1 The Challenge of Migration

Politics as Labour and Labour as Politics

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Abstract

Van Roermund coins the fundamental concepts in this book to be 'labour' and 'migration'. Plus 'law', of course. However, the latter is not at par with the former two. Law will enter the argument as the normative viewpoint from which the basic conceptual discourse on migration and labour will be analysed. In other words, first and foremost, he explores the conceptual geography of these complex phenomena directly. Section 1 presents their fundamental differences; section 2, their relationship based on these differences; and, against this backdrop, section 3 spells out the implications in the form of a few general parameters for lawmaking. As the angle of this paper is a philosophical one, primarily, it will not come as a surprise that these implications will be accounted for in terms of legal principles rather than rules, doctrines, or policies.

Keywords: conceptual discourse, reproduction of human existence

1 Migration and Labour: Different Perspectives of Political Ordering

It goes without saying that 'labour' is more than a job; it is more than even a market full of jobs that are in demand and on offer. By the same token, it is more than everything we call 'employment' – being employed or providing employment. In essence, labour is the variety of ways in which human beings as a species reproduce themselves in multifarious exchanges with

their environment.¹ A woman giving birth is said to be ‘in labour’ because she is doing exactly this, reproducing human existence from a body that, towards the end of pregnancy, has gradually become as much her (intimate) environment as herself. Only against this conceptual backdrop we can understand why, in daily life, the production of ‘value’, usually in the form of goods and services, emerges as the hallmark of labour.

It is important to appreciate the inherently multifarious character of these exchanges. In contemporary western society, we tend to lend prominence of place to industrial production, driven by the intertwinement of labour force and capital. A little reflection, however, suffices to show that industrial production is only a contingent default for what labour is about. Take art, for example. Arguably, making art is an essential aspect of reproducing human existence. But it resists, to a large extent, industrial production, and it is much more geared to craftsmanship than to entrepreneurship. Or, again, consider crop and livestock farming – without doubt, a classical area of labour. These practices, as one witnesses on a daily basis, soon appear to work against human health (hence, human existence) if they are governed, from beginning to end, by the laws of industrial production. This is why effects of pesticides and transmission of animal diseases on humans are called ‘adverse’.

What is at the root of labour, much more than industrial production, is that it requires coordinated division and distribution. Even artists, say professional musicians and painters, are dependent on the contributions of others towards what is, in the end, their performance. They rarely make their own instruments, their canvasses, or their basic colours. They need theatres and galleries, as much as the galleries and the theatres need their talents. Note that artists are among those who are most tempted to work on an individual basis. But if division of labour is already inevitable in the case of small-scale art production, how much more necessary is it in situations where the ‘job’ to be done requires large amounts of skills, or time, or money? Still, coordination in labour practices does not necessarily bring in dedicated coordinators. Rather, what is necessary is a process of reciprocal

1 I summarise early Marx here: ‘Denn erstens erscheint dem Menschen die Arbeit, die *Lebensfähigkeit*, das *produktive Leben* selbst nur als ein *Mittel* zur Befriedigung eines Bedürfnisses, des Bedürfnisses der Erhaltung der physischen Existenz. Das produktive Leben ist aber das Gattungsleben. Es ist das Leben erzeugende Leben. In der Art der Lebensfähigkeit liegt der ganze Charakter einer species, ihr Gattungscharakter, und die freie bewusste Tätigkeit ist der Gattungscharakter des Menschen.’ ‘Zur Kritik der Nationalökonomie – ökonomisch-philosophische Manuskripte’ [1844] in K. Marx, *Werke – Schriften*, Bd. I, hrsg. v. H.-J. Lieber and P. Furth, (1971) Darmstadt, Wissenschaftliche Buchgesellschaft, p. 567.

'tuning' by the participants themselves. It is the job that dictates, in the final analysis, what is to be done, who should do what, when and where it should be done, etc. Of course, in complex situations, one calls on coordinators to make authoritative decisions. But still, the quality of their decisions, hence their authority, can be measured against the demands of the job that is to be done. In principle, whose proposals, efforts, and achievements will count as 'contributions' is often decided *ex post*, depending on whether or not it appears to fit, in hindsight, into the coordination scheme at hand. Sometimes, a seemingly 'useless' activity, like counting insects on ten square metres of land for five years, suddenly appears of crucial importance for the development of innovative produce.

