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**Conditional belonging**

*A legal-philosophical inquiry into integration requirements for immigrants in Europe*

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## Chapter 3

# Structural Risks of Integration Requirements

In the previous chapter, I established that the contemporary academic literature on the ethics of migration does not reflect on the particulars of the relatively novel (obligatory) integration requirements for TCNs in several EU Member States. The ambition of this literature, I explained, is to present general theories on immigration (border control) and naturalization (the acquisition of citizenship). As a result, it does not provide contextualized normative frameworks to conduct a detailed analysis of state policies that monitor the prescribed residential inclusion and potential civic inclusion of legal immigrants (such as family migrants and refugees).

For this reason, we must draw upon other academic perspectives to understand and evaluate the integration measures in EU countries described in Chapter 1. In this chapter, I will discuss three such perspectives. First, I will turn to the scholarship on liberal nationalism that focuses on liberal forms of nation-building and the boundaries of a liberal national identity.<sup>242</sup> This normative body of literature has not extensively engaged with integration requirements for citizenship, with the exception of a few noteworthy points. Its focus has been to explore whether such requirements can be justified *in principle* based on liberal accounts of nation building. In the end, I however found this research approach to be insufficient. In fact, the main goal of this chapter is to demonstrate that this approach should be supplemented with a normative analysis, acknowledging that the most prominent risk of integration requirements is that they are prone to exploit the inherent power imbalance between receiving states and legal immigrants that are not yet equal members of the political community and legal order. In other words, I argue that if we want to evaluate the normative quality of integration requirements as conditions for attaining increased rights such as secure residency and full citizenship, we should not only search for *possible* defenses of the legitimacy of these policies. Instead, we should also be attentive to the *actual* risks of

242 E.g. Tamir 1995; Kymlicka 1995, 2002; Miller 1995.

such integration requirements and evaluate them based on how well they provide safeguards against their susceptibility to be used for exclusionary purposes.

To substantiate this claim, I will also — and this is the second academic perspective I discuss — examine the social science scholarship that has emerged on the integration requirements in Europe, conducted by empirical scientists such as legal scholars, sociologists and comparative political scientists. This literature is equally relevant, as although it consists of empirical research, it (implicitly) operates within the same theoretical framework as liberal nationalists.<sup>243</sup> Most often, it maps and categorizes the different integration laws across European states and places them on a continuum from ‘prohibitive’ to ‘enabling’ (or similar terms, such as ‘liberal’ to ‘restrictive’).<sup>244</sup> Hence, at the core, the social sciences work with the same assumption as liberal nationalists, that is, that linking integration requirements to obtaining increased residential or civic rights is *in principle* legitimate. As a corollary, in its own way, this literature also illustrates that this research approach problematically underemphasizes the involved structural risks of enacting integration requirements on individuals who have not yet obtained secure residency and full citizenship. As a result, the social science scholarship also lacks analysis on how to possibly *avert* the growth of overly prohibitive integration requirements as conditions of access to social programs, permanent residency, citizenship and so forth.

On that account, in first half of this chapter, I will deduce that both liberal nationalists and social scientists working on integration requirements provide helpful information about the potential justifiability of integration requirements — but *do not* deliver us comprehensive responses, let alone solutions for, the intensified use of (mandatory) integration requirements for TCNs as described in Chapter 1. However, interestingly, the underlying reason why they are unsuccessful in delivering such comprehensive responses reveals indispensable information about the supplementary normative approach that is required for assessing these requirements.

Moving from this discussion, in the second half of this chapter, I address a third academic perspective on integration requirements. More particularly, I will explore the work of James Hampshire and Linda Bosniak to understand the real-world legal and political dynamics behind the integration requirements in Europe. In this context, I conclude that the Achilles heel of these policies involves a normative focal point, highlighting that these measures are applied to non-citizens who have no secure residency, no full constitutional protection and no strong political voice yet in the liberal-democratic state that receives them. *This* aspect, I argue, makes the integration requirements for TCNs in EU Member States vulnerable (from a normative viewpoint), particularly when anti-immigrant

243 E.g. Joppke 2007a, 2007b; Kiwan 2008; Cooke 2009; Guild *et al* 2009; Peucker 2008; Howard 2009; Van Oers 2013; Goodman 2010a; Michalowski 2011; Goodman & Howard 2013.

244 See e.g. the ‘civic integration index’ of Sarah Wallace Goodman (2010) and the Citizenship Policy Index of Marc Morjé Howard (2009).

attitudes are on the rise and politically mobilized. Therefore, normative evaluations of integration requirements that fully ignore this Achilles heel are incomplete. Their approaches underestimate the risks of granting states the discretion to impose ‘integration’ obligations that demand efforts and costs on legal immigrants who are in a precarious position.

