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Grasping Legal Time: Temporality and European Migration Law

Martijn Stronks

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"What time is it, Eccles?"

"Um, just a minute, I've got it written down here on a piece of paper."

- Spike Milligan, *The Goon Show*

In this short treatise of 102 pages, Stronks puts a thought-provoking argument for *lex temporis*. This, Stronks argues, is an argument for reflecting human time in European migration law. To build the argument, Stronks distinguishes philosophical conceptions of human time and legal time. Human time is 'always the time of someone, who constitutes a present, implying a future and a past, whose time is finite due to their mortality' (p7). An object carried along the current of a stream cannot perceive the stream as having a beginning, middle, or end, because it cannot see those things. It can only see the instant that it is in. That also means that the object cannot move backwards in the stream of time, nor can it jump forward, nor pause it. Likewise, human time can only be perceived from within the stream of time itself and as such can only be experienced as a series of moments (p41).

In contrast, legal time can perceive the stream of a specific individual's human time as having a beginning, middle, and end, because it is positioned outside of the human time. This means that legal time can also go "forwards" and "backwards" in time (p34). For example (p17), an Eritrean woman applied for asylum in the Netherlands when she was seventeen years old, and was eighteen years old when she was granted refugee status. Child refugees are permitted under EU law to sponsor their parents to enter the host state with no limitations, whereas adult refugees can only sponsor *dependent* parents. The Eritrean woman argued that the applicable law ought to be that which applied at the date of application, not the date of decision. The Dutch government disagreed and by the time the Court of Justice of the EU (CJEU) had determined the case, she was now 22 years old. However, the CJEU was able to move legal time "backwards" so that the Eritrean woman would be treated as being seventeen years old. But in human time, she will never be seventeen again.

Stronks examines different ways in which legal time and human time interact in migration law, often for the purpose of migration control ("temporal governance"). This book frequently uses examples from European migration law (CJEU and ECHR judgments, and

Dutch national migration policy) to effectively explain his philosophical material and ground it in real-world experiences.

Stronks argues that there are four main ways in which time is used to differentiate between migrants. Firstly, in the concept of 'temporality': 'the distinction between past, present, and future' (p25). This can be found in migration control with respect to labelling different migration routes as 'temporary migration', in the necessary time to demonstrate genuineness for the purpose of the *Surinder Singh* route, or the 'present or actual danger criterion' for public order deportation. (Although the latter two could also be alternatively and convincingly described as predicated on assessing an individual's internal intention, not on time).

Secondly, time is used to impose deadlines. 'Countdown deadlines' (relying on work by Elizabeth Cohen) are 'a type of temporal boundary in which limitations are linked to two dates by a precise quantity of time' (p29). Residence permits granted for a set period of time being a core example as the entitlement of residence ceases to exist after the expiry of the set period of time. 'Single moment deadlines' are also temporal boundaries but which are based on human time (in that they are moments in time that cannot be revisited except by the manipulation of legal time), such as the way in which some migration benefits lapse on one's eighteenth birthday (p30).

Thirdly, the qualification of time: when 'some time counts, while other time does not' (p32). For example, only periods of time qualified as being 'lawful residence' count towards naturalisation criteria. Other time may count, such as allowances made for holidays outside the territory of the state still being counted for the purposes of continuous residence.

Fourthly, procedural differentiation. These include antedating, such as dating a refugee residence permit to the moment of application (p33) or the retrospective application of legal provisions, as in the first draft of the UK's Illegal Migration Bill which proposed a date in the past as the relevant date from which any asylum claim made by those irregularly arriving would be declared inadmissible. Procedural differentiation need not be explicit. Stronks argues that 'Government frequently use the speed and therewith the duration, of the procedure to distinguish between wanted and unwanted forms of mobility.' He contrasts the instantaneous "decision" to admit the entry of an EU national into one EU country from another, and the years long wait of asylum applicants for decisions on their claims (p34).

Stronks suggests that there are some benefits to the operation of legal time for migration law. Legal time can quantify human time and so 'Calculation on the basis of time in legal criteria is the ultimate example of how a legal decision about the life of a human being can be detached from the singularities of that particular life' (p20). For example, requiring a set

number of years of residence before qualification for citizenship is a useful 'abstraction' of other processes - rootedness or integration - which occurs as a function of time (p19).

But Stronks also argues that there are 'vices' of legal time (chapter 2). He critiques the extreme end of arguments that citizenship ought to be granted on the basis of *jus nexi* (an individualised assessment of material characteristics of rootedness or integration) and *jus domicili* (that simply having been resident - lawfully or not - for a set period of time ought to be sufficient) (p52). He argues that both fail to grasp the importance of time. Citizenship on the basis of materially demonstrable facets of integration assess only a moment in time, 'no matter how that moment relates to the particular past or future' (p51). For example, language criteria may be met even before arrival in the host state (p51) or relevant circumstances such as employment status may change unpredictably in the future. In contrast, citizenship on the basis of residence completely divorces the proxy measure (time) from what it is proxy for (rootedness) as it fails to take into account the different amounts of time that it may take an individual to put down roots (e.g. older migrants may find it harder to learn the language or adjust to new social conventions, whereas younger migrants may take longer to establish roots based on employment or family).