Such a coordination scheme, in turn, is a function of what the job is about; which, in the end, is about reproducing *human* existence. Thus, what lends a sense of direction to these reproduction processes are values, in the sense of more or less shared preferences in societies. These values are the variables that determine what is regarded, for instance, as a *flourishing* human existence. They are also decisive in what we call 'skills', as well as in the hierarchy we make of 'low' and 'high' skills. Last but not least, they are at the bottom of individual self-respect. This is a variable independent of the said hierarchy, since, under certain conditions, lower skills may be valued as very high, and vice versa. To mention just one case in point, if a coordination scheme is merely driven by the values of cost-efficiency and opts for division of labour by infinite parsing of tasks at the cost of individual job satisfaction, it becomes highly probable that the scheme will run idle and be abandoned. This happened, for instance, in Japan in the 1990s, when so-called 'lean production' at conveyor belts fell victim to shortage of workers who successfully looked for more satisfying employment opportunities.

I will return to the implications of all this in Section 2. Here, I would like to emphasise that, from the viewpoint of labour and division of labour, the constraints of social ordering are dictated by coordination. In the simplest of words, the more people are prepared to join and do the job, the better, provided that their actions can be coordinated. Or, again, in a specific sense, division of labour is *inclusive*, even if it is divisive. Predicates like 'foreigner', 'migrant', or 'child', for instance, do not register for those who are primarily interested in labour and coordination of labour. Their sole concern is the job that is to be done; and to get it done, they ignore any boundaries external to the job, including political boundaries, be they territorial, functional, or ideological. This is why large-scale projects, like seasonal harvesting or the Olympic Games, attract large crowds of people from all over the place.

It is why, for instance, IOC or FIFA are called ‘moving sovereignties’; they are in the habit of partially taking over the legal order in the place they happen to land in, demanding special tax regimes, extra infrastructure, exceptions on social security, etc., and getting away with it. But it is also why, as I saw in Rwanda, a project of labour, like building a house together, may start a complex process of reconciliation between women who lost their husbands in the 1994 genocide, and women whose husbands were imprisoned as guilty of the same slaughtering. So the inclusive nature of labour is ambiguous. It brings people together, sometimes to their benefit and sometimes to their detriment.

A very different perspective on sociopolitical ordering is opened if we now ask what migration is about. The question is itself a misfire. The term ‘migration’ can only be used by those who pretend to transcend political ordering and speak from a politically neutral vantage point. People ‘migrate’ in all sorts of ways. They are on the move to drive their business, to do research, to get education, to satisfy their curiosity by seeing remote places, to find a job, or indeed also to escape from violence and hardship. By presenting all these kinds of behaviour under the heading of ‘migration’, we extract the political sting out of the problem. Migration becomes a problem of political ordering only under the guise of *im*-migration and *e*-migration, i.e., if we acknowledge that it is about leaving or entering a polity. From a political angle, a polity is a bounded whole, and its boundaries are set (not once and for all, but again and again) by self-inclusion.

In this respect, the concept of a polity is crucially different from that of a society. Or, if one does not like this kind of ‘essentialist’ terminology, one may revert to its linguistic equivalent: political discourse is crucially different from social discourse. Different societies are separated, but also connected by gradual transitions in languages, cuisines, customs, religions, and their ilk. Polities are separated by lines; and, as we know, lines have length, no width. In everyday communication, we think about these lines, boundaries, or borders in terms of bars and barriers. But these are just one kind of epiphenomena (‘marks’) of what is meant. Not only national states, but *all* polities include a ‘we’ by various strategies of representation. This first-person plural ‘we’ is always determined from the inside, thus including some and excluding others. Only by presupposing this bounded whole is it possible to use typically political discourse and refer to such important issues as ‘the *general* interest’, ‘the gross *domestic* product’, ‘the *common* wealth’, ‘the *national* security’, or ‘*third-country* Nationals’. Obviously, these boundaries are construed, and they are not construed from nothing. They are often built on rather arbitrary data, such as the presence of a mountain range

or a river, differences in physiognomy ('ethnicity'), etc. But a polity cannot afford not to construe them, or pretend that they are just fictitious, hence nonexistent. Every politician and every citizen of a polity has to participate in this terminology of 'the bounded whole' if they want to claim relevance and credibility for their words and actions in the society they seek to order.

There is no point in denying that the boundaries of a polity are and should be flexible, porous, and malleable rather than rigid, impenetrable and petrified. A polity can only survive if it remains relatively open to pressure experienced as 'coming from the outside'. Preserving its resilience, it should be able to respond to changes in, for instance, the global economy, standards in technology, or regional climate. But then again, such responses will always be geared towards the preservation of the polity over time, thus cast in the mould of how the polity sees itself from the inside, in particular with regard to the sustainability of its boundaries.

