

# The Nexus between Immigration, Integration and Citizenship in the EU

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**Abstract**

What is the nexus between immigration, integration and citizenship in the EU, and what are the effects emerging from that relationship? The papers presented at the CHALLENGE seminar of 25 January 2006 addressed these questions and offered an overview of the main trends, issues, uncertainties and vulnerabilities surrounding these contested issues.

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# UNEQUAL CITIZENSHIP: INTEGRATION MEASURES AND EQUALITY

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## Introduction

In this paper I briefly discuss some of the aspects and implications of the ‘integration measures’ that are being adopted in the Netherlands at present.<sup>1</sup> These can be brought under three headings:

- *Equality*. The various integration measures proposed, passed and pending raise a host of questions concerning equality, equal treatment and discrimination. Here I focus only on the results as to the degrees of citizenship:
  - a shift from the previously clear and inherent inequality between citizens on the one hand and non-citizens on the other, towards a very complex distinction of various degrees of citizenship attending to different groups of persons, depending on their specific background, which is reminiscent of the various statuses within empires;
  - there is an incidental positive aside, in that distinctions that seemed to exist under EC law, particularly those in which reverse discrimination was allowed (national citizens can be treated less favourably than other EC nationals, who must be granted minimum treatment in the field of, e.g. free movement across borders), has in the discussion on integration measures come to be considered unlawful in the Netherlands; and
  - no longer is citizenship determined by the external territorial borders of a state; it has become personalised (dependent upon the particular background the person happens to have) and leads to ‘internal’ borders between citizens within a national polity.
- *‘Juridification’*. The integration measures express the move from social policy measures to immigration measures.
- *An inversion of form and substance*. An inversion has occurred from conferring a status that entails rights (and duties) to a situation in which duties come first for the entitlement to rights, with only the possibility of formal citizenship status as an eventual consequence.

## 1. The integration measures

What are the integration measures that are at play at the moment? There are three, of which two have been adopted (among these, one has entered into force and the other shall enter into force soon); the third measure is now pending (after the withdrawal of a very drastic proposal). The central aim of all three measures is expressed in the Dutch titles of the Acts. None of them speak of ‘integration’ but rather of *inburgering*, which is very much like the term ‘enculturation’ but having a root of *burger*, which means ‘bourgeois’ or ‘citizen’. So the acts address the entrance into citizenship/civility/civilisation.

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<sup>1</sup> This paper has been written in the framework of the CHALLENGE Research Programme, financed by the DG for Research of the European Commission under the Sixth Framework Programme.

The content of the process imposed is essentially that of acquiring knowledge of Dutch society and the Dutch language. The three acts pose increasingly more obliging requirements on groups of persons wishing achieve entitlement to long-term stay in the Netherlands.

First is the 1998 Act on the Integration of New Immigrants (*Wet inburgering nieuwkomers*). This has entered into force. In essence it prescribes an integration programme of 600 hours of language training and general knowledge of Dutch society for ‘newcomers’, aliens and Dutch nationals born outside the Netherlands who are aged 18 years and older and who have come to the Netherlands to reside for an indefinite period for the first time. Among the exceptions are those persons who come to the Netherlands only for a limited time for a specific reason (for instance, those who work for a limited time), and those “who on the basis of provisions of treaties or decisions of international organisations cannot be obliged to participate in an integration programme”.<sup>2</sup> The sanction for *not participating* in the programme is an administrative fine.<sup>3</sup> The Act entered into force on 30 September 1998 and is still in force.

The second measure is the 2005 Act on Integration Abroad (*Wet inburgering buitenland*). This measure requires third-country nationals who come from countries for which a visa requirement exists<sup>4</sup> to pass an oral test in elementary Dutch (and social knowledge) while still abroad. The test is to be assessed with the use of a computer at a Dutch embassy or consulate general in the country of residence, and will cost approximately €350. The sanction *for failing to pass* the test – which is required for the visa – is that the special visa may be refused. This Act was passed on 22 December 2005 and is to enter into force on 15 March 2006.