To explain this, the structure of this chapter is the following. First, I will summarize the main arguments of liberal nationalists regarding integration requirements for citizenship and expound the social science literature on the integration requirements in EU Member States. Then, I will explain the limitations of the normative approaches of these bodies of literature. After that, I will revisit the political and legal mechanisms and societal dynamics that shape integration policies, through the work of James Hampshire and Linda Bosniak. Lastly, I return to the main findings of Chapter 1 to illustrate that we should indeed not only evaluate integration requirements based on whether they can be defended as legitimate in principle, but also evaluate if they are justifiable in practice.

Before starting, it is worth to mention the following. In the previous chapter, I emphasized that the significant growth of integration requirements in EU Member States triggers several normative issues (that, I reasoned, have not been sufficiently addressed in the ethics of migration). In the present chapter, I focus on one of those issues, that is, on what the normative salience is of the unequal power relationship between arriving TCNs and receiving liberal-democratic states. In the next chapter (4), I will zoom in on the potential symbolic and societal effects of these integration requirements on how citizens perceive each other. I will make clear that these two processes — respectively processes of *precarity* and processes of *stigmatization* — are two distinctive types of risks and harms. I contend that both are at work in Europe today and that both are problematic, but for different reasons.<sup>245</sup>

## 1. Liberal Nationalism and the Social Sciences on Integration Requirements

In political theory ‘liberal nationalists’ such as Will Kymlicka, Yael Tamir and David Miller describe the bandwidth for fostering national identity in the context of liberal democracies. On the one hand, they seek to understand the neutrality of the liberal-democratic state and, on the other hand, they explore the merits (or necessity) of upholding a national identity that motivates citizens to recognize each other as belonging to the same historical and intergenerational society. In a nutshell, defenders of liberal nationalism argue that states are permitted to foster forms of nationhood in order to secure solidarity and stability, as long as the promoted national

245 A person can have a precarious legal status without being subject to stigmatization and, conversely, naturalized immigrants may no longer be precarious but may still be stigmatized. In Chapter 5, however, I will propose an institutional solution that addresses these two processes at the same time.

identity is ‘thin’<sup>246</sup> and underpinned by the principles of liberal democracy. This thinness involves that it is inclusive towards people from different (ethnic, cultural, religious, etc.) backgrounds and that it does not limit the capacity of individual citizens to choose or revise their personal conceptions of the good.<sup>247</sup> Otherwise said, according to liberal nationalists, it is from the perspective of liberal democracy not per se troublesome if states employ strategies of nation-building and promote a national identity. They observe that, just as other nations, liberal-democratic states are ‘imagined communities’ of groups of people that share a territory, historical community and future.<sup>248</sup> Nonetheless, crucially, liberal democracies are distinguishable from illiberal and undemocratic states based on the inclusive type of nationhood they promote.

On a more fundamental level, liberal nationalists assert that the norms and skills of democratic citizenship are not innate, but must be learned, socialized and practiced. The state is therefore permitted to create an ‘ethical community’<sup>249</sup> with an official language, national symbols and common institutions. Under these conditions, it is then thought, people are most likely to fulfill their obligations of justice towards each other and will be able to participate as equals in democratic deliberations and societal life.<sup>250</sup> For that reason, liberalism and nationalism are not only described as reconcilable but rather as complementary and strengthening each other. Or as Yael Tamir puts it: ‘No individual can be context-free, but... all can be free within a context.’<sup>251</sup>

In this body of literature, the use of integration requirements is discussed, but only in relation to monitoring the *political* inclusion (i.e. naturalization) of newcomers — not in relation to obtaining other rights, such as a visa to migrate for family migrants or obtaining permanent residency. And in general, liberal nationalists hold that to install some pre-naturalization demands for newcomers should be perceived as a standard political practice. More specifically, the enactment of integration requirements for citizenship is listed as one possible example of a public tool that may be employed by the state to promote its national identity, official language(s) and to stimulate democratic socialization. Will Kymlicka, for example, holds that permanent immigrants should have: ‘relatively easy access to citizenship after, say, three or five years of residency, with minimal tests of national integration, including knowledge of the national language, knowledge of national history and institutions,

246 Kymlicka 2002, 265.

247 Kymlicka 2002, 265.

248 Anderson 1983.

249 Miller 1995, 23.

250 An open question for liberal nationalists is of course why the nation-state would be the best (or perhaps even only) political unit and social context to achieve such an ‘ethical community’.

251 Tamir 1995, 14.

and an oath of loyalty to the country and its constitution.<sup>252</sup> Along the same line, David Miller writes that permanent immigrants ‘should be admitted on the basis that they are citizens in the making. This implies they should be granted a wide range of rights straight away, and the rest will follow as soon as they have fulfilled whatever residence requirements and citizenship tests the state imposes.’<sup>253</sup>

In short, liberal nationalists conclude that integration policies for increased rights can in principle serve legitimate nation-building goals, even as they acknowledge that it would be illiberal and illegitimate if these policies involve unduly ‘thick’ conceptions of national identity that interfere with an inclusive attitude towards diversity in personal matters (such as religion, culture, personal views on the good life, etc.) or impose burdensome requirements.

To grasp the limits of this research approach on integration requirements for increased rights for legal immigrants, I think it is also interesting to look at the social science literature that emerged over the last two decades on the integration requirements in EU Member States. This social science literature builds on the liberal nationalist position to the extent that it distinguishes ‘liberal’ and ‘enabling’ forms of integration policies from the more ‘illiberal’ or ‘prohibitive’ forms.<sup>254</sup> Accordingly, social scientists most often accept that integration requirements can be employed as reasonable tools of communication that lay out the required responsibilities, knowledge and civic virtues to be a citizen.<sup>255</sup> Nevertheless, they also emphasize that these requirements provide policy makers with ‘instruments to use positive, politically acceptable language of integration and inclusion to achieve potentially objectionable and discriminatory outcomes of exclusion’.<sup>256</sup> Therefore, although social scientists clearly offer more context-sensitive and also more critical analysis of the integration demands for TCNs in Member States than liberal nationalists, they essentially mirror the political theory on liberal nation-building. It is assumed that integration requirements as conditions for increased rights can be benign, but it also identifies forms of integration policies that are exclusionary and illiberal. This research perspective, therefore, as I see it, suffers from the same methodological blind spots as the scholarship on liberal nationalism. Having in principle accepted the legitimacy of such policies, the literature only highlights which integration requirements are inclusionary and exclusionary — *not* how best to prevent them being misused for exclusionary effects.

252 Kymlicka 2007, 36-37. In this context, Kymlicka, as other liberal nationalists, holds that long-term immigrants have a right to full citizenship based on the argument developed on the ethics of migration that the inner logic of democracy demands that permanent members of society should obtain equal citizenship.

253 Miller 2008, 375.

254 See e.g. Goodman 2010; Howard 2009.

255 E.g. Orgad 2009; Hansen 2010; Hampshire 2011.

256 Goodman 2011, 235. See also e.g. Groenendijk & Van Oers 2010.

For example, Dina Kiwan argues that the enactment of integration requirements in the UK in the form of language standards is not a restrictive measure but ‘more an entitlement than a hurdle, providing new citizens with the opportunity to actively participate — socially, economically and politically — within their new society’.<sup>257</sup> Yet, Melanie Cooks fiercely criticizes Kiwan’s research and is of the opinion that the integration and citizenship laws she defends, though justified by politicians and their advisors as ‘empowering’, are in fact ‘highly illiberal legislation which seeks to limit the rights of asylum seekers, spouses wishing to join their families and migration from outside the EU’. Additionally, Cooks writes that the language requirements in the UK are ‘a powerful linguistic gate-keeping mechanism which disproportionately affects low-paid workers and vulnerable members of society’.<sup>258</sup>

On a more systematic scale, Sarah Wallace Goodman tries in her influential work<sup>259</sup> to develop a ‘civic integration index’<sup>260</sup> to categorize the (mandatory) integration requirements for residency rights and political inclusion in several EU countries. She develops categories of these requirements based on the underlying citizenship strategies of these countries.<sup>261</sup> In 2010, for example, she discerned that Austria, Denmark and Germany had ‘prohibitive’ citizenship strategies and had installed high barriers towards full citizenship. In contrast, Belgium, Finland and Ireland opted for ‘enabling’ citizenship strategies. This shows that Goodman’s analysis rests on the (tacit) assumption that the use of integration requirements as conditions of residency rights or political inclusion is not *necessarily* problematic. This is also illustrated by an argumentation she co-authored with Marc Howard, in which it was observed that Belgium had also enacted integration requirements for naturalization that asked for demonstrations of integration and knowledge of one of the three national languages. However, instead of assessing that Belgium’s citizenship strategy as more ‘prohibitive’, Goodman and Howard concluded that it had ‘normalized’.<sup>262</sup> After all, they concluded, Belgium’s citizenship scheme was initially remarkably liberal compared to other EU Member States. So, also here, Goodman and Howard assume that integration requirements as conