298 One difficult question here is whether an asylum seeker can lodge his claim for asylum in the midst of a pushback or rescue operation on the high seas, or even in another territory. See M. Den Heijer, *Europe and Extraterritorial Asylum* (Studies in international law, 39, Hart Publishing 2012), and, for example, the ECHR judgment of 23 February 2012 in *Hirsi Jamaa et al. vs Italy, 27765/09.*

299 Just as legal time does not simply refer to our common understanding of clock time, so the legal presence of migrants in a territory does not coincide with our everyday understanding of physical presence. See Battjes, 'Territoriality and asylum law. The use of territorial jurisdiction to circumvent legal obligations and human rights law responses'.

300 For an extensive discussion of the reception conditions of asylum seekers, see: Slingenberg, *The Reception of Asylum Seekers Under International Law. Between Sovereignty and Equality.* Allegedly, asylum centres are often located on the outskirts of society.

301 For this latter category, it seems quite clear that they lack the right to have rights in the first place, to use the famous aphorism by Hannah Arendt. Scholars have argued that those undergoing the asylum procedure also lack the right to have rights (although they certainly have rights, and clearly more than those outside this procedure), just as unlawfully resident migrants are excluded. The point is, then, that these migrants lack the right to have rights precisely because of their exclusion from the world of civic life. See, e.g., N. Oudejans, *Asylum. A philosophical inquiry into the international protection of refugees* (Uitgeverij BOXpress 2011), N. Oudejans, 'The Right to Have Rights as the

The rules regarding illegal presence in a territory also encourage the legal exclusion of migrants from the life there. Not only is there always the prospect of forced expulsion, but the rules linking aspects of civic participation in a country to migration status reflect an effort to exclude unlawfully resident migrants. In the Netherlands, for example, the Linkage Act stipulates that one can only work, study, apply for social benefits and obtain non-emergency medical care if one is lawfully resident on Dutch territory.[302] In addition, unlawfully resident migrants constantly risk detention as undesirable aliens, another obvious form of exclusion.

It is clear, then, that the law is perfectly able to exclude certain migrants from interaction with others and the outside world. Yet I have argued that this very temporal experience of interaction is the process whereby migrants become *selbstverständlich*. So what is the relationship between legal exclusion in the form just described and becoming *selbstverständlich*? In the next chapter I discuss at length how this exclusionary force of the law relates to time, but at this point it is important to emphasise how exactly the physical and legal exclusion of migrants relates to their becoming *selbstverständlich*.

The answer is that if the migrant has no contact whatsoever with others and the outside world, this cannot become a *selbstverständlich* part of his identity, nor can his life become a comparable part of the lives of these others. To give an example, if a migrant without any links whatsoever to the host country arrives at its border and is immediately detained and placed in solitary confinement for an indefinite period, he will not develop any ties with the country. The temporal experiences he has in detention[303] might gradually become part of his identity, as might the limited contact he has with his guards, but this is certainly the most limited form of interaction with others and the outside world someone can experience in a given territory. The absence of further experiences makes him unable to develop any further ties, and so his presence within the country does

Right to Asylum' (2014) *Netherlands Journal of Legal Philosophy* 7, A. Gündogdu, *Rightlessness in an Age of Rights. Hannah Arendt and the Contemporary Struggles of Migrants* (Oxford University Press 2015). See for a similar argument, not focussing on migration law, but analysing the role of law in identity-formation and people's lives, P. Ricoeur, 'Who Is the Subject of Rights' in P. Ricoeur (ed), *The Just* (The Just, The Chicago University Press 2010). Such a perspective is interesting *per se*, and combining it with the analysis in this book would be very worthwhile, but in itself it falls outside the scope of this work. As mentioned in the introduction regarding the non-normative approach I have used, the question of whether such an exclusion of asylum seekers and unlawful migrants is wrong because of the analyses by Arendt and Ricoeur or for other reasons falls outside the scope of this book, too. I just take these forms of exclusion as they are and focus on the consequences for the life of the migrants concerned, their temporal experiences and their identity.

302 *Koppelingswet*, 2 April 1998, *Stb.* 1998, 228.

303 Let us assume he has temporal experiences in detention, as the question of whether one experiences anything in isolation and what implications the absence of experiences might have for the understanding of a durable identity is quite another story.

not become part of his identity (whereas his presence in jail does become an important aspect of his life and identity).

However, the world is more complex than a simple distinction between absence of experiences in detention and full experiences in normal life. As the previous examples of exclusion in European migration law indicate, legal exclusion of a migrant and his life can take different forms. *Not* being present in a territory obviously constitutes one end of the spectrum; if one is not there, one gains no experiences of those in the territory, or its environment.[304] And, as just mentioned, in detention contacts with the country are also very limited. Yet unlawfully resident migrants clearly face quite a strict form of exclusion as well, as do those in the asylum procedure. Even these forms, however, are quite different from actual exclusion from the territory or detention. After all, despite the various restrictions they face, unlawfully resident migrants and asylum seekers can interact with other people to a certain extent, and they can find their way around in the outside world. A person housed in an asylum centre might, for example, have children who go to school and he might visit acquaintances in the neighbourhood or do his shopping in a nearby village. Clearly, this interaction is limited compared with that of fully-fledged citizens, but the experiences will still affect his identity over the course of time.

The point here is not to find out how precisely these different forms of exclusion affect the pace at which these various migrants become *selbstverständlich*, since that would require a sociological or historical analysis. Moreover, besides these distinctions between different categories of migrant there will also clearly be important exceptions and individual differences. Rather, the point is to argue that the *presence* of a migrant within a territory over time implies that he will normally have contact with others and the outside world – relationships which, over the course of time, inevitably become a durable part of his identity. It is in this sense that his presence and his experiences within the territory become a durable part of his identity; in other words, that this becomes *selbstverständlich*.

Yet this does not necessarily lead us to the conclusion that law is without force when it comes to the life of migrants in a territory. It is important, though, that we appreciate that certain migrants can be excluded *legally* from presence in the territory, or from such activities as work and study and so on. Moreover, it is important to emphasise

304 The complicating issue of virtual contact with people (and the outside world) within the territory is left aside here. It is, however, interesting to note that the European Court of Human Rights has allowed virtual contact between family members (e.g. by telephone or e-mail) as a reasonable way to pursue family life. See e.g. ECHR 24 March 2009, *Mbenheh v. Finland*, 43761/06; ECHR 17 February 2009, *Onur v. The United Kingdom*, 27319/07. The justification for not discussing this issue here is that it has been made clear from the outset that the focus in this book is the growth of the rights of migrants who spend time in a territory. Ties that exist before entry are, in my analysis, only relevant if they are related to the time someone spends in the territory (see chapter 4).

that the law is not merely a force opposed to migrants and their lives by restricting and categorising their living reality. In fact, legal categorisation is often actively embraced by its subjects and becomes an important part of their lives. In this sense, legal differentiation can become a significant part of people's self-understanding as well.

Yet the central point I am making here is that only if a migrant is entirely excluded from a territory – that is to say, absent from it – does this preclude his experiences in it becoming *selbstverständlich* (for there are none). If it is 'merely' forbidden for the migrant to actively engage with others and the outside world, but he remains physically present, the experiences he *does* have in a territory will still slowly but surely become a durable part of his identity. We see a good example of this when the friends, neighbours and classmates of unlawfully resident migrants demonstrate against their deportation. Despite their clear and often long-term legal exclusion, these migrants have clearly managed to become a *selbstverständlich* part of a community and of others people's lives, and *vice versa*. One of the main recurring reasons for the 'regularisation' of unlawfully resident migrants is that they have become rooted, that they have developed ties; in other words, that their life in a territory has, despite their legal exclusion, become a *selbstverständlich* part of their identity and that of others.

The most important conclusion I can draw, therefore, is that the law is perfectly capable of excluding migrants, either by removing them from a territory, preventing access to it or restricting their lives within it, but that if they are not prevented entirely from residing there then their lives in the territory will slowly but surely become a *selbstverständlich* part of their identity. The above analysis has not only shown this double effect, but also helped us understand how that developing *Selbstverständlichkeit* works and relates to time.

The above argument is by no means normative, nor does it even have a qualitative component. And the question of the quality the contact migrants have with others and the outside world, and how that develops over time, falls outside its scope altogether. Nor is the issue of what kinds of ties are deemed important by the host country relevant to this analysis. To put it bluntly, even migrants who become active criminals after their arrival in a territory – a well-accepted normative ground to deny or withdraw their right of residence – will become *selbstverständlich* over the course of time.[305] And as the practice of requiring integration tests in current European migration law shows, it is perfectly conceivable that migrants can be asked to meet normative criteria that allegedly test their ties with the host country. In such tests, particular specific ties with the host country – for example, a certain command of the language – tend to be privileged over

305 It is even arguable that one needs a good knowledge of a place and an extensive, well-functioning local criminal network in order to become a successful criminal there. This is really an anthropological or sociological question, but if true would imply that becoming a successful criminal actually requires very thorough *Selbstverständlichkeit*.

others. The point in my argument, however, is that even those migrants who do not properly speak the language after a certain period of time *inevitably* have *experiences* within the territory which become an inextricable part of their lives and identities (just as there are many nationals of the country who fail to master the language properly but certainly still have experiences within its territory).

10.7 Conclusions

In this chapter I have sought a philosophical account of the relationship between time and identity which might clarify why migrants generally receive stronger rights over time in European migration law. The most important challenge was finding an account of identity that would do justice to both the lapse of time *and* human temporality. The basic problem we encountered in European migration law was that human time and clock time cannot be entirely reconciled. The latter reduces time to an succession of unvarying time segments, whilst the former presupposes a moment at which a future and past can be distinguished, while it lacks succession. The task of this chapter was to find a temporal understanding of human identity in which succession, in the form of a certain durability of identity, could be conceptualised.

I have found such a durable understanding of identity in the developing *Selbstverständlichkeit* of the migrant over time. Gradually, repeated encounters with others and the outside world become part of the narratives about his life, just as he becomes entangled in the stories of others. These experiences within a territory slowly gain a certain *restance,* a fragile durability within his identity. Once his experiences have been organised by bringing them in the realm of the 'same', by means of identification, they slowly but surely sink into the background of his life. His presence in the territory thus becomes a *selbstverständlich* part of his identity. *Selbstverständlichkeit*, however, is not explicit; the moment it is referred to by means of explication in words, the risk immediately arises that it will be questioned and lose its 'self-evident' character. *Selbstverständlichkeit* is therefore the unproblematic reference at a general level to certain singularities; that is, it refers to those aspects of human identity which come along in a story without attention being drawn to them.

It is his presence in a territory, enabling the experience of contact with others and the outside world, which slowly but steadily becomes a *selbstverständlich* part of the migrant's identity . As a result, that presence can no longer easily be distinguished from his identity. In other words, over time experiences in the territory become an inextricable part of this person's life and identity. Even if he remains legally or otherwise excluded from aspects of the life of the territory, his identity will inevitably be marked by his experiences of his life there.