The problem of emigration and immigration can only arise against the backdrop of this 'logic', i.e., of what is ineradicably political about politics. Obviously, neither emigration nor immigration will register as problems as long as the agents ('migrants') can be categorised in terms imposed on them by this logic of the political. They register as either 'regular' or 'irregular' migrants. Or, if this political logic has managed to determine the legal order (to some degree), they will be counted as either 'legal' or 'illegal' migrants. Here, those on the inside decide about those on the outside, a maxim that makes principled issues of migration vanish into thin air.

The problem of migration emerges as a principled problem only if it is regarded as a problem of massive trespassing on boundaries drawn from the inside. In the case of emigration, the legitimacy of these boundaries is challenged by insiders; in the case of immigration, by outsiders. It is tempting to think of such challenges as so many checks on the resilience of the polity's boundaries, to see if and how they should be redrawn. On a small scale, they probably are. But large-scale immigration and emigration mean much more. These challenges become particularly edgy if and when they leave no space for alternative boundary setting. In these cases, the message conveyed to the polity by both emigration and immigration is a radical one: boundary setting is not at issue. In other words, the polity in question, as it sees itself, may as well not exist as far as the challengers are concerned. This message is understandable from their point of view. They want to avoid, at all costs, being trapped in yet another round of discourse in which the boundaries are redrawn, at the end of the day, by those who are already inside. The same message, however, is also rather frightening for the insiders, as it confronts them with the contingencies of their political

order. These contingencies are deeply felt when the political metaphor of the line having no width, of the doorstep neatly separating inside and outside, appears to be false in social reality. Immigrants landing at the shores of a country may be pictured as being 'at the doorstep' of the polity, but, in point of fact, the doorstep already appears to be part of the inside of the house; a position that may be reclaimed by the residents, as they may construct new thresholds for entrance over and over again, leaving newcomers in an inferior position for years to come. But doing so only contributes to proving the point at issue: They have reason to fear that their boundaries, at the end of the day, may as well not count in the eyes of others, even if, for themselves, they are the very definition of an ordered society.

This fear is not really different if we turn to the polity that faces emigration rather than immigration. Potential emigrants seeing no future in their own country may be treated (i.e., threatened, in many cases) as being 'inside' by the authorities of their polity. In point of fact, however, even the fences at their borders appear to be, literally, an area of transition for those who are determined to leave. In conclusion, we may say that massive emigration and (probably even more) immigration, violate, indeed jeopardise, the inherently exclusive logic of the political. Note, however, that the predicates 'inclusive' and 'exclusive' in this context do not imply any normative, let alone moral connotations. They just capture the general lines of two ways of ordering society.

2 The Interplay between These Perspectives

How, then, do these two perspectives or 'logics' of ordering society – the inherently inclusive character of ordering governed by labour division and the inherently exclusive character of ordering dictated by the polity – relate? At first sight, on the account above, they seem to be incompatible. If this would be the end of the argument, there would be only one solution remaining to usher this conceptual analysis into everyday practice: We would have to argue for a hierarchy, lending priority of one over the other. In this vein, many would defend that the political should take priority over the economic logic that comes with the division of labour. For them, politics is the overarching practice ordering all social practices, from relaxing to religion and everything in between. But others would certainly argue that this claim about the role of politics is outdated, and that global division of labour should take priority so that we can all profit from the wealth it will bring. On closer inspection, however, the picture becomes much richer. So

let us ask if it is possible to intertwine both perspectives and explore the implications for the principles of lawmaking.²

We start at the end of labour. The commitment to values is the point where labour and division of labour take on a genuinely political dimension. What is at stake in this commitment is the kind of societal structure that will count as 'order' – hence also what will count as disorder, or inferior order, or superior order. Note, however, that the values reflecting how a society sees itself flourishing, are far from mere wishes or blueprints. Values determining this order present the conditions under which the reproduction of human existence, intertwined with a specific environment (i.e., labour), is seen to become and remain sustainable – in a first-person plural perspective, i.e., from the vantage of a 'we'. What values express are not these abstract pictures of possible social worlds, as is sometimes thought. In promoting values, one cannot picture any society as the 'ideal' one. Values are very much underpinned by facts from which 'we' cannot cut loose. Indeed, more often than not, our values are better called 'interests' – what we seek to achieve in between (inter-esse) the life we desire and the facts with which we have to reckon. In this sense, interests are realistic, and so are, in principle, the demands to be met in divisions of labour. As a polity, we cannot seriously claim that we have an interest in becoming the world's leader in producing hydroelectrical energy if our country does not have powerful water currents. In brief, values are more or less shared preferences in a polity, but since this polity and its members are always, already *situated* at a specific time and place, these preferences matter, to themselves as to others, to the extent that they are promoted to, and register as, interests.

This should not, however, count against the conclusion that division of labour is value-driven, and that, from the agent's own perspective, this valuing cannot be separated from articulating the collective identity that comes with the first-person plural, i.e., the 'we' we are committed to, but under conditions of greater sustainability. This 'we' decides what the task at hand amounts to, how it should be pursued, what should count as a contribution, and who is therefore invited to join the venture. In other words, the political perspective of self-inclusion cannot be kept at bay if we try to look at social orderings from the economical vantage point of labour.

If we depart from the other end of our analysis, migration under its politically relevant guises of emigration and immigration, we may discover

2 The argument below profits greatly and gratefully from discussions with C. Rauceu, who defended her PhD thesis, (18 December 2017) *Citizenship Inverted: From Rights to Status?* at Tilburg University.

that we are pursuing a path taking us into the division of labour rather than the reconfirmation of boundaries. To cut things a bit short, I take the liberty to focus on immigration rather than emigration, leaving it to the reader to draw the parallel. Let us return to the point where the frightening character of massive, nonregulated immigration was explained. I submitted that the threat consists of the members of a polity being inevitably confronted with the contingencies of the body politic they happen to live in. Immigrants appearing at their borders in considerable numbers without visa applications, invitations or registrations, i.e., people ignoring the legal requirements for entrance, signal to be indifferent to the constitutive act of the residents' polity, i.e., the act of self-inclusion. In this sense, the message of immigrants is that their 'host' polity might as well not exist at all. It is without entitlement, precisely because its boundaries have been set without any opportunity for them to raise their voices. This does not mean, of course, that, as outsiders, they contest the insiders' right to live in *some* polity. But if massive immigration is frightening, what are the reasons for that exactly?

One reason often given is that it collapses the polity into problems of distributive justice. To give people their due of the common wealth, i.e., to divide the profits as well as the burdens of social goods like education, health care, infrastructure, etc. equally, one should be able to count the number of those involved in the distributive scheme of the polity, and the number should be finite. If, by hypothesis, social goods are scarce, hence in limited supply, it is logically impossible to distribute them if the denominator of the division is infinite. It is in virtue of this finitude that self-inclusion is part and parcel of political action. This is a pretty strong argument, and its persuasive force is greatly enhanced by the rhetoric of the cake at a birthday party. To divide the cake in accordance with the exigencies of distributive justice, i.e., to give all guests an equal part of the cake, one should start by counting the guests (and stop counting at some point). But it is precisely this metaphor that allows us to probe the weak spot of the argument. Prior to counting the guests and dividing the cake equally, there should be a cake to divide in the first place. This cake is not brought about by sheer command. It has to be produced by coordinated and sustained action of a plurality of agents. Indeed it requires ... labour, hence division of labour. This explains why, in western societies, immigration is welcomed to some extent, on the condition that it enhances the common wealth of the polity, e.g., by bringing in a qualified workforce, or a workforce of unskilled labour, or (in particular) a *cheap* workforce.

Of course, at first sight, this takes us back to what was said about this perspective a moment ago. This does not reach beyond the political vantage

point of self-inclusion. If a polity opens its borders solely for what it deems profitable, it just demonstrates with greater clarity what self-inclusion is about and how it comes around. However, the argument of the cake having to be produced before it can be divided is stronger than the metaphor suggests. It does not easily collapse into the political logic of self-inclusion and exclusion. What is to be produced is not just a cake, it is the very identity of the 'we' that grapples for self-inclusion. It is not a matter of 'us' baking a cake, i.e., something pre-determined outside of us, but of 'us' reproducing, i.e., reinventing ourselves. There is no other way to 'reproduce human existence' than by reproducing society; and there is no other way to reproduce society than by reproducing a plural self, a 'we'. Precisely this process of jointly carving out a plural self is itself a matter of labour, hence division of labour. Thus, at the heart of the political order, we discover its *opposite* form of social ordering, namely labour. And, as we saw, from the viewpoint of labour, there is no *a priori* reason for exclusion. We can never be certain beforehand about who on the outside will matter to those on the inside. In other words, none of those excluded in actual practice can be excluded in principle. As a first-person plural, we can neither cut loose from self-inclusion nor achieve it completely. Without 'negotiating' such identity (in all meanings of the word 'negotiate'), the process of *self*-inclusion would become inconceivable. Indeed, *ex hypothesi* (see above), any political action would then be undercut from the beginning, as all political action starts out from discursive references to this identity in the sense of a plural 'self'. At the same time, however, these references never reach what they target. Our plural identity escapes us in the moment we think of defining it. These references remain efforts to grasp what can never be grasped completely and what therefore remains contestable, namely a definitive 'we'.