This chapter uses the EU's Long-Term Residence Directive as an example of *jus domicili* and the case law on article 8 ECHR in expulsion cases as an example of *jus nexi*. Yet the academic arguments at the 'extreme' ends of *jus nexi* and *jus domicili* which Stronks critiques relate to citizenship. However, there is a strong case, not explored, that can be made that the three migration law contexts – citizenship, enhanced residence rights, and human rights appeals against expulsion – are of fundamentally different characters which justify different applications of *jus nexi* and *jus domicili* principles.

In his final chapter (chapter 3), Stronks argues that *lex temporis* be observed as a means of limiting temporal governance: that waiting periods for asylum decisions, enhanced residence rights, naturalisation and regularisation of irregular stay, all have limits based on what is just because human time has value, and ought to be respected.

One interesting potential extension to this *lex temporis* argument based on the idea of human time would be that such waiting times could be made to be different based on the subjective perception of human time and/or the amount of finite time left that a person has. For example, older people could be made to wait longer for an asylum decision because they perceive human time as moving more rapidly than young people. Conversely, an older person should not be required to wait as long for naturalisation or regularisation as they have less of their finite time remaining. This would be the logical consequence of Stronks' argument that

‘entitlements should be proportionate in relation to harm expressed in terms of the human time of the individual at stake...[L]apsed time in the life of the particular individual should be taken into account as having value’ (p82). However, this is unexplored by Stronks as either an appropriate or inappropriate extension of application of his *lex temporis*.

More urgent and more convincing is Stronks’ argument that *lex temporis* demands that there be a point in time when a person should be excluded from deportation. This is not least because many European states do not recognise an upper limit to when one’s period of residence ought to make one immune from deportation, especially on public order grounds.

He argues that arguments for an upper limit based on *lex nexis* or *lex domicilii* alone are defeasible because the fact that individuals do successfully migrate and put down new ties in a new place becomes an assumption that ‘they can start over again elsewhere’ (p79). This is observable in operation in UK immigration law in, for example, the discussion in *CI (Nigeria)*¹ of the relevance of ties developed whilst present unlawfully and whether time in prison suggests that the individual was never integrated in the first place. Additionally, in *AS*² the Court of Appeal found that the ties of an individual’s parents could be counted by the courts as meaning that an individual was not really starting over again for themselves from nothing.

In contrast, *lex temporis* would recognise that ‘time spent on the territory is undeniably bound to the life and the time of the specific human being’ thus ‘the greater proportion of finite time spent by the migrant within a territory, the stronger a claim for inclusion will be’ (p80). But why? The argument needs something more to make it complete. I think what is missing is the explicit statement that finite human time means that in reality a person does not have an infinite capacity to ‘always start anew elsewhere – as if no time had lapsed’ (p80). This is because a person will never get the time back that they invested in the host state: deportation may put the individual back in their place or origin, but not back in time.

Whilst this is clearly an interesting way of formulating part of the injustice of deportation, it is not strong enough to challenge the logic of deportation. The prevailing logic of deportation is that the individual should not have invested that time in the first place (in the case of someone resident irregularly) or has invested that time poorly (in the case of a time-served offender). The value of one’s investments – including of time – may go up as well as down: as anyone stuck in a dead-end job, or whose long-term relationship has gone sour can tell you.

¹ *CI (Nigeria) v Secretary of State for the Home Department* [2019] EWCA Civ 2027.

² *AS v Secretary of State for the Home Department* [2017] EWCA Civ 1284, [2018] Imm AR 169.

The more convincing argument about the importance of human time is one that is strongly connected to *lex nexi* arguments. The assumption that a person can start over again elsewhere as if no time had elapsed is flawed because one will never have the time back that is connected to important life stages. For example, childhood, schooling, first starting a family, or establishing careers or businesses are all unrepeatable. Even if on deportation an individual could establish new ties through education (e.g. learning the local language, obtaining local versions of professional qualifications), a new business, or even a new family, these will be of a fundamentally different nature as the nature of an experience is not just dependent on the place in which it is formed, but also dependent on the time in one's life it takes place.

Finally, the argument for *lex temporis* as articulated in this book is an important call to remember that time is not just an abstract concept, and that migration law and policy must take into account that time is experienced by a unique human being whose time 'is finite, cannot be stopped nor traversed' (p14). It is therefore uniquely precious and so when migration law imposes excessive time on an individual (e.g. the ten-year route to settlement, the twenty-year route to regularisation, and lengthy waits for immigration and asylum decisions and appeals), even aside from its welfare implications, it is unjust.

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