The third measure is the bill on Integration (*Wet inburgering*), which was introduced in October 2005 into the Lower House, where it is pending. When adopted, the Act is to *replace* the above-mentioned 1998 Act on the Integration of New Immigrants. Adoption can be expected before the elections of May 2007. In principle the Act is to apply to all third-country nationals and to naturalised Dutch citizens enjoying a social benefit allowance (including unemployment benefits and minimum welfare allowances) or having the care of minors resident in the Netherlands. There are again a series of exceptions, some of which are substantive and others formal. A substantive exception is for persons who have been residing in the Netherlands and have enjoyed eight years of compulsory education; these individuals are assumed to have acquired a sufficient knowledge of the Dutch language and society. Exceptions on formal grounds include EU and EEA citizens and again the broader category of those “who on the basis of provisions of treaties or decisions of international organizations cannot be obliged to participate in an integration programme”. Sanctions for *failing to pass the test* are administrative fines and (for foreigners) prevention of acquiring entitlement to long-term residence (the bill does not provide for expulsion for failing to pass the test).

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<sup>2</sup> *Wet inburgering nieuwkomers*, Art. 1 (1) a: “op grond van bepalingen van verdragen of van besluiten van volkenrechtelijke organisaties niet verplicht kan worden aan een inburgeringsprogramma deel te nemen”.

<sup>3</sup> This fine is in principle 20% of the relevant social assistance benefit (*Bijstandsuitkering*), which is a sum that may vary depending on the family situation from (at the time of writing) approximately €14 to €240; the fine is doubled if within 12 months from the imposition of a first fine, an individual still has not complied with the duty to register and take part in an integration programme; see *Boetebesluit inburgering nieuwkomers*, Staatsblad, 1998.

<sup>4</sup> This concerns the *machtiging tot voorlopig verblijf*, an authorisation for temporary residence that has to be obtained in the country of origin.

## 2. Equality

The integration measures raise many issues of equality and hence bring into play international treaty commitments such as Art. 26 of the International Covenant on Civil and Political Rights, the 12<sup>th</sup> Protocol of the European Convention of Human Rights, along with Art. 1 of the Constitution, which prohibit discrimination and unjustified unequal treatment.<sup>5</sup> A major problem in this respect concerns the exemption of some persons on formal grounds. This exemption has nothing whatsoever to do with the knowledge that such persons have or even can be expected to have of the Dutch language and society. The provision makes for the unequal treatment of aliens who have no such knowledge: some of them may be admitted and acquire an entitlement to (long-term) residence, while others are not. Moreover, the third-country nationals who have to comply with the integration requirements tend not to be white Europeans, and hence indirect discrimination on the grounds of race and ethnic origin also comes into play. Further, the distinction between (some groups of) Dutch nationals who are naturalised and those who are Dutch by birth raises tremendous legal complications regarding equal treatment and legal certainty.

Within the scope of this paper it is not possible to analyse these matters in detail. Here I wish to note the consequences of the integration measures for the types and degrees of citizenship that are being created. In the past, the essential and inherent inequality at issue was that between citizens and non-citizens. To this the category of denizens was added, those who had a right to residence but not to the nationality of the place of residence. But these matters are no longer so easy at all. Even the threefold distinction between citizens, denizens and those non-citizens who cannot be classified as denizens, can no longer be made from the perspective of the integration measures – measures that in the Dutch context are not merely a matter of ‘integration’ but explicitly a matter of ‘citizenship’, *inburgering*. After all, certain Dutch nationals can also be subjected to these measures. This latter point applies to those falling under the 1998 Act, i.e. those Dutch nationals born outside the Netherlands (mainly Antillean and Aruban Dutch nationals), a distinction that the new bill retains as an interim measure,<sup>6</sup> while the new bill also applies to naturalised Dutch citizens with children who are minors or who receive social benefits.

## 3. Imperial citizenship

All this leads to a variegated situation regarding citizenship, which relates to the personal status of each individual. This calls to mind the situation in empires, both those of classic history and those of colonial times. Many classes of citizens existed, depending on where they happened to be born and or the territorial or habitual place of residence within the realm, and of course, on the degree of civilisation inferred from the place they happen to come from. The situation we find ourselves in at present creates a differentiated status defined by substantive rights of citizenship. In this presentation this concerns substantive rights of residence, but one could tell a similar story concerning that other traditional right of citizenship: voting rights.