Nevertheless, there are a few strongholds that may enhance the success rate of this negotiation process. We mentioned one already: in search of identity, it seems wise to aim at flexibility rather than rigidity, as conditions in a group's environment are in the habit of changing in unpredictable ways. There is, however, another side to this coin, namely reliability. To make references to a plural self *reliable*, the ascriptions of its properties should be reliable. These can only be trusted to be reliable if they are tested against criteria that are not controlled by the same agents that make the ascriptions. To a considerable extent, political identity is based on recognition from 'outsiders'. As in the case of the individual person, not just self-awareness but reliable self-awareness is the key to sustainable social orderings. This does not imply any form of collectivisation in the sense of subjecting individuals to the group, but there is no point in denying that 'identity' – in both the

singular and the plural mode of the self – comes with ‘targeted unity’. Split polities are as pathological as split personalities if their parts are radically antagonistic (as is the case in unconstitutional secession and civil war), and cannot see themselves as parts of a larger (bounded) whole.

Pathology aside, let us stay focussed on the point where I said that the process of self-identification in a polity has to do with (division of) labour. I should explain what this has to do with (im-)migration. Remember what was said about labour at the very beginning of this paper: In the final analysis, labour is about reproducing human existence in interchange with one’s environment. On this account, the process of articulating a plural self may indeed be characterised as ‘labour’. This is most evident in the case of revolutions, that more often than not come with a promise of the birth of ‘a new human being’. Typically, what initiatives of revolt need, is the contributions of ‘the many’ or ‘the multitude’, as an infinite reservoir, not only of forces but also of ideas. Under these circumstances, participation is maximally open towards both agents and action. As the polity itself is at issue, there is no pre-given decision with regard to what counts as a contribution and who counts as a partisan. The process is under-coordinated, which is one of the reason why, soon after a revolution has proclaimed its success, it tends to ‘devour its own children’. It is not different in less dramatic cases, in which a society gradually transforms into what it sees as a new era for itself, demanding the articulation of a new, more reliable and sustainable ‘we’. In what sense does this reveal the logic of labour emerging at the heart of political logic? In what sense does it emerge through massive immigration, in particular? Take, for instance, how a polity P that thinks of itself as ‘western’, ‘modern’, ‘democratic’, ‘liberal’, ‘welfare directed’, etc., prepares for human-induced climate change, or for genetic engineering. Note, first and foremost, that we ascribe such preparations to ‘society’ rather than ‘the polity’. This simple change of words already suggests that we are trying to capture a level of social life that is not yet affected by the inside-outside gambit of political action; political action comes with the claim to order social life, and thus precedes it, conceptually. Note also that, in the case of climate change, the phenomenon of ‘climate refugees’ coming P’s way as potential immigrants, hugely enhances P’s awareness of the challenge it has to face, hence the need for a reliable plural identity. It is this very influx, as well as P’s response to it, that I propose to regard as ‘labour’. Look, secondly, at the manifold of pursuits converging and diverging around such alleged phenomena; the narratives told, the technologies presented, the policies announced, moral debates arising, stock markets moving, etc. All of these dynamics transgress the basic fault line of P’s self-inclusion, though not