11.

Time and the Enforcement of Differences

Categorising the subject – Welcoming someone – Leaping from the general to the singular – Rending time in the legal moment – Reducing and freezing the life of the migrant – Keeping temporal control – Where is the final doorkeeper? – The circle of migration law – Lack of full control?

In the previous chapter I focused on the relationship between time and the subject of migration: the migrant. We saw that the progress of time constitutes a problem for the identity of the migrant; the more time passes, the more difficult it becomes to speak of the same identity. In part I, however, we found that, in European migration law, migrants generally receive stronger entitlements over time. In the previous chapter I therefore sought an understanding of time and identity which would do justice to both these features – change and sameness as a basis for stronger rights – and found it by arguing that identity becoming *selbstverständlich* enables a durable understanding of it.

This becoming *selbstverständlich* is, as I stated in the previous chapter, an inevitable feature of human development over time. This does not mean to say, however, that time and human identity have a necessary and constant relationship. Not everyone will become equally *selbstverständlich*, and certainly not at the same pace. *Selbstverständlichkeit* can even vanish suddenly after a long presence. More importantly, it can be retained by recalling certain differences over time. If these are reiterated again and again, it becomes impossible to forget them.

As mentioned I will not elaborate further in this book on how specific migrants become *selbstverständlich* over time, nor will I try to explain the differences in pace between different persons. This would be asking for a historical analysis to find out how this has happened in the past, for sociological scrutiny to learn more about current trends and developments with contemporary migrants, and maybe for psychological research on what precisely happens in individual cases. With the analysis in the previous chapter, I have merely provided a *philosophical* account of what is implied in our *understanding* of human development over time.

In this chapter I analyse *the role of law* in that development. After all, law's part in influencing the life of migrants in the territory of a certain country can hardly be overestimated. It is clear that law makes distinctions which have a great effect on migrants. One important one, for example, is between temporary or permanent residence – a distinction which has all kinds of effects on the migrant's chances of staying in the territory. Moreover, the differentiation between various kinds of *subjects* – family migrants, refugees, economic migrants and so on – is a clear way in which the law endeavours to create a difference between people in the territory in order to apply

different time regimes to them. Just as the very distinction between a migrant and a national can be phrased in terms of time (the one whose presence is temporal and the one who is out of time or whose presence is atemporal). And this is probably the most basic yet far reaching of all migration law distinctions: the one between legal and illegal stays. I argued in chapter 8 that enforcing the return of unlawfully present migrants lies at the basis of the entire differentiating force of migration law. After all, that law exists to control the presence of people in a territory – a purpose that stands or falls on the ability to remove persons successfully from it.

Differentiation between the subjects of different time regimes is central to migration control. And enforcing the return of the unlawfully present migrant is the ultimate basis of that control. In this chapter I further analyse law's differentiating force and the relationship between time and success or failure in removing migrants from a territory.

In section 11.1 I further analyse how law draws distinctions and show that time is one of the most important means of differentiation. I then argue that in order to make this kind of differentiation, law has to categorise the identity of a migrant *at a certain moment*. Keeping in mind the problems we have encountered in the previous chapter as to the relationship between time and such a momentaneous identity, I will argue that time *can* obstruct this categorising function of law. Not only can an expectation turn out to be wrong in the future (e.g. a temporarily resident migrant can remain permanently), but the mismatch between legal expectation and social reality can force the law to change its categorisation. It is important here to discern the level of abstraction contained in this statement: the law is not forced to allocate an individual to another category – giving them a new status – as there might always be individual reasons not to do so. The point is rather that it is difficult to conceive of a legal system which does not provide the *possibility* of changing a migrant's legal categorisation over time, as such a system would be unable to deal with time. We will see in this section that many of the time questions which have arisen in Part I are the result of legal efforts to deal with the never-ending flux of time.

In section 11.2 I analyse this relationship between time and the structuring force of law from the other side. I now focus on the failure of law to *enforce* its distinctions. This problem with law's structuring force and streaming time is nowhere as visible as it is with attempts to enforce the removal of migrants who have no authorisation to stay, as already discussed in chapter 8. There I observed that the legal presence of migrants and the absence of those who lack this authorisation function as the central principles of migration law. That boils down to the stance that only those with legal authorisation to stay are allowed to remain and those who lack that status must leave.

We have also seen, however, that 'tolerated presence' is explicitly acknowledged in the Return Directive in the event that the state fails to return an illegally present migrant. My focus in this section will be the situation in which the law repetitively *fails* to enforce its own structuring principle of legal presence, with illegal migrants absent.

It is this failure over time which highlights the two principal points of this entire chapter: on the one hand, the fact that the law has a seemingly endless list of possibilities for differentiating the entitlements of migrants over time and, on the other hand, the fact that when the law fails to *enforce* its own principle of excluding illegal migrants, this can actually become an argument for their inclusion within the legal domain. Not because they have become *selbstverständlich* – as I argued in the previous chapter – but because this solution provides an opportunity to bring them under legal control once again.

11.1 Categorising the Subject to Maintain Differences

'Hier konnte niemand sonst Einlaß erhalten, den dieser Eingang war nur für dich bestimmt. Ich gehe jetzt und schließe ihn.'
Kafka[306]

I concluded in part I of this book that, in European migration law, migrants *generally* receive stronger rights over time. This does not mean to say that *all migrants* receive stronger rights; after all, the law has an entire spectrum of possibilities for distinguishing between people to whom the time hypothesis applies and those to whom it does not. The point is that law can create different categories of subject and it can apply entirely different time regimes to them. In other words, law differentiates. But how does this differentiating force relate to time and identity?

A jurisdiction can only *enforce* its rules by drawing distinctions between subjects to whom particular legal rules should and should not apply. There is no legal system that applies every rule equally to everyone. The law may be broad or general in scope, but in its application it has to be made specific by drawing distinctions. Yet this question of personal scope is always a matter of interpretation. Even if a norm is formulated as broadly as possible ('all members of the human family'), there will always be room for different interpretations in borderline cases (e.g. embryos, dead bodies, comatose patients).[307] Consequently, the application of a rule implies the identification of the

306 F. Kafka, *Vor dem Gesetz* (Fischer 1983), p.121.

307 Moreover, one could ask whether such a norm would be *enforceable* and hence become, as I will touch upon in below, a legal rule and not merely an ethical norm. I happily leave this issue aside here, though, as this book focuses on European law, which has a clear territorial limitation.

legal subject to which it applies. And by making this identification, the legal system differentiates between those to whom the rules do and do not apply.

A legal system cannot enforce its laws if the human beings to whom they should apply cannot be placed in the relevant legal categories. Without categorisation, the identity of these persons would slip through the grasp of the law time and time again. If, for example, the state tries to withdraw a migrant's residence permit because he has committed a crime, a reply like 'I didn't do it – my earlier self did, and I'm not him any more' will not help at all. This question of responsibility is, as Ricoeur stressed, a crucial question for the relationship between time and identity. It is in taking responsibility for the behaviour of an earlier self that one's temporal identity can take form, as Ricoeur pointed out when referring to the figure of promise. And this is what we teach children from a young age. Obviously, it also works the other way around. If a migrant claims a stronger residence entitlement, he is claiming in effect that he has remained himself over time and that this self now has a valid claim for a stronger right. And that the state for its part cannot play this identity trick to evade its responsibility.

It is therefore inevitable that the identity of the legal subject has to be categorised. However, this reminds us of the philosophical problems with identity we encountered in the previous chapter. The crucial difference between the relationship of lapse of time with identity in law and the analysis presented in the previous chapter should be apparent, though: in that analysis I sought a durable understanding of human identity whereby I tried to incorporate change – the difference resulting from the lapse of time – at the heart of that identity. I therefore had to look for a form of durability that was not fixed at a particular moment, but changed with the passage of time. As a result, I proposed identity becoming *selbstverständlich* as a means of understanding durable identity. What we now see is law seeking a durable categorisation that *fixes* a status; that is, that keeps the same what is actually constantly undergoing change. *The legal order forces people to remain legally the same over time by categorising them as part of a certain legal group*. Unless and until this legal categorisation is changed by means of a legal procedure or application of a legal rule, the person concerned remains *legally* the same despite all the changes his identity undergoes over time. And such categorised identification seems to be a *prima facie* prerequisite for any differentiation. After all, in order to discern a difference one has to identify the elements one is distinguishing. If one wants to apply different rules to nationals than to asylum seekers, one obviously first has to define these categories. The categorisation of identity thus appears to be linked intrinsically to the differentiating force of law by means of categorisation. But why exactly? I can discern two explanations: that identification is needed in order to welcome (section 11.1.1) and in order to decide (section 11.1.2),

11.1.1 Identification in Order to Welcome

Derrida goes so far as to say that this question of identification actually constitutes an *aporia*: an antinomy or unsolvable problem. He has discussed this issue in great detail, but most relevant for my purposes in his text on the question of hospitality.[308] On the one hand, Derrida argues, hospitality implies that the host opens his house unconditionally: that he summons his guest 'to feel at home' and 'to behave as if at home'. Yet if this form of hospitality were truly unconditional, the host could set no conditions all for his guest's stay, nor even ask him to identify himself. And this would certainly restrict his sovereignty as host of the home. The more absolute the welcome, the more restrained the sovereignty of the host becomes.

Welcoming an 'absolute other' – someone without a known identity and history – might therefore be frightening or even dangerous. It seems only reasonable to be able to hold the guest responsible for his behaviour, and this implies that he identify himself at the outset. Nevertheless, an unconditional welcome seems to reflect the highest form of hospitality. It is as on one of the pieces of art on display at the Vrije Universiteit Amsterdam states rather succinctly: 'In the promised land we would not recognise ourselves or the others'. That is the ultimate appeal of hospitality: that it welcomes the other without identifying or even recognising them. Yet that very formulation makes the downside of this situation immediately apparent. If all identification were impossible, then both host *and* guest would disappear. It might sound ideal for some for the hierarchical relationship in hospitality to vanish, but in such a situation one would not only fail to recognise the guest, but also one's own loved ones and friends. One would live, to put in the terms used by Bergson, in a situation of an uninterrupted streaming consciousness, incapable of making any distinction or recognising anything in the surrounding world. This reminds us of the hypermigration scenario presented by Bauböck in his argument.

Clearly, hospitality is not shaped solely by this demand for an unconditional welcome. Rather, it is haunted by two equally demanding appeals. Alongside the absolute hospitality just described, Derrida also discerns 'concrete' hospitality as formalised in finite laws. These provide it with a clear form, which migrants can invoke in their favour. But that inclusion has exclusion as its unavoidable counterpart. After all, the moment one starts to set conditions, one inevitably starts to differentiate, select and exclude, even though this seems to be at odds with the principle of welcoming a person. Yet the paradox is that an unconditional appeal to hospitality can only have *force* if it is put into concrete laws, even though by doing so it inevitably loses its unconditional character. It is in migration law that migrants can claim that they have an entitlement or right to stay, and can enforce this, even as simultaneously by the very same laws other migrants are

308 Cf. J. Derrida, *Of Hospitality* (Stanford University Press 2000).

being excluded because they *do not* fulfil their criteria. This double movement, typical of Derrida, reminds us of the iterability discussed in the previous chapter: one loses what one rescues in the same movement. We have seen exclusion and inclusion at work at the same time in the time hypothesis, too. This issue obviously comes most prominently to the fore with the analysis of the refugee. He is clearly the absolute sacred other, whose characteristics are beyond human description. Yet it remains an inescapable fact that, in order to welcome such a divinity into one's human home, he first has to be identified.

If one focuses on the question of identity, it becomes apparent that in the 'promised land' no identification would be possible. But a situation with actual and finite laws clearly requires that a subject be identifiable. This is the aporia of hospitality: the migrant has to appear before the law as a subject and not as an absolute other, a 'ghost' or a 'god', yet by this very appearance he loses his 'ipseity' – his strangeness, if you will – and he is encompassed within the structure of the law. It is, as in Derrida's interpretation of Kafka's *Before the Law*, the law which cannot be entered by the singular human, while the law cannot entirely grasp its subject. 'Before the law, the man is a subject of the law in appearing before it. This is obvious, but since he is *before* it because he cannot enter it, he is also *outside the law* (an outlaw)'[309]

11.1.2 Identification in Order to Decide

The question of identification is therefore central for any application of the law. The general level of the law and the singular plane of the individual circumstances of the case in hand cannot be reconciled entirely. Giorgio Agamben has put this unequivocally: 'just as between language and world, so between the norm and its application there is no internal nexus that allows one to be derived immediately from the other.'[310] Since there is no automatic relationship between the general rule and the individual case, the application of a rule to a case always implies a legal decision. Hardly ever is this an automatic transposition of the general rule (although this may be possible, with the help of technological tools, in very simple cases such as speeding fines); it almost always involves an individual assessment of the various circumstances of the specific case. Such transposition from the level of generality that characterises a rule to the level of singularity of an individual case implies a moment of madness, according to Derrida, quoting Kierkegaard.[311] If the translation is not entirely automated, it requires a leap –

309 J. Derrida, 'Before the Law' in D. Attridge (ed), *Acts of Literature* (Acts of Literature, Routledge 1992), p. 204; emphasis in original.

310 G. Agamben, *Pilatus & Jezus* (Sjibbolet Filosofie 2014).

311 J. Derrida, 'Force of Law. The Mystical Foundations of Authority' (1989) 11 Cardozo Law Review 920, pp. 976-968.

because the levels of generality and singularity are simply not connected; it is only in the legal decision that the gap between can be is bridged.[312]

A 'leap' also implies something of a rush: one cannot await the moment that everything has become clear, that all the facts are certain, that all possible interpretations have been weighed up over and over again. There is no moment at which the outcome becomes self-evident, so there is no point waiting for it. The problem, in the words of Thomas Aquinas, is that 'a variable matter cannot be judged upon before it has come to an end'.[313] And that is precisely what a legal judgment has to do: decide the ongoing matter *as if* it were Judgement Day, as if everything had come to a resolution and every circumstance of the matter could be overseen and clearly interpreted. Procedures have to come to an end because a decision is demanded. The legal decision must 'rend time', as Derrida puts it.

A legal decision is therefore always imperfect, since it is not an automatic finding or a mathematic sum. It is a judgement on the basis of a finite amount of information, it implies an interpretation of this material in the light of the general rule and it often entails an expectation of the future. It is in this sense that the decision rends time: *it creates a legal moment* at which the case and the relevant material are determined and assessed. This legal moment fixes both the future and the past of the subject since it implies their assessment, too, at that point. The legal fixing of subjects into different legal categories further implies that their future and their past are fixed from that moment onwards. The legal decision demands the temporality of human time; it is made in a present, the legal moment, which creates a legal past and a legal future.

Say a person is granted a student residence permit. This implies that they are expected to reside in the territory concerned only for the purpose of study. Moreover, this permission is qualified as 'temporary', meaning that they are not expected to stay permanently. In order to qualify for such a permit, however, the migrant must satisfy certain criteria. And these require an assessment of his past; for example, he must already hold certain qualifications. In other words, the requirements he has to fulfil can only be fulfilled because of what he has achieved, or what has happened, in the past. Often, this must be corroborated by producing documents or other proof, although in some cases it can be done by making statements about the past (as we saw with the assessment of the future risk the asylum seeker might run). In other words, relevant aspects of the person's history have to be brought to the fore by telling a story or stories about their previous life. This construction of a future and past is particularly obvious for those who migrate as 'family members': they are granted permission to do so because they *already have* a

312 See also P. Scholten, *Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht* (W.E.J. Tjeenk Willink 1974), p. 130: 'Het rechtsoordeel… is ten slotte een sprong, gelijk iedere daad, ieder zedelijk oordeel dat is… In zover is ieder rechtsoordeel irrationeel.'

313 As cited in Agamben, *Pilatus & Jezus*, p. 61; my translation from Dutch.

relationship with their sponsoring relative and because they *are expected to* live together with them in the future, once they have entered the territory. The difficult relationship between the timelines of the family member and their sponsor, already discussed in chapter 4, is a further product of this creation of a legal expectation of the future. The family member is expected to live with the sponsor for a certain amount of time, because that is why they have been granted their permit.

These examples, and plenty of others from part I, illustrate what we have learned from Bergson. We can only perceive the future and the past from the perspective of a *moment* in time. Without such a momentaneous perspective, we would have only a streaming perception of time from which no future or past could be discerned. Yet this moment implies a spatialised conception of time, with its current point perceived as being on a line with a before and an after. Since the legal system can only bridge the gap between a general rule and the singularities of a particular case at a certain moment, this implies that the future and past as seen at that exact moment are fixed in time. Identification of the legal subject is the prerequisite for any legal entitlement, but the singularity of that subject is affected by the very process of legal identification.[314] Whilst this might be the case for any legal decision, the question of identification is certainly at the heart of the issue of hospitality.

I can draw two conclusions from this. First, the migrant is fixed in a certain category and therefore only the relevant facts and aspects of his life story can be presented. *The legal subject is thus necessarily a reduction of the life of the migrant.* Legally speaking, he becomes only an asylum seeker *or* a family member *or* a worker or whatever; the rest of his identity is *irrelevant*. This is rather obvious; after all, every identification of a person entails a reduction of his life, just as every conceptual reference does injustice to the endless complexity of what it refers to. And every context demands a different identification. The point, however, is that the law *categorises* this identity, pinning it down at *the moment* of the decision *and holding on to this fixed identity* from then on. That is my second conclusion: *the categorised subject with his fixed past and future will remain static until such time as there is a new legal decision to change the law's perception of him.* No legal system that wants to enforce its differentiations can allow them to change at any more or less random moment. For the controlled legal categorisation of identity to have any effect, the system must also control the rules for the change of classifications over time. A system that allows its differentiations to evaporate the moment they have been decided upon will have little meaningful effect.

As we saw in part I, migration law has plenty of regulations and rules about changing its classifications. Following the decision to allocate a person to a certain category

314 I have discussed this issue of simplification of the life narrative of the migrant elaborately in M.C. Stronks, 'The Question of Salah Sheekh: Derrida's hospitality and migration law' (2012) International Journal of Law in Context 73.

(e.g. student), they will be classified as such until the moment their legal permission to stay (linked to their category) expires, is withdrawn or is changed into permission based on another category. The consequence of this, obviously, is that the subject's situation can alter – perhaps drastically – over time. Not only can the subjective intention of their stay change, but so can circumstances relevant to the status of their residence permit. For example, the situation in a refugee's country of origin can normalise, resulting in withdrawal of their asylum permit. Or the migrant's own behaviour may effect a change – if he commits a crime, for example, his residence permit can be cancelled. A migrant can also change category: after graduating on a student permit, he might find a job. Or after seasonal work he might find a partner.

Once again, we see here how law tries to deal with the lapse of time. It bases its categorisation of legal subjects on an assessment of the past and an expectation of the future, but it has to be able to adjust that expectation if the future does not turn out as foreseen. All of the examples described in part I are legal attempts to deal with such changed circumstances. Some are possibilities already foreseen in the legal regime relating to the specific category (e.g. the rules for the expiry or withdrawal of a permit, or the granting of a stronger status), others are less expected (e.g. a change of category). One could argue that, with these legal instruments at its disposal, the system is quite adept at dealing with the lapse of time. After all, it has plenty of opportunities to change its initial categorisation. And that is certainly true. *It is through these rules for change that the legal system tries to retain temporal control, maintaining its differentiations by allowing them to be updated from time to time. The categorisation of the legal subject and the legal opportunities to change a classification with the lapse of time are the law's means of keeping control in the face of the never-ending flux of time.*

In allowing the possibility to change a migrant's legal categorisation over time, the law shows that it is quite adept at dealing with time without losing its differentiating force. After all, the law only allows such change if it complies with the rules, thereby maintaining its grip over the changing identities of its subjects. The reason for this possibility is the leap which has to be taken from the level of generality to the plane of singularity; since this is not an automatic process, it requires a legal decision in each and every case. And that decision rends the flux of time: it has to align the singularities with the general rule, thereby endlessly simplifying the complex reality it nevertheless acknowledges. In the *moment* of the legal decision, the future and past become fixed – and they remain so until the moment of a new legal decision.

This is the force of law; it is in this application of the general rule to the singular case that the law is enforced, by means of fixed general legal categories. Yet what if this fails? What if the law cannot enforce its own categorisation? In the following section I analyse what happens if streaming reality appears to be more complex than the legal differentiations would acknowledge.

11.2 What is Behind the Final Doorkeeper?

The force of law, which has come up several times now, is crucial for every legal system. 'The word "enforceability" reminds us,' says Derrida in his *Force of Law*, 'that there is no such thing as law (*droit)* that doesn't imply *in itself*, *a priori, in the analytical structure of its concept,* the possibility of being 'enforced', applied by force.' Derrida hastens to add that there are laws that are not enforced, but there are certainly no laws that lack enforceability. And certainly this force can take many forms: physical, symbolic, subtle and so on. Without force, a law has no effect and is not capable of making any differentiation. The relationship between law and the enforcement of its distinctions is clearly vital.

We have seen above that migration law differentiates between the people present in a territory, in order to keep them under control. Different categories correspond with different entitlements and different expectations of the subject's stay. By these means, the law tries to control the entry and stay of people in the territory. The law fixes migrants in legal categories for the purpose of control, even though these migrants inevitably change as time goes by. Why would this changing identity be a problem for the force of law?