The number of groups of citizens we can distinguish on the basis of whether one needs to *inburger* – to enter into citizenship and civility by being subjected to integration measures – is at least six, although in reality there are even more groups (for instance the citizens of new

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<sup>5</sup> The first two are justiciable in the Netherlands on the ground that the courts consider these to be directly effective provisions of the treaties, which on the basis of Art. 94 of the Constitution have priority over acts of parliament. An alleged violation of Art. 1 of the Constitution by an Act of Parliament is not justiciable under Art. 120 of the Constitution, which prohibits courts to review the constitutionality of acts of parliament. The latter, however, is bound to review bills against Art. 1 of the Constitution.

<sup>6</sup> See Art. 58 of the bill.

member states who in the Netherlands do not yet enjoy free movement rights, as well as the Turks under the Association Agreement). Further, the nature of the integration measures, particularly the integration test to be undertaken abroad, would alter the picture, but we will try here to keep it somewhat simple.

The six main groups we can distinguish are the following:

- 1) *Dutch citizens by birth.* These persons **cannot** be subjected to integration measures.
- 2) *Dutch citizens who need to become more of a citizen (or a more virtuous citizen).* This group includes those falling under the 1998 Act on the Integration of New Immigrants, mostly Antilleans and Arubans who come to the Netherlands for the first time. The measures in the new bill on integration will also apply to naturalised Dutch persons who receive social benefits or have children who are minors. All these persons **are** subjected to compulsory integration measures.
- 3) *Non-Dutch EU and EEA citizens.* These groups of citizens are privileged, irrespective of whether they have any knowledge of the Dutch language or society – a knowledge that is not generally assumed to exist for most non-Dutch EU and EEA citizens. They **cannot** be subjected to integration measures.
- 4) *Aliens with EC privileges but who require more integration.* These persons are mainly long-term third-country residents and reunified family members falling under the two relevant EC directives. They **are** subjected to integration measures. Notably, long-term resident third-country nationals who have already been subjected to integration measures in another EU member state can only be subjected to the language part of the integration requirements.<sup>7</sup>
- 5) *Aliens who lack EC privileges but benefit from bilateral agreements.* This group comprises citizens from countries with which bilateral agreements have been concluded, which accord them national or most-favoured nation treatment in general as well as with regard to migration issues in particular. This concerns the Japanese, US citizens and Australian citizens. They are exempt and **cannot** be subjected to integration measures.
- 6) *Aliens without privileges.* These persons are the true aliens. They **are** obviously subjected to integration measures.

#### 4. Borders: External and internal, territorial and personal

What becomes apparent from the list above is that personal status as linked to rights of residence is no longer a matter of the borders of the polity in the traditional territorial sense. Territory is no longer decisive. It is presumed knowledge of a country and the virtue of being able (or vice of not being unable) to speak the language, which are substantive elements in the distinction. But the presumption is linked to birth, background and origin. The consequences attached in terms of residence rights also imply that the borders are less geographical and have become personal as well. New borders are being created within the polity, dependent on the personal status of an individual. Some are in the country but not full members of the polity and in a sense outside it.

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<sup>7</sup> See Art. 15(3), final paragraph of Council Directive 2003/109 of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16/44, 23.1.2004.

## 5. From social policy measures to legal immigration regimes

What we can notice in the course of the programme for introducing integration measures is a shift away from seeing integration as a positive social measure towards a shift to mainly repressive immigration measures.

Integration programmes in the form of language and general societal knowledge courses, as well as courses on certain social skills aimed at improving the position of certain groups of immigrants for the labour market, existed for quite a few years before the 1998 Act. The pre-1998 legal instruments have to be qualified as ‘soft law’. They involved financial instruments enticing and facilitating courses and programmes to be organised at municipal level for targeted groups. The 1998 Act turned this into ‘hard law’. But in fact the 1998 Act itself was not an immigration measure, although it was exclusively aimed at immigrants. The concept of sanctions was not in the sphere of migration law or residence entitlements.