without returning to it at the end of the day, reiterating P's identity in a new key. For P, there is little point in denying, for instance, that a large amount of these narratives, announcements, and movements, are conveyed to it by what immigration from China to P (and similar polities) has achieved on a global scale: the business China acquired, the resources they bought, the infrastructure they erected. P facing China as the new economic and military world leader is what I call 'labour' in the sense proposed consistently from the beginning of this paper. It is part and parcel of the process of reproducing human, hence societal, existence. This 'job-to-be-done' is a political exercise that, at its heart, exceeds the logic of political ordering in order to re-order, re-re-define, and re-produce it. Assess, thirdly, how inclusive and under-coordinated this process of labour and labour division is. Reports on South Korean experiments with cloning, or disastrous flooding in Myanmar, do not register as *faits divers* from remote places, but as challenges to a western society like P is exposed to. They matter because they propose a division of labour to which P cannot afford *not* to respond, in the short or the long run. Here, once more, migration matters. It registers not only as 'im-migration' from the viewpoint of established polities like P, as we saw in the first section. It also registers, within P, as e-migration from other polities. It matters to P in the first-person plural. To express this more perspicuously, I propose to add this 'P' (for a specific polity) in superscript to the first-person plural pronoun.

We may say then, that migration matters to us^P, not only as *our*^P political problem (what about our^P borders?), but also as *their* political problem spilling over into ours^P (what about their borders?). Their and our^P interests meet, i.e., we^P are involved in their interests, neither out of curiosity nor out of moral concern, but because of 'the job' that needs to be done. This is not to say that there is a *common* problem, as their political perspective may well be radically different from ours^P. But we^P cannot be blind to this perspective, insofar as emigration, for the polity left behind, often means, e.g., brain drain, capital flight, demographic ageing, diminishing labour force, exploitation, impoverishment, etc. In this sense, the seemingly neutral term 'migration' often refers to practices proposing a global or regional division of labour that is far from indifferent to any polity left or entered. It is not at all sure beforehand where, eventually, the costs or the benefits of a certain division will fall. P would not be entirely wrong if it would come to see its dealings with problems of immigration as delayed payments for its colonial invasions of the not too distant past. In sum, we may say that the challenge of massive immigration and the response it evokes do not just cause problems for labour and the labour market, they *are* themselves forms of labour.

3 Implications for Lawmaking

We have to take stock by asking what the intertwinement of labour and migration means for lawmaking. I started out by explaining the basically different perspectives of social ordering in which the concepts of labour and migration are usually perceived. The economic perspective of reproducing human existence is home to the concept of labour requiring a division that is as inclusive as can be, given the (re-)production 'job' that needs to be done. The political perspective of establishing a bounded polity that is sustainable (hence, flexible and resilient) over time immediately makes migration dovetailing into immigration and emigration, depending on the vantage point of the polity where migration registers. Upon further reflection, however, both of these perspectives come to include the other, so that they become intertwined without merging. The joint enterprise of reproducing *human* existence requires a form of joint valuing that inevitably poses the question of identity, thus introducing the political logic of self-inclusion, hence exclusion. Then again, articulating this political logic in the form of productive action necessarily comes under the guise of division of labour, which is inclusive in principle as long as coordination is warranted.

Already at this level, there are conclusions to be drawn for policy-making in general, regardless of the role attributed to law. If the argument above is basically sound, it is probably not wise to expect that the dedicated representatives of the economy and the dedicated representatives of the polity will agree on shared arrangements. In all probability, they will talk at cross-purposes, as they will cling to the primary perspective they represent, despite the crossovers between the two perspectives. As representatives, they will be unable to represent the intertwinement from their respective vantage points. They can act and speak either as economists or as politicians, but not as both, without forsaking their roles as representatives. This is why there is scope for a third perspective, namely law.

Although it is an unwarranted generalisation, I presume that many a trained legal mind would now be tempted to hold that it is the task of law to strike 'a balance' between these two perspectives. Indeed, for all practical purposes, this is precisely what ought to be done. In doing so, however, the drift of my argument should not be taken as a plea for a conceptual synthesis of the two perspectives. On the contrary, my aim is to show that they are conceptually irreconcilable. They are and remain as alien to each other as my left leg to my right leg. Perhaps this metaphor is a felicitous one; we need both legs to walk, alternating their functions of lending support and

moving forward. This is, in my view, how, from a legal point of view, one should go about the two perspectives, striking a balance by negotiating their ineradicable difference.

A critical reader will ask what it means to strike a balance if the metaphor neither captures a conceptual synthesis nor complies with its own narrative by revealing what – in imagining a balance – is the correlate of ‘gravity’? My answer is that law *does* present such a correlate, at least in western culture. It is possible to say what it is (all) about in the end, generalising a number of legal orders and trying to grasp their ‘telos’. Law is geared towards ending and/or preempting conflict that is potentially disruptive to social order, by means of authoritative decision making. This thumbnail definition accommodates a number of features that are characteristic of law. Let me mention just three of these:

- Law is primarily interested in ending or preventing conflict in society, rather than ‘solving’ the underlying problem; although it is obvious that solving the underlying problem is a solid way to end or prevent conflict.
- Law does not aim to prevent or end all conflicts in society, only those that are considered socially disruptive. Obviously, what is disruptive of social order depends very much on which society is at stake and how it has evolved (is evolving) over time.
- Law is dependent on authority – a notion too complex to detail here any further. Suffice it to say that without recognising and shaping structures of authority, decisions taken in the name of the law are null and void.

From these features, one may infer some implications for lawmaking with regard to the intricate relationship between labour and migration. It is crucial to determine, first and foremost, the problems of this relationship in terms of conflicts that are potentially disruptive to the societies involved. Not all the problems it raises usher in conflicts – as I mentioned already, for instance, an established welfare society welcoming an unskilled labour force, in spite of the problems of immigration. Some of these problems are to be addressed by policies other than lawmaking and/or by policies other than by state agents (e.g., entrepreneurs redefining their long-term corporate interests or labour unions reinventing themselves). Moreover, not all conflicts are socially disruptive (some conflicts further cohesion and resilience), not all conflicts disrupt the same societies, and different societies may be affected in ways that may turn out to be the root causes of conflicts between them. Let me try to formulate a few ‘tasks’ that should take priority in this ‘labour on labour’ and let me link them to the parameters or values of legal validity that Gustav Radbruch proposed in his canonical

work.³ The first task at hand is an in-depth analysis of the conflict areas of migration where law has a role to play, as distinct from areas that should be left to other arrangements of ordering, such as the economy, politics, education, etc. The general parameter in this diagnosing exercise from a juridical point of view is *inequality*. In principle, unequal treatment of equal cases is the root cause of social conflict. Defining an overlapping consensus between political ideologies will be crucial in determining what case is equal to what other case(s), and what treatment will count as 'equal' in all cases. The second task, with regard to policy design, is to involve major stakeholders in labour who are *not* primarily driven by the logic of the political, for example, international businesses and banks, labour unions and consumer organisations, nongovernmental organisations dealing with migration, refugeeship, and poverty. Their responsibility is to lend 'voice' to migrants as the primary stakeholders, which obviously entails letting them speak for themselves wherever this seems possible. Without such involvement, policy-making will not be 'expedient'. The third task is to review structures of authority that could ground legal decision-making, so as to enhance legal certainty for migrant workers. Here, EU authorities could take the lead in the pursuit to enhance international, indeed supranational authority with regard to labour and migration. It should aim, for instance, at a more robust integration of the ILO in the current WTO environment, in spite of the lack of enthusiasm at the WTO end of the rope (the latest update on their relationship at the WTO site is from ten years ago).⁴ This does not necessarily mean that such structures have to precede legal decisions. There is a two-way street here, in the sense that legal decisions establish structures of authority as much as they make use of them. This is especially the case if and when such decisions impose not only an end to a conflict, but lead on to solving the underlying problem(s) in a sustainable way. Of course, by calling these three projects 'tasks', I do not imply that they are yet to be performed; the better part of both the literature and the policy-making on labour and migration falls squarely within these lines.

But is it possible to enhance the sense of direction that should guide these efforts? Here, I can only point to a few general parameters (and I will not hide my inability behind the confines of this paper). First and foremost, we should be aware of the fact that law is a political artefact. It is, itself, made (i.e., posited in the encompassing sense of enacted, executed, and applied) by