The answer is clear and simple: because migration law endeavours to *control the entry and stay of people in a territory*, and only authorises the migrant to remain in his capacity as *legal subject*. In other words, if the migrant is granted a residence permit on the basis of a successful asylum claim, he is legally a refugee and granted legal residence on this basis. This means that he is *not* granted the right to stay as a family member, worker, student or, more randomly, in his capacity as a passionate gardener or amateur painter. A human being might live with plenty of identities, but the right to reside in a territory is granted to a legal subject as the fixation of just one aspect of his identity as a migrant. He is granted a residence permit on the basis of a legal differentiation, and it is vital for the legal system that this can be enforced.

If the migrant's identity changes – and we have seen that it is undergoing constant change – this can have consequences for his residence permit, as it raises the question, to whom is that permit then granted? We have seen plenty of examples of this in part I: the dependant's permit of a family member, the student who seeks work after his study, the refugee who no longer has anything to fear in his country of origin, the migrant who becomes a criminal and so on. When the migrant no longer fits the specified category, he might exchange it for another legal status or, if the change entails the expiry or withdrawal of his authorisation, lose his right to remain altogether. And without that right, he is under an obligation to leave the territory.

I have concluded that, at the basis of migration law, one ultimately finds the power to enforce the removal of the migrant. It is certainly this threat of being forcibly removed which is at the basis of the enforcement of permissions to stay. Migrants will fulfil all kinds of requirements to meet the criteria to stay, because the state *ultimately*

threatens them with removal. This force of law thus seems ultimately based on the enforcement of the removal of the migrant. That is to say, the question of enforcement will normally not be problematic if the request for permission to stay is granted. The migrant will simply stay, and has the right to do so. Prohibitions might also be enforced by mere obedience on the part of the legal subject; migrants who lack authorisation to stay will often just leave, or not even enter the territory in the first place.

Yet it is clear that a law that is not followed and cannot be enforced is problematic. Or, to put it in Derrida's words , can even hardly be called a law. If the force of migration law is ultimately grounded in the removal of the migrant from the territory, this being the system's ultimate remedy, then that system floats on the actual *enforcement* – the application by force – of this power of removal.

Yet we have seen in the analysis of the Return Directive that the return of migrants is first and foremost left to the migrants themselves, on a voluntary basis. Only if they do not leave of their own accord might they be forcibly removed from the territory. This threat of detention and forced deportation must certainly lead some people to obey the obligation to return in the first place, as otherwise they would be removed by force. The power of detention and forcible removal thus functions as the keystone of the control over the presence of people in the territory. It enables the state to enforce the principle that presence must be lawful, a principle on which the entire system of legal differentiation ultimately rests. The paradox, however, is that a *failure* to remove the migrant *ultimately* shows that the law must acknowledge, must tolerate, the unlawful presence of these migrants.

Note the true issue at stake here: what is left of the concept of *enforcement* if the failure to apply its rules is attributed to the very subject who should be *forced* to act in compliance with the rules in the first place? We have seen that repeated attempts to enforce its rules after multiple failures reveal that, *ultimately*, the force of law is based on obedience. This is nicely illustrated in Kafka's parable 'Before the law', as discussed by Derrida. The countryman who comes before the Law in this short story and asks the doorkeeper for admittance obeys the prohibition to enter. 'Observing that, the doorkeeper laughs and says: "If you are so drawn to it, just try to go in despite my veto. But take note: I am powerful. And I am only the least of the doorkeepers. From hall to hall there is one doorkeeper after another, each more powerful than the last. The third doorkeeper is already so terrible that even I cannot bear to look at him."'[315] Since the gatekeeper leaves open the possibility that he might be allowed to enter in the future, the man decides to wait. In fact he waits for the rest of his life – after which the gatekeeper closes the door, for it was only assigned to this man.

This is what we have seen in the Return Directive, where, behind every measure to enforce the removal of the migrant from a territory, another more forceful measure

315 Kafka as cited in Derrida, 'Force of Law. The Mystical Foundations of Authority', p. 183

appears. It is suggested that behind every door, behind every attempt to enforce the return of the migrant, another doorkeeper is to be found, even more terrible than his predecessor. Yet the aporia, to put it in good Derrida prose, is that behind the final doorkeeper there is nothing. Or, to quote Mr Ping from the movie *Kung Fu Panda*, 'the secret ingredient is… that there is no secret ingredient.'

11.3 Regaining Control by Losing It

'The problem of rooted unlawfully present migrants has to do with the fact that the circle of migration law is not closed,' a former Dutch minister once said.[316] The unlawful presence of migrants in a territory might indeed be conceived as a fundamental problem of migration law. This is, as I discussed in chapter 9, what Shachar has called the argument from 'the nation-of-laws-camp': migrants who have breached their obligation to return by remaining will not overcome this 'original sin'. This would amount to rewarding those who disobey the migration rules, and it would be unjust to those migrants who have returned because of this very obligation to leave.

On the other hand, there are arguments to be found to regularise the unlawful presence of such migrants. These might relate to their integration over time, making them equal: they have become rooted, their centre-of-interest has shifted, or, in my terms, they have become *selbstverständlich*. The argument here boils down to the notion that, because of their tolerated presence over time, these migrants have slowly but gradually created a future here.

It is important to see how these two perspectives of time are opposed, with a different temporal stance: the opponent of regularisation will argue that the legally relevant moment is when entry to the territory is refused. Any time spent there after that moment is due only to the migrant's disobedience in ignoring their obligation to return, and so cannot be taken into account. Moreover, this original sin can never be overcome: the legally relevant moment of the refusal of entry remains frozen in time. By contrast, the defender of regularisation argues that the time has changed: the law cannot and must not neglect the human time spent in the territory, during which his experiences there have become part of the migrant's life story, his past and even his future. The legal present must coincide with the human present of the migrant.

It seems difficult, if not impossible, to reconcile these two perspectives of time: a frozen view of time and control opposed to a rather fluid stance – never the twain shall

316 M.C. Stronks, 'Pragmatisch en openhartig. Interview met staatssecretaris van Veiligheid en Justitie Fred Teeven' (2014) Journaal Vreemdelingenrecht 9.

meet. Nevertheless, two options seem to come close[317]: either tolerating the unlawful presence of a group of people in the territory or regularising that presence through an intricate game of forgetting and remembering. Let me briefly discuss these two options.

11.3.1 Simply Acknowledging the Lack of Full Control

As I found in my analysis of the Return Directive, the possibility of gaining greater control over the presence of migrants by way of detaining and forcibly removing them is conditioned. Powers of detention are limited in time, and the migrant must be returned in a humane manner, with full respect for his fundamental rights and dignity. These measures are the *ultimate remedy*, because more lenient possibilities must be attempted first *and* because, if this ultimate measure fails, no more options are left to force the migrant to leave. If a migration policy therefore invests substantially in measures to detain and forcibly deport migrants, this can have the consequence that, if the policy fails, that failure becomes very visible. As long as there is a threat of his detention and removal, the migrant remains under control, since enforcement measures are available.[318] The moment these measures fail and the state has to provide written confirmation that a particular migrant is undeportable, it becomes very apparent that he is beyond state control. His presence becomes visible evidence of a failure to regulate admission and residence. And every subsequent failed attempt only makes this worse. This results in a paradox: the more a migration policy invests in control over the unlawful presence of migrants, the more visible its failure to remove some or all them becomes. This can be likened with the cleaning paradox: the more one focuses on a spotless house, the more problematic every single speck of dust becomes.

Tolerated presence therefore seems to be a sound way of dealing with the unenforceability of the return of some unlawfully present migrants. Such acceptance would not mean these migrants becoming lawful, nor that their obligation to return would be lifted, but rather would simply acknowledge that, although they have no future in the host country, in the enduring legal present it is impossible to enforce their obligation to leave it.[319]

317 There is obviously a third option, too, omnipresent in contemporary European migration law: to stubbornly try to enforce the removal of migrants, or at least to keep them strictly out of everyday life. Examples of the latter are the criminalisation of illegal presence or linking work, housing, social security entitlements *et cetera* to residence status, as is the case in the Netherlands under the Benefits Entitlement (Resident Status) Act . If such measures do not force the migrant to leave, they at least make their lives in the territory extremely unpleasant.

318 Cf. De Genova, 'Migrant "Illegality" and Deportability in Everyday Life'.

319 This was the practice in the Netherlands, for example, prior to 1994. Until then, unlawfully resident migrants could work, rent a home or even claim certain benefits without a residence permit.

11.3.2 Regularisation (Gaining Control by Concealing the Lack of it)

As mentioned earlier, Article 6 (4) of the Return Directive explicitly leaves open the possibility that an EU Member State may at any moment decide to grant 'an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory'. In fact, this provision restates the sovereign power of the Member State to decide who is allowed on its territory. At the same time, the temporary aspect of this power is also emphasised: the Member State may not only grant a migrant permission to stay upon request shortly after arrival, but at any moment it wishes to do so.

In providing regularisation, however, control over the presence of migrants is restored by acknowledging the lack of control over their earlier admission. It is because the initial decision to return could not be enforced in the first place that the question of regularisation comes to the fore. The unenforceability of the decision to return is therefore the *conditio sine qua non* for regularisation. In other words, regularisation returns control to the legal system by admitting the lack of ability to enforce the return of migrants.[320] At the same time, as Shachar has pointed out, this is precisely the strongest argument for opponents of regularisation: irregular migrants have breached the country's immigration laws and cannot overcome this 'original sin'.

Regularisation therefore necessarily reflects this ambiguity; it must restore control by *concealing* the lack thereof.[321] It does so by attempting to forget the previous lack of control.[322] Instead of focusing on the lack of control to enforce the decision to return, the system focuses on the control it has at the moment of regularisation. If we

320 Suzanne Guerlac has put this beautifully, 'The pardon disentangles the present from the past to the extent that it detaches the agent from his or her past action, freeing that agent to act anew in the present. The pardon is thus a temporal intervention that slices between the agent who moves forward n time and the act that is left behind', see S. Guerlac, 'The Fragility of the Pardon (Derrida and Ricoeur)' in P. Cheah and S. Guerlac (eds), *Derrida and the Time of the Political* (Derrida and the Time of the Political, Duke University Press 2009), p. 269. She furthermore discusses the question who this 'agent' is, in the case of the regularization of unlawfully resident migrants it seems to apply both to the state and the migrant, both are freed from initial actions in the present. See also, J. Derrida, *Pardonner. L'impardonnable et l'imprescriptible* (Éditions Galilée 2012), p. 15.

321 See for an in-depth analysis of the relation between time, amnesia, the pardon and forgiveness, Derrida, *Pardonner. L'impardonnable et l'imprescriptible*, the epilogue of Ricoeur, *Memory, History, Forgetting*. For an insightful discussion of these two texts, see Guerlac, 'The Fragility of the Pardon (Derrida and Ricoeur)'. For a Dutch analysis and application to the situation of historic injustice see Veraart, *De passie voor een alledaagse rechtsorde. Over vergeten, herinneren en vergeven als reactie op historisch onrecht.* (Boom Juridische Uitgevers 2010).

322 For a further discussion of the etymological roots of amnesty (a-mnestis, forgetting) and its meanings, see L. Bosniak, 'Amnesty in immigration: forgetting, forgiving, freedom' (2013) 16 *Critical Review of International Social and Political Philosophy* 344. Bosniak discerns the 'forgive-and-forget amnesty', the 'administrative reset amnesty' and the 'vindicatory amnesty', but I will not discuss these in this section, since my focus is time and control. Ricoeur discerns between two forms of forgetting,

focus solely on control at that moment, then we see that the power of the legal system is absolute at that time. This is already indicated in the formulation of Article 6 (4), where the words 'at any moment' reveal full discretionary power.[323] There is nothing that forces the system to begin regularisation at a certain moment. The previous lack of control is forgotten by way of reframing the question of control in terms of the moment of regularisation: lack of control at a certain moment becomes full control later on.

Once this temporary shift has been made, there are several ways to demonstrate legal force, the most important being related to the scope of the regularisation. Here, it is important to distinguish between an individual regularisation (a pardon or amnesty, if you wish) and a general one. In the former the question of who will be pardoned is left entirely to the discretionary power of the decision maker; in the latter it is about the question of who falls within the criteria of the regularisation. In both situations, however, the strategy to demonstrate control is the same. With an individual pardon, control is demonstrated by the lack of clear formal rules applicable to regularisation for 'compassionate, humanitarian or other reasons'. The question of who is granted a residence permit, and when, is entirely at the discretion of the decision maker. When it comes to general regularisations, the same pattern becomes apparent: the legal system displays its control by determining the criteria for the regularisation. Again, there are no formal rules determining who must fall within the scope of the exercise, so that the system is given more or less absolute discretion. The difference, however, is that an individual pardon is not often granted publicly, whereas general regularisations are more often open in character, with at least some general rules about its scope being publicised (although the rules are still drafted at full discretion of the state).

This public-private differentiation is of great importance. It matters significantly whether regularisation remains confidential or becomes public. If it has to be admitted openly that the admission policy previously lacked control, this is more problematic than if the process remains behind closed doors. This is a peculiar aspect of regularisation, since keeping the criteria private is not something that relates well to legal rules, which are generally supposed to be foreseeable and understandable. Confidential criteria can lead to arbitrary application, too, because nobody is able to contest them. At the same time, however, the opportunities for migrants seeking regularisation might be greater if the process is kept behind closed doors, because this also keep's the lack of control hidden. Greater discretion leads to greater control, whereas a more open and formal process also brings the lack of control out into the open. A double paradox thus arises here: open regularisation necessitates revealing both the current discretionary power

destructive forgetting, that is a form of repression or denial that attempts to wipe out the past, and a more affirmative form of forgetting a forgetting that preserves, see Ricoeur, *Memory, History, Forgetting*.

323 This is the aporia of the pardon, according to Derrida, because the pardon is unconditional, which means that it cannot be asked for, see Derrida, *Pardonner. L'impardonnable et l'imprescriptible*.

and the earlier lack of control. By contrast, confidentiality implies arbitrariness that can actually have positive consequences for individual migrants, since the lack of control also remains hidden.

The most problematic consequence of all to arise from this renewed search for control is that regaining it implies that some migrants will not be regularised. After all, as we have just seen, in regularisation control is gained through differentiation. And in regulating the scope of the regularisation, the law could well show its renewed force by determining that some potential subjects fall outside that scope. For them, then, the law has *no force.* After all, it has already been determined that they cannot be removed from the territory, because that was the reason for considering their regularisation in the first place. So here we see a reiteration of the same *aporia* we have encountered previously. If irregular migrants who are excluded from regularisation remain in the territory, or new migrants enter illegally, the most the regularisation exercise succeeds in doing is creating greater control *at that moment*; ultimately, it does nothing to bring full closure of the circle of migration law. Yet this is also understandable because, if the exercise regularised everyone resident illegally in the territory at any time, this would equate to a total collapse of the entire policy since controlled admission – with no differentiation – would no longer be possible.

11.4 Conclusions: Forcibly Categorising, Again and Again (and Again)

We have seen in this chapter that the differentiating force of law presumes the categorisation of subjects and relevant circumstances at the moment of the legal decision. This is implied not only in hospitality that is always granted to *someone*, but is also presumed in the legal decision. As long as the general plane of the rules cannot be transposed automatically to the singularities of the subject's particular case, a legal decision is required. And this is always a leap from the general to the specific, taken at a certain moment in time.

This is not to say that the control of law is based merely on the initial legal decision, however. The point is that change can only be allowed legally at a subsequent moment of decision. Consequently, the law not only fixes the life of the subject at a certain moment, it keeps him fixed until the moment of the next legal decision.

The enforcement of the time regimes based on these legal categorisations ultimately rests on the power to remove unlawful migrants from the territory. After all, the legal distinctions that should control their presence can only function if non-compliance is challenged and will eventually lead to the 'non-presence' of these migrants. Interestingly enough, in the first instance the removal of such a migrant is left to his own discretion. Only if he does not leave within the allotted deadline for voluntary

return can he be removed forcibly. And in order to prepare for that removal, he may be detained. Such detention is the *ultimate remedy* in migration law: the final, most forceful measure in enforcing removal. The consequence, however, is that if this final option fails, the migrant must be released and his presence must be tolerated from that moment onwards.

This can either become a more or less permanent toleration, or the migrants concerned can be regularised in some way. Through such regularisation, the previous lack of control over the presence of these migrants in the territory is concealed by the level of control implied by the regularisation exercise itself: the law regains control, even though some of that control immediately slips away. This phenomenon of regularisation turns out to be last piece of the jigsaw puzzle I have been trying to solve in this book.

Conclusion

As easy as it has been to observe that in European migration law migrants generally receive stronger residence entitlements after progression of time (the time-hypothesis), it was as difficult to argue why this should be so. I have concluded in this book that this complexity is the result of the time enigma: the mysterious signification of time in European migration law. If we did not have a clear picture of what legal time in European migration law signified, it would be impossible to find the rationale behind the time-hypothesis. Let me, therefore, first précis my analysis of legal time (paragraph 12.1). This will subsequently enable us to bring to the fore how the law uses time to control the presence of migrants in the territory (paragraph 12.2). It will be apparent at this point that the forcefully legal categorization is at odds with changing identity of the migrants over time. The notion of becoming s*elbstverständlich* of identity will be summarized in the next part (paragraph 12.3). In the final paragraph, these three parts of the conclusion will together form the answer to the central questions of this research: *What is the meaning of time in the incremental system of residence entitlements in European migration law?* (paragraph 12.4). It is argued that becoming s*elbstverständlich* of the migrant's presence, by way of his contact with others and the outside world, makes him after lapse of time indistinguishable from nationals. The time-hypothesis functions as the regularization of these lawfully residing migrants over time.

12.

Grasping What Constantly Slips Away

12.1 What is the Meaning of Time in European Migration Law?

I have attempted in the largest part of this book to disentangle the role of time at work in the legal control surrounding the presence of migrants on European territory in contemporary European migration law. In the introduction, I have put forward that in migration law numerous references to time are used and that in the usage of time I constantly shift between all these senses of time and know them intimately without giving much thought to their differences. Inspired by the book of Barbara Adam I had decided to disrupt this natural attitude towards time by giving some attention to those differences and extracting from them clusters of characteristics that allow us to *see* the complexity. This unravelling of time was directed at the time hypothesis – the assumption that in European migration law migrants present in the territory, over time, generally receive stronger residence entitlements. That said, the disentanglement of the different meanings of time has not been a goal in itself in this book; ultimately, I endeavoured to clarify *why* migrants receive stronger rights over time in the first place. Let me first summarize how I disentangled the meaning of legal time.

12.1.1 Clock and calendar time

Legal time in European migration law clearly refers to clock and calendar time. The success of the *clock and calendar* in the regulation and management of social life is obvious. And it is the standardized character of clock time that enables setting clear rules that have a general and objective character. It is because of clock time that we can have a rule stipulating that after five years of time a migrant can apply for a Long-term resident status, although this period not only refers simply to clock time. However, the point is that it is only by means of abstraction from the individual life of the migrant and also the abstraction from the *experience* of this life, can a general rule be formulated on the basis of clock and calendar time.

12.1.2 Temporal Understanding

In the introduction I have proposed that temporality – the need for a temporal present, that implies a past and a future – is a characteristic feature of human time. In chapter 10 when I discussed Bergson's stance on time, we encountered that one could distinguish two forms of temporality which I distinguished as the *temporal understanding* and *temporal experience.* It is the human capacity to *understand* time, by means of spatialization and rationalisation, that enables the individual to control it. This is reflected in the clock and calendar and it this form of *temporality* earlier ascribed to human time in the

introduction – that human time presumes a present in which a past and a future can be perceived.

As Bergson demonstrated, such a present implies a point-like instant that is to be distinguished from earlier and later moments of time. This implies an outsider's perspective, a perspective that transcends itself, for otherwise a moving point will not perceive itself as moving linearly. This is to be contrasted with a temporal experience – duration – in which the different perceptions permeate each other and cannot be discerned from each other without changing their characteristics.

If someone must have an outsider's perspective to have a temporal understanding of *himself,* it is clear that the law in any case transcends from the experiences of the migrant in order to make an objectified assessment of his situation. Unavoidably, the law has a *temporal understanding* of the migrant's situation that distances it from the *temporal experience* of the migrant. It is this temporal understanding that presumes a *moment* within which a past and future can be perceived (contrary to the experience in which the different perceptions mutually permeate each other). It is on the legal moment that the law constructs an expectation of the future and makes an assessment of the past. The constructed expectation of the residence as temporary, non-temporary or permanent on the moment of the legal decision, also functions as a qualification of time and serves as a means for control and differentiation.

12.1.3 The Difficulty in Dealing with the Flux of Time

The clear problem of such a temporal understanding is that it lacks succession and movement. This is already expressed in the example of the qualification of the residence as 'temporary' since, after a lapse of time, this residence can turn out to be non-temporary, or the other way around. The legal decision is based on a point-like present, at which moment the former and next moment can be distinguished, and always requires a *new* moment in time upon which, again, a past and a present can be perceived.

As we have seen in the temporal *experience*, there is succession because the mental states permeate each other, yet there is no *exteriority,* for nothing can be *distinguished* in the streaming consciousness. Nevertheless, clearly there is no such thing as a legal temporal experience, as the temporal experience of law *itself*. In legal control, a temporal understanding is presumed and therefore law has to be inventive in order to deal with lapses of time. We have seen plenty of examples of the legal attempt to deal with a lapse of time. The ex nunc/ex tunc judgement; the construction of expectation; temporary and permanent status; dependant status of the family member and declaratory status of the refugee, are all examples of the legal attempt to deal with the lapse of time. Further, the rules for the change of a category, the withdrawal of a given permit or a stronger status also reflect the effort to deal with change over time.

12.1.4 The Peculiar Character of Human time

Another aspect of time is hidden in the legal time of the time hypothesis. In the introduction, I quoted Muldoon who puts forward that human time is characterised by a temporal present, which functions as a unifying principle that mediates between the time of the cosmos on the one hand and the lived experience of a mortal human being on the other hand. This statement could have been a bit puzzling upon initial reading , now we can fully appreciate its merits. I can now demonstrate that the temporal present is indeed a unifying principle: it clumps together by means of abstraction from streaming singularities, a present moment in which future and past can be perceived. It creates a certain identity, while this identity is per definition momentaneous, it brings together by abstraction what immediately moves forward. In this sense, such an identity is a reiteration, it generalizes and abstracts from the endless singularities it refers to, thereby rescuing from oblivion what it loses in the same gesture (to use Derrida's formulation).

Yet there is more to say, Bergson's distinction is not an exhaustive enumeration of what is at stake in human time. Importantly, human time is also always *mortal* time, it has a clear direction from birth to death. Where the construction of the calendar might make it possible to traverse time, as we have seen, the time of a human has a clear direction. This shows the clear differences between clock time and human time. Firstly, in the former time has a general, abstract and invariable character, in the latter every present is different. The generality of five years of clock time suggest that this is for everyone the same, yet from human time I take the differences between individual experiences. Not only is the temporal experience of everyone different, moreover it makes a great deal of difference which moment in someone's life it refers to. It makes, for example, a great deal of difference whether the five years relate to the first five years of someone's life, or to the five years in someone's adulthood. Moreover, human time is finite, while the time of the clock and the world have a (seemingly) endless character. One can start anew in a life, obviously one has several opportunities to commence again, yet there comes a point in one's life that there is no future left.

In other words, human time has a clear direction, one does not become younger, and one can never *undo* life. One might change, correct or try to resolve earlier problems but one can never live time backwards. The objective character of the time criteria in migration law might conceal that this time always refers to the time of *someone*, a *mortal being,* whose life cannot be undone or relived. This aspect of human time is best reflected in the individual and material conception of time of the case law of Article 8 of the European Convention on Human Rights. There, the singular character of the time spent in the territory comes to the fore, for every single person the time is different. It depends on what that individual has experienced in the time, but also during which part of the migrant's life it took place. As I have argued in chapter 3, it boils down to an

assessment of the time and identity of the migrant, in other words to an assessment of *his life*. And this life can never be fully grasped by mere reference to clock time.

12.2 Time Regimes as Legal Control Over the Presence of Migrants in the territory

The presence of migrants in the territory is subject to legal control. We have seen that law can differentiate between subject by means of time regimes. For different subjects different, rules apply that define their presence in the territory, relating to all steps of the time hypothesis. Whereas the entry of the family member is dependent on that of his sponsor, the refugee may await his application for refugee protection in the territory. The Union citizen can freely move in the internal market during the first three months of stay, after which only questions of money can prevent residing long-term in another European Member State. Moreover, what is five years of residence on territory, can differ for these different subjects. Different rules for continuity of residence apply to the Union citizen, and for the calculation of the time spent in the territory while still in the asylum procedure. Even the 'sacred refugee' whose protection must be permanent is not immune to legal control. How can time be a means of legal control over the presence of migrants in the territory?

12.2.1 Clock time

The time-regimes qualify the presence of migrants over time. The clock is an obvious means for qualification, as the calculation of the time spent in the territory brings to the fore. On the basis of the amount of clock time one may spend outside the territory it is possible to differentiate easily when the time spent in the territory qualifies as continuous. Moreover, the formal and general aspect of clock-time makes it easy, as we have seen, to adjust the time to obtain different policy aims. The amount of time in the territory before the next status, the time of the procedure, the amount of time before one can apply for family reunification, all these terms can be easily adjusted to differentiate between the working of the time hypothesis for different subjects.

It is the lack of an unequivocal connection between the formal time criteria and the life of the singular migrant that makes these criteria fairly easy to adjust. This seemingly arbitrary aspect is in fact the precondition for its alterability to achieve different policy aims. There is nothing that necessarily precludes a five years term being changed into a seven years term. Moreover, it is this arbitrary but general aspect of this criterion that also has a clear advantage for the migrant. It is the general and formal aspect of this time-criterion that makes it unnecessary to prove the actual integration/

rootedness of this particular migrant, since the point is that this is generally assumed in the time-criterion.

All migration law terms lend themselves for such alteration due to their general and rationalized character. There is nothing in the five years term of the Long-term residence directive itself that necessitates setting the term at this particular point in time.[324] This is why these time-criteria are arbitrary, as Carens has pointed out. He has stressed that at some point a threshold is crossed, yet that it is impossible to put forward convincingly exactly *when* this threshold is crossed, at least not purely on the basis of clock time. It is the general character of such criteria that cannot be directly related to the singular lives of migrants. In the formal time-criterion it is *generally assumed* that migrants have become integrated/rooted etc. Time is a proxy for rootedness, because of which we do not check whether the individual is indeed integrated. The lack of a clear relation between time and the individual migrant makes the term, however, easy to adjust.

However, just as the formal and general criterion lacks the necessary relation with the life of the singular migrant, an entirely material and individual criterion risks to lose the relation with lapse of time. After all such a criterion can be satisfied at *every moment*. From both legal attempts to grasp the human life of the migrant something slips away.

It is the calendar that furthermore enables for the differentiation between the present of the legal decision and the present of the migrant. It is because of the calendar that we can traverse time from the present to the past and from the past to the present moment. Because of this the legally relevant moment can be situated in the past – for example at the moment of the application – which implies that the time since that moment till the present of the migrant cannot be taken into account. It is also because of the calendar that it is possible to do *as if* the asylum seeker has been a refugee already from the moment of his application. Perceived from the present the refugee was a refugee from the beginning (while perceived from within the procedure he still was a potential refugee). The calendar is therefore based on an objectified aspect of time *and* human time, for it assumes the objectified time of the calendar *and* the human present.

324 Although, as Paul Minderhoud has once pointed out at a seminar of the Center for migration law in Nijmegen, one could argue that this five year term is a matter of customary (international) law, for we see that in different fields of law (such as social security law) this has been the practice for ages. However interesting, such an argument falls outside the scope of this book, for it would imply an historical analysis. Moreover it would require an argument as to whether such a historical practice makes it necessary to set the term on five years, or whether it is a mere contingent historical continuity (and could therefore be changed in the future).

12.2.2 Legal Temporality

Also the temporal qualification relating to the expectation of the residence as 'temporary' 'non-temporary' and 'permanent' qualify the presence in the territory. 'Temporary' residence does not count for the Long-term resident status, 'non-temporary' presence is the prerequisite for 'permanent' residence. These qualification reflect temporality for they relate to the future of a migrant on the moment of the legal categorisation. Strictly speaking it would be possible that a migrant subsequently gains different temporary residence permits after each other, while being excluded from the stronger Long-term resident status for a long period of time. But also the postponement of the removal and qualifying the unlawful presence as temporary or the temporary detention with the prospect of removal, illustrates how temporality can be a means of control.

It is clear that these qualifications are momentaneous, they put forward the legal expectation of the future at a certain moment in time. They reflect the temporality of human time, although the legal control is expressed by the possibility to construct the expectation and therewith distance from the human time of the singular migrant. The law can make a temporal qualification of his presence and this qualification is a means of control.

12.2.3 The fixation of the moment of the legal decision

The temporal understanding is implied in the legal decision, for the decision must be taken on a certain moment in which the plane of the general rule should be related to that of the singularity of the subject. It is because the general plane cannot be automatically related to singularities of the migrant's case, that on a certain moment a decision is made, which necessarily implies a leap. It is on this legal moment that the relevant circumstances of the case are fixated, the past is assessed and the expectation of the future is constructed. This categorized legal subject is necessarily a reduction of the life of the migrant it nevertheless refers to and after the decision the migrant remains legally fixated in a the category. After all, a legal system that wants to enforce its differentiation has to control the rules for change of the categorization over time. A system that allows the categories to penetrate and intermingle with each other at each moment, can have little effect. Therefore the legal subject remains categorised in time, till the moment he is situated in another legal category by means of a legal procedure. This momentaneous character of the law is clearly a result of its temporal understanding: on the legally relevant moment the past and future are overseen and assessed and this moment can be related to other moments in time.

Yet also the *exact* moment of the legal decision is an important means of control, for it determines which time is relevant and which time cannot be taken into

the equation. In an *ex tunc* judgement the circumstances after the moment of the administrative decision cannot be taken into account in a subsequent judicial review, whilst in an *ex nunc* judgement the relevant legal moment coincides with the moment of the judicial review.

Another example of how the legal moment can be used for control, is again the removal of the migrant from the territory. Instead of acknowledging that the migrant is unlawfully present in the territory from the moment he has been given a return decision, he is granted a period for voluntary return. He is still under an obligation to leave *now*, for he has no future in the territory, albeit that this legal present stretches out over a period of a maximum of 30 days.

This question of fixation upon a legal moment comes also to the fore in the necessity to fixate the subject in legal categories that can only be changed via legal procedures. If a migrant is granted a temporary status this can only become non-temporary by application for another status. Just as the residence of a family member can only become 'permanent' after the application for and grant of the Long-term resident status. It is in the regulation of the legal moment that the law expresses control.

If there is no longer a moment for a legal decision, not even a moment for the prolongation of the permit, legal control has diminished to a minimum. What is left of the control over the presence of Union citizens, is that only when the immigrant becomes a genuine, present and sufficiently serious threat, may a legal decision for removal of long-term residence status be requested. Such a legal moment is therefore fully dependant on the behaviour of the Union citizen; if he behaves well, the legal possibilities for withdrawing his status are minimal.

12.2.4 Waiting time

The best example of legal control over the categorization of the identity of the migrant might be the refugee. Whilst the refugee can only be 'recognized' –the migrant does not become a refugee because of recognition, but is recognized as such because he is a refugee – this 'recognition procedure' can take quite some time. Obviously, this procedure illustrates that the state has control over the legal entry and residence of refugees. Not only because the criteria for refugee recognition leaves room for interpretation by government officials but more importantly, the mere fact that procedures take time, shows the naked power of the state. After all, the asylum seeker during this procedure lives in a limbo, he is not yet allowed to reside in the country and might be expelled in the future. I have put forward that the refugee has a sacred status, and this is expressed by the principle of non-refoulement, which already has an effect before the refugee is recognized as such. Yet, the *waiting time* of the procedure is a counterforce to this sacred status of the refugee, it shows the power of the state to control the residence of migrants

in the territory. The refugee might be sacred, the protection is granted to a human being, who has to wait before we recognize his sacral status.

This waiting time is also expressed in the two year term for family reunification, it can take two years before the family member can join his 'sponsor'. Moreover, it can be clearly found in detention, which can only be imposed in order to prepare the return or carry out the removal process. As soon as there is no reasonable prospect of removal the migrant shall be released. Nonetheless, this preparation or actual return can take six months, to a maximum of 18 months if the migrant does not cooperate with his removal. In this time the legal control over the migrant is obvious: in detention he is merely awaiting his removal.

12.2.5 Detention and Removal as Ultimate Control

Ultimately, control over the presence of migrants within the territory is grounded in the removal of the unlawfully present migrant from the same territory. All legal differentiation rests on this enforcement of the removal of the unlawful migrant. After all, the difference between the migrant and the national is the possibility to remove the former, just as the likelihood of removal is the difference between the different stages of the time hypothesis. The stronger the status, the less legal possibilities for migrant removal. This removal is in the first place, voluntary, the law leaves the migrant a period for voluntary departure. If the migrant has not left the territory after this period, he can be detained in order to prepare his return. Detention is a temporary measure to enforce the return. Moreover, it is the *ultimate remedium*, it can only be used if no less coercive measures are available. Yet, this *ultimate remedium* character reveals that if this measure fails, no other means are available to enforce the return of this unlawfully present migrant. After the full control in detention, the migrant either has to be returned or his presence tolerated.

I can conclude now that the control of migration law ultimately rests on the forceful return of the unlawful migrant *and* the obedience of migrants to the law. If the migrant cannot be returned, the only way to regain control over his presence in the territory is by regularization of his status. This regularization, however, must conceal the lack of control over the presence of migrants in the territory by showing the control over the scope of the regularization.

12.3 What Happens to the Migrant over Time?

The disentanglement of legal time in European migration law has led to the conclusion that time constitutes several means of control concerning the presence of migrants in the territory. However, we have also realised that law has a difficult relationship with lapse of time, and that the temporal understanding at the legally relevant moment leaves no room for succession. At the same time, we encountered the fact that the rationale behind the time hypothesis – the reason why we grant migrants stronger rights after lapse of time – is to be found in the change that occurs over time. In the legal part of the book I found three arguments that are being advanced as rationale: expectation, integration and equality. Yet, all three fail to address their precise relation with lapse of time. In chapter 9, I encountered similar problems. Although most of the findings in the legal part were affirmed in the scholarly debate, none of the arguments would precisely address the relation with lapse of time. Two important conclusions were drawn on the basis of chapter 9. I took from Shachar's analysis that there should be a proper place for the *temporal experience* of the migrant in our understanding of the relation between the migrant's identity and time. In addition, I concluded that a non-normative argument for the legal inclusion of these migrants was lacking, this was be found in the relation between time and control. I will summarize our findings as to the role of temporal experience in durable identity in this paragraph.

In the introduction (paragraph 1.6) and the tenth chapter of this book I have encountered that the 'same problem' relating to time returns again and again in our observations and analysed it on three different conceptual levels. I have analysed it as a problem of time with Bergson, as a question of language with Derrida and as an issue of identity with Ricoeur. The returning problem is that in every attempt to grasp time, something immediately slips away. It has turned out that to conceptualise the durability of the migrant's identity and presence in the territory, I needed to situate Bergson's temporal experience and Derrida's reiteration and *restance* in the heart of Ricoeurs' narrative of identity.

12.3.1 The Becoming Durable of Human Identity

I have sought for an understanding of narrative identity that incorporated *succession*, a form of identity that could deal with lapse of time by means of temporal experience. This, I found, in the notion of *Selbstverständlichkeit*, the unproblematic reference on a general level to certain singularities. Within this term I tried to assemble the three conceptual levels of analysis. From Bergson, I took that we constantly live with two perceptions at the same moment, a conceptual one bringing experiences in the realm of the same and an uninterrupted perception of the streaming singularities. Derrida's concept of

iteration reminded us that a similar double gesture is at stake in every utterance, for a word relates to the level of singularities, while forgetting the complexity of it in the general reference. 'Restance' is the unproblematic yet very fragile signification of a word in a certain context that is implied in every successful communication. Such *restance* on the level of narrative identity I called *Selbstverständlichkeit*, for it relates to those aspects of identity that go without saying.

Selbstverständlichkeit is not merely the implied meaning of certain identity at a particular moment, since that would imply that I still would not have found succession. The point is that this *Selbstverständlichkeit* is the succession of narrative identities, it is what joins human identities through time. It is because certain aspects of the narrative identity gain a certain durability, go without saying, that we can speak of the identity of the same (but unique) person over time. *selbstverständlich* is what holds together the narrative identity, albeit in an indistinguishable fashion. After all, the very point is that as soon as one tries to point at it, it risks falling apart; it becomes separated and no longer fulfils its sticky function. The *selbstverständliche* aspects of identity mutually penetrate each other, they come along on the background and glue the different momentaneous explications of identity together. It is because of this that one can distance from oneself, by saying 'I wasn't myself that night', or 'I keep my promise, whatever happens'.

It is important to see the parallel and difference between this *Selbstverstandlichkeit* and Ricoeur's notion of 'character'. Habits give a character history, habits are the dispositions we hold on to over time, the dispositions that do not change, Ricoeur stressed. This solidified change seems related to what I have endeavoured to describe with *Selbstverständlichkeit*, but there is an important difference. Ricoeur's description of character and habit is part of the temporal *understanding*, it *fixates* the character in words and narratives to a certain moment. It cannot escape that in this very description it loses exactly what it searches for: i.e. succession. What I have endeavoured to put forward with *Selbstverständlichkeit* is precisely that which comes along from earlier narratives and significations without becoming explicit. The indistinguishable aspect of identity that has become self-evident over time, yet whose self-evidence can evaporate the moment one focuses on it.

This latter implicit aspect of *Selbstverständlichkeit* has been at the basis of the individual and material perception of time in article 8 of the European Convention on Human Rights. These aspects of the identity of the migrant have no general signification for the durability of identity over time. Work or schooling are not the necessary conditions to show that the migrant's identity has gained a certain durability and that he has developed ties or grown roots. All these examples must *implicitly* bring to the fore that the migrant has become *Selbstverständlich*, yet this cannot be put into words conclusively and unproblematically.

Crucial for our analysis is not just any aspect of the migrant's identity becoming durable but the question of his presence in the territory as related to identity is crucial.

His presence that constitutes his contact with others and the outside world, to use the formulation of the Strasbourg Court. I can now conclude with the previous analysis in mind that slowly but steadily the migrant's presence in the territory becomes a *selbstverständlich* aspect of his identity. His identity intertwines with the outside world and others, because they start play a more and more obvious role in his life, just as he becomes more and more part of the life of others. Slowly but steadily his presence and the contact with others and the outside world becomes an implicit part of his identity.

12.3.2 What is the relation between *Selbstverständlichkeit* and time?

This *Selbstverständlichkeit* holds together identity over time, but why? Simply because we cannot live in a world of endless singularities, as the story of Borges shows. Human beings live, as Bergson convincingly argued, constantly with two perceptions of time. The one enables us to identify, make the same, rationalize, organize, create coherence and grasp the reality, the other enables us to experience the stream of differences, to forget, and to live in duration. The problem is, however, that despite these conceptually clear differences between these two perceptions of time, in life they are constantly entangled. We constantly shift from the attention to differences, to the forgetting of differences in the general reference to it *and so on*. We need to bring the repeated experience of a certain person in the realm of the same, before we can recognize him as the same person. He might introduce himself to us and after a while he might become our friend. As soon as we get to know each other better, this 'knowledge' of him being the same person sinks away, we do not think every time again 'there is the same person again', while it remains the precondition for recognizing him. And this is the fate of every aspect of his identity; I might discover that my friend is a bit selfish, and this might be a constant frustration in our friendship. In such a case this implies that in new situations this annoying aspect of his identity returns, this entails, however, that there is no succession. After all, the description on this moment on which the aspect of his identity can be related to other moments, implies a perspective that transcends the moment and relate it to other moments that are simultaneously perceived. It is only when the aspect of his identity becomes *Selbstverständlich*, when it sinks to the background, that it succeeds in identity, it becomes a durable part of it.

If someone came to live next to me, he would have to organize his experiences by making them the same. In order to grasp the new place, he needs a temporal understanding of it; recognize where he had been *before*, in order to be able to find his way today and tomorrow. This identification is the precondition of his getting around in the place, yet slowly but steadily this knowledge, however, will sink to the background of his streaming consciousness. After a while he could just find his way, without thinking about it. This will not only happen to his experiences with the outside world, but also to

his experiences with others. They will become part of his life, and slowly but steadily he will become part of the life of others. Certain aspects of his identity will slowly become *selbstverständlich,* simply because humans cannot focus all the time on all the differences of the endlessly complex varieties of a life.

In order to grasp the streaming reality, a migrant inevitably simplifies and forgets differences, therewith bringing it in the realm of the same. Just as remembering, forgetting is a necessary part of the human condition. As a consequence, his presence sinks back in the temporal experience and forms an indistinguishable part of his life. This implies that his presence no longer fits a temporal understanding, for that implies that it is distinguished and situated on a certain moment. The point is that as soon as the migrant's presence becomes *Selbstverständlich*, his presence is no longer grasped by a *temporal understanding*. He no longer is defined as the one who came here in the past, or the one who might leave in the future. In the sense that his presence can no longer be grasped by time, he has become outside of time, just as the national.

This becoming *selbstverständlich* of his presence and his contact with others and the outside world is an aspect of human becoming in time. Certainly individuals become *selbstverständlich* at a different pace, some might even remain different for a long time because certain aspects of their identity are being kept on the foreground again and again. Yet, what is not actively remembered, becomes forgotten. For this reason human becoming in time has an eschatological arrow, differences become forgotten over time if they are not actively remembered.

12.4 Stronger Rights to Keep Control Over the Changing Subjects

I have tried to unravel legal time, which enabled us to see how the law can use time for control and differentiation by means of time regimes. It also allowed us to provide a durable perception of human identity that could take on board human time *and* lapse of time, without reducing the latter to the temporal understanding of clock time. Thereby, I have addressed the first part of the enigma that kept returning in both European migration law and the scholarly debate: to provide an account of identity that could take lapse of time on board. Together with the second part of the conundrum, the question why law should acknowledge change in the identity of the migrant, this constitutes the answer to the central question of this book why migrants receive stronger rights over time.

12.4.1 Becoming Indistinguishable from the National

The account of durable identity that I have put forward also enabled putting the pieces of the jigsaw puzzle I had earlier identified in European migration law and the scholarly debate, in its proper place. In the encounters with *others and the outside world* the migrant's identity will generally become *selbstverständlich* over time. This implies that the migrant's identity slowly but steadily changes, the *stories* about his life become more and more interwoven with the *stories* about others and the place. In this web of stories it becomes more and more difficult to distinguish clearly between the different identities, for the differences slowly fade into the background. If they are not actively remembered, they become forgotten. The durable identity is determined by those aspects of one's life that come along implicitly in the reference to one's identity. It can be expressed in all kind of stories about one's life, but not explicit since it is *by definition indefinable*.

What if I would relate this to the principal migration law distinction – the migrant's presence is temporary, while the national is outside time? The migrant is the *temporal par excellence*, for his presence is defined by his being here temporary, either because he arrived here in the past and/or because he can still be removed in the future. For the national, his presence in the territory is *Selbstverständlich*, it is implied in his identity as national. His national identity cannot be defined by his being here for a long a time, or because he will never leave, he is *simply outside of time*. He is ~~temporarily~~ here.

I can now say that over time, the presence of the migrant becomes *selbstverständlich* as well, because of his experiences over time in the territory. It becomes more and more difficult to distinguish him from other people present in the territory, such as nationals. Over time he becomes more like the national, not in the sense of a similar identity, but in the sense that his life becomes entangled with the lives of others and the outside world he is living in. In this sense, the migrant and the national do not become the same, they do not become *equal,* it just becomes more and more difficult to distinguish them from each other.

12.4.2 Time Hypothesis as the Regularization of the Lawful Migrant

Whereas the migrant might over time have become indistinguishable from the national, this does not clarify why this should be legally acknowledged. After all, one important difference remains between them: their legal status. The enforcement of this difference between the migrant and the national over time remains the *conditio sine qua non* of the migration law system. Why would the law include those who are explicitly excluded after a period of time?

A temporal argument for their inclusion is found in the figure of legal control itself. As earlier encountered, the precondition of legal control is the creation of legal moments, and the fixation of the identity, past and future of the migrant at that particular moment. Change is only allowed if it complies with legal rules for change and when it is decided upon a new legal moment. We have encountered in the analysis of the Return Directive and the scholarly discussion on the regularisation of the unlawful presence of migrants, that change, as such, cannot be an argument for the legal inclusion of these migrants. On the contrary, as Shachar has pointed out, the argument is rather that these migrants cannot overcome the "original sin" of the breach of the countries' immigration laws. The refusal of entry must remain fixated since otherwise this would undermine the entire admission policy. After all, the regularization of unlawfully present migrants could be seen as rewarding and undermining the admission policy. The problem of rooted illegal immigrants over time is, in this perspective, the problem of the circle of migration law that cannot be closed.

Indeed, the circle of migration law is not closed. Not only do migrants remain unlawfully present in the territory over time, despite their unequivocal obligation to leave the territory, in fact, migrant status changes over time and no longer fits initial legal categorization. This book is full of examples of how the migrant's situation changes over time (temporary residence becomes permanent, dependant relation becomes independent, risk ceases to exist *etc.*) and how the law changes its categorization. This legal change is necessary, for otherwise the subjects would no longer fit the legal categorization, which would eventually lead to lack of control. After all, the law would not be able to take changed circumstances into account to be therefore unable control them. If a migrant is, for example, still categorised as student, while he already works as labour migrant, the law fails to control the circumstances under which he works. Or, if a migrant has a residence permit and subsequently invites his partner to join him in the territory, law should take this changed situation into account in order to control it.

We have seen that this aspect of control is also clearly present in the time hypothesis. The time hypothesis not only bears witness to the growth of residence entitlements over time, every step is also clearly an illustration of the repeated power of the state to control the residence of the migrant. Although ways of controlling residence may become less over time, stronger entitlement still has to be granted.

We have seen that regularization is the contradictory answer to an apparent lack of control over the unlawful presence of migrants over time. In the regularization, control is regained by acknowledging its earlier absence. The force of law is clearly revealed by its determination of the regularization's scope. Virtually nowhere else is this force as visible, as in this almost full discretionary power over regularization. In the regularization of unlawful migrants migration law reinstalls control over the presence of migrants in the territory, by concealing the earlier lack of it. This is, however, an eternally recurring

problem, for reinstalling control is based on the inclusion of some and exclusion of others. Just as every admission policy will keep excluding people from legal entry into the territory, such exclusion at the moment of regularization will have the effect that migrants will stay present in the territory. Therefore the circle of migration law will, despite the attempt to close it with a regularization, necessarily remain open. Either because in the full inclusion the control over the presence in the territory is given away, or because in the control over the scope of the regularization some stay unlawful in the territory.

This figure of the paradoxical regularization is the last missing piece for finding the rationale behind the time hypothesis. The time hypothesis is the repeated regularization of the lawful migrant over time. We have seen that the migrant constantly undergoes change over time until no longer distinguishable from the national. His presence becomes *selbstverständlich:* after lapse of time he becomes intertwined with others and the outside world. This change implies that over time he slowly surely distinguishes himself from every fixating legal categorisation that endeavours to differentiate his legal entitlements. This changing identity of the migrant implies, therefore, a lack of the control that is based on fixation into categories and moments. This lack of control is also reflected by all the aspects of the time-regimes I have discussed, for with every time-measure something slips away. The clock-time does not coincide with individual human time, just as formal time does not overlap with material time. The temporal assessment of the future can change in the future, just as the legal relevant moment can differ to a great extent from the human present. Moreover, the tolerated presence or the waiting time does not entirely preclude the possibility that the migrant becomes *selbstverständlich* during his presence in the territory.

Therefore, the time hypothesis must be understood as a means of keeping control over the presence of migrants by creating legal moments at which a stronger status may be granted and renewed control exposed. Not as the only means of control since a migrant without entitlement to stay can legally be removed from the territory. Rather, it is a means of control over those migrants that remain present in the territory long-term. The obvious paradoxical aspect of this form of control, just as with the regularization however, is that in the very effort to keep control it is eventually lost in the naturalisation of the migrant. From that moment onwards he is not only *Selbstverständlich*, the law no longer legally differentiates him from the nationals. The moment he is out of migration law control, he is outside of time. The eschatological arrow of time in the time hypothesis is based on migrants becoming *selbstverständlich*, yet it bears witness to reiterated attempts to retain control. Or, to conclude this book with a theological metaphor, the end of a mortal human being is his death, which is the prerequisite for his resurrection in paradise; the end of time hypothesis constitutes the demise of both migrant and migration control, *and* resurrection as national with the full control of the state over his new born subject.

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Just as it takes time to read a book, it takes time to write one. A book is in this double sense related to the lives of its author and its readers: the act of reading or writing is part of their respective lives. I can still recall, for example, that I read large parts of Tolstoy's *War and Peace* next to a swimming pool in Sozopol, Bulgaria, during a train trip through Eastern Europe. And when I occasionally reread (parts of) a particular novel, I am often struck by the sensations of my earlier reading of the book. It brings back memories of the text, but also of my life at the time I was reading it. In a way a read book functions like a photo, it is a token of an experience.

With this dissertation in my hand, I can now say that something similar applies for writing a book. Although one difference with reading is immediately apparent: writing a book takes more time than reading one. I have spent more than four years of my time with it. Therefore, the end of this book also signifies the end of an episode in my life.

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Summary

This book is about time, law and migrants. It consists of a legal and philosophical scrutiny into the question: why do migrants receive stronger rights over the course of time in European migration law? That migrants receive stronger rights over time is easily proven, much more difficult is the question *why* this is so, or even, what time is and what it means in law.

In order to answer these questions the author first attempts to disentangle the meaning of time in European migration law. He argues that although time is commonly perceived to refer merely to the clock, the reference to *human time* remains hidden. In the latter perception, time is not understood as the lapse of time on a clock, but rather, the focus is on the lived experience of a human being. Moreover, human time is marked by *temporality*, the need for a temporal present that implies a past and a future. It is in a moment, that one can discern the past from the future.

In this book, it is argued that legal time combines human time and clock time. While legal terms clearly refer to clock time, law takes temporality from human time. Only at a legal moment, that fixates the relevant past and creates a reasonable expectation of the future, can a legal decision be made. Since the general legal rule should always be transposed to the concrete circumstances of the case, a legal decision is necessary and therefore a fixated moment is required.

The clear problem is that time goes on, and circumstances change. Although the list of legal measures to deal with lapse of time is sheer and endless, law can never fully grasp it. This slippery character of time is both success *and* pitfall of a legal system that seeks control over its subjects. The legal analysis in this book bears witness to the legal possibilities for manipulating time to reach different policy ends. At the same time, it clearly shows that migrants nevertheless *generally* receive stronger rights over time.

It is within this quandary that the question *why* migrants receive stronger rights, is situated. In the philosophical part of this book this question is addressed by a scrutiny of the relation between time and the migrant's identity, and time and legal control. The author argues that in order to have an understanding of the *durable identity* of a migrant who lives in a given territory, it should reflect his *temporal experiences*. When people live over a longer time in a certain place, their experiences will slowly but gradually become part of their identity. In order to find their way around, they will endeavour to grasp the streaming reality in which they live. They will identity the people they meet and the surrounding environment. Yet, the point is, that slowly but surely this *understanding* will become evident, whereas it is still needed, it will slowly sink to the background of one's life. Simply because people cannot have equal attention for everything, all the time. Over the course of time, experiences will become *selbstverständlich*, the author argues. They will become a *selbstverständlich* part of their lives and identities. And it is this very *Selbstverständlichkeit* that holds together someone's identity over time, as the implied meaning of a live that comes along with every narrative explication of it. The author

claims that as long as someone is present in a territory, over the course of time this will imply that his experiences with 'others and the outside world' will become slowly but gradually *selbstversändlich*.

Yet, this is only one part of the answer. If it is a convincing understanding of the relation between time and the migrant's changing identity, this is in itself not an argument why the law should acknowledge this change with the grant of a (stronger) residence permit. Since the entire project is based on a non-normative approach, the author searches for an argument for the legal inclusion of this "changing" migrant in the relation between time and legal control. The starting point for the analysis is the observation that legal control of the presence of irregular migrants is based on two contradictory understandings of migration law. On the one side it is argued that irregular migrants should *never* be regularized since that would undermine the system of migration control. On the other side it is suggested that a system that neglects *actual life* within the territory, loses its force. The author argues that in both situations time can become a problem of legal control over the presence of migrants in the territory. On the one hand the presence of migrants residing unlawfully in the territory over a long period of time shows a *lack of force* to remove them, and hereby control the entry and stay in the territory. On the other hand, if residence permits were automatically donated after a lapse of time this would seriously affect the power of state control at the earlier moment. So both scenarios lead to lack of control and the author argues that this cannot be resolved for it reflects the *enigma* of time. One cannot simultaneously grasp streaming time *and* the moment of time.

Yet, in this *enigma,* the key for the central question of this research is to be found. Within the troublesome relationship of time, identity and law, a solution is offered as to why migrants receive stronger residence entitlements over the course of time. The proposed answer is: because the temporal experiences of migrant's within a territory become inevitably a *selbstverständlich* part of their identity, therefore, they become entangled with the identity of others. Over time it becomes more difficult to disentangle the lives of the people living in a territory. Their lives within the territory will gradually become more and more distinct from the initial legal categorisation. The grant of stronger rights to these people is a means of regaining control while acknowledging the changed situation (and consequently, immediately losing control). Granting stronger rights to migrants is therefore the regularization of lawful resident migrants in order to prevent loss of control over the course of time.