This decisively changed with the Act on Integration Abroad. The sanction of not passing the test taken abroad is the refusal of a visa for the Netherlands. This aspect turned what could still in essence be viewed as a *social* measure aimed at solving (and preventing) a certain (and very important) social problem, into an *immigration* measure. Such a turning point can be viewed as an epiphenomenon of the present political climate in the Netherlands, coinciding with the rise of the late Pim Fortuyn and his LPF party, which views the huge social and economic problems of groups of persons living in certain (mainly but not only, urban and suburban) areas as a problem of ‘foreigners’ living in the Netherlands – aliens who should be kept out.

What this way of looking at social problems fails to recognise is that these severe and real problems themselves are nowhere near being solved by the kinds of tests imposed. It is, to put it mildly, a rather indirect way to solve a labour market problem by imposing a language test requirement. Nor can computer-steered language tests abroad solve problems of housing and urban planning, or social and cultural isolation. Immigration measures are no substitute for social and economic measures, certainly not if the nature of the problem is mainly social and economic in nature – although this rather simple truth seems to be repressed in the political conscience of national politicians. And even if the problem is viewed not as a social or economic one, but in terms of culture – as with the present war on Islam conducted by politicians such as Hirsi Ali – it is still not solvable through the simplicity of language or other knowledge tests.

If one has a close look at the documents accompanying the various integration measures when they were introduced, then the documents themselves mention the real targets of the measures. They are mainly: Turkish and Moroccan brides imported by second-generation Dutch nationals from Turkish and Moroccan issue; culturally and socially isolated Turkish and Moroccan mothers with children; a well-defined group of unemployed young men coming from the Netherlands Antilles island of Curaçao to find their luck in the Netherlands, who end up in criminal circles here; those who enjoy social and unemployment benefits; and those who have difficulty accessing the labour market.

These problems of these four of five groups can hardly be solved by immigration measures. ‘Keeping them out’ by imposing language requirements upon entrance and admission to the Netherlands is a rather simplistic way of approaching the (again very real) problems of these groups of persons. There is also a legal point to this: where the immigration measures run into issues of unequal treatment and discrimination because they are too broad yet fail to cover all the relevant aspects, targeted social measures will not so easily run into similar problems

## 6. Form and substance inverted

It is quite clear that so far we have been discussing citizenship in substantive terms: citizenship in relation to the qualities one should possess and the rights to which they give access. This quality characterises the full brunt of the integration measures in the Netherlands. This policy direction means a reversal compared with the previous schematic outline of the situation. Once upon a time the relation between status and rights was based on the presumption that the person who acquired a certain citizenship status, in particular nationality, by birth, marriage or adoption, subsequently enjoyed rights of citizenship, such as long-term residence rights. And as a natural consequence one acquired the knowledge of the language and society in which one was living.

The recent integration measures are based on the opposite idea. First one must prove that as a matter of fact one sufficiently knows the language and society before one is allowed to have residence there. One must first prove to be a good citizen, to be worthy of the rights of citizenship, before one can formally acquire such rights. Initially, there are obligations (civic duties), followed by substantive rights and ultimately one may then acquire a formal status like that of nationality.

This trend coincides with a republican view of citizenship, where virtue and duty (*officium*) are the conditions for true citizenship. Are the integration measures in the Netherlands to be viewed as signs of re-kindled republicanism? I think not. Republicanism in the classic sense of civic virtue has not been much of an ideology in the Netherlands since the 19<sup>th</sup> century. Although one cannot exclude the development of some form of consistent neo-republican political thought and practice, I deem it more likely that the integration measures must be viewed as an instrument of political and social pragmatism. Politically, they are mainly a pragmatic response to a populist political correctness that is prevailing throughout the political spectrum since the successes (and tragic demise) of Pim Fortuyn (the necessity of these integration measures as essential elements of a migration policy are supported equally by left wing, right wing and centre parties). Socially, it is in a sense an attempt to address real and urgent social problems. But as such it is a largely misguided attempt, which has a more symbolic nature than the ability to solve the problems it is supposed to address.