3 Cf. his *Rechtsphilosophie*, 4. Aufl., hrsg. v. E. Wolf and H.-P. Schneider, Stuttgart, Koehler Verlag, 1950.

4 Available at: https://www.wto.org/english/news_e/news07_e/ilo_feb07_e.htm.

political action. It therefore cannot evade the logic of the political explained above. But then, though made by politics, it is not reducible to politics once it is made. It also undercuts politics, preventing self-inclusion from becoming relentless. In some polities, there may be largely shared moral reasons in the background of this undercutting. Since law should also be able to create social order when and where moral reasons go in radically different directions, one should not underestimate the political reasons in favour of exercising *political self-restraint*. Equal treatment, for instance of labour force, is a case in point here. Going rigorously by the logic of the political, i.e., of the polity including itself as a bounded whole, it would be perfectly acceptable to enhance the common wealth by what is usually called 'social dumping'. Large groups of legal as well as illegal immigrants are particularly vulnerable to the various practices that come under this name. To counter these practices, one may use moral arguments that point to pervasive notions such as human dignity or moral rights. But it is often more convincing to appeal to the danger of a rigorous pursuit becoming a rigid pursuit, at the cost of harm to the very polity venturing such pursuit. The Viking and Laval cases before the European Court of Justice, for instance, banned unequal treatment because it jeopardises the internal market of the European Union rather than its moral virtuousness. Similarly, on a global scale, there is increasing evidence that a WTO labour rights clause is to be advanced for the sake of greater productivity, hence trade capacity, in low-wage countries, hence for the sake of 'good' ('smooth') trade worldwide, rather than for the sake of allegedly 'universal' moral rights.

Going on to a second parameter, for the very same reasons, *democracy* appears to be a *relatively* successful format of lawmaking. In a polity consisting of changing majorities and minorities, it holds on to the principle that any majority may follow its preferences, on condition that it abstains from the use of violence in leaving to any minority, the institutionally warranted chance to become a majority. It is only consistent (though not logically compelling) that the same polity would apply this very principle in the relationships with other polities as well. Prior to all metrics of voting and electing by which one may articulate 'majority rule', this principle anchors the idea of 'self-government by the people' in institutional reality. It harbours an understanding of the people's 'self', i.e., their identity, in terms of majorities and minorities constantly in flux, with only one permanent point of reference: their commitment to majority rule. By the same token, it shows that the 'identity' of a plural self does not necessarily take us into the conceptual realm of monolithic polities, totalitarian states, central authority, and their ilk. On the contrary, it opens up to political strategies

for large groups of relatively powerless people to gain power by getting organised. Thus, we may say that democracy is a powerful format to arrange political self-restraint in lawmaking, but it is not the panacea of lawmaking under all circumstances. Under conditions of so-called ‘transitional justice’, i.e., in the transition from a polity torn apart by oppression or civil war to a polity under the rule of law, democracy is in transit, too. Preempting major conflict in such a society, e.g., by enforcing lucid (rather than strict) anti-corruption policies, may well require temporary authoritarian rule, on the very same grounds that would ‘normally’ foster democracy. Rwanda seems a case in point here.

As a third parameter, I suggest that, as a matter of principle, lawmaking should be regarded as *transboundary*, by all three powers involved in it: legislative, governmental, and judicial. I prefer the predicate ‘transboundary’ over, for instance, ‘supranational’, for various reasons. The most salient one is that I propose to steer away from the idea that one should first establish cooperation and, indeed, institutionalisation of dedicated legal bodies on a level beyond the national state before one can embark on lawmaking. Important as such cooperation may be in its own right (cf. the transposition of EU directives, the reinforcement of the role of the ILO), the driving force of labour lawmaking should be elsewhere. A ‘transboundary’ vantage point should be the hallmark of both national and supranational legal agents who opt for law as political self-restraint. This applies to legislators implementing supranational rules and standards, to governments enforcing them by international cooperation, to judges exercising discretion after due comparative research informed by legal principles rather than domestic black letter rules. With regard to the latter, ‘judicial dialoguing’ – as it is sometimes called – should take place not only between the judges of supranational polities like the EU, but also between judges in sending and receiving migrants, difficult as these dialogues may be.

A fourth parameter regards the attribution of fundamental rights to migrants, often used by a polity to differentiate not only between legal and illegal immigrants, but also between different subcategories on both sides of this divide. I would like to point to the *interconnectedness* of fundamental rights. You cannot have one without the other. It is common policy, for instance, to distinguish free movement rights of workers from rights to family life, rights to health care and education, and political voting rights. The latter, again, are often subdivided into voting rights on various institutional levels of the polity, e.g., municipal, national, federal, and their ilk. One should see these differentiations as varied efforts to negotiate the boundaries of the polity. As I argue above, such efforts are part and parcel of the way

politics exist, and there is no point in dubbing them ‘right’ or ‘wrong’ as such, let alone in arguing that they should be abandoned in the name of morality. What morality may demand is that they should be made under provisions of self-restraint; a demand that backs up, by principle, what is often enough already demanded by prudence. It is precisely the exercise of political self-restraint that will make legal authorities recognise that access to education and health services come in the wake of the right to family life, which sooner rather than later turns out to be a sequel to a permission to enter, which, in turn, only illustrates that fundamental rights root in *human* rights, and one cannot reduce humans to workers. After all, labour, indeed, is about reproducing *human* existence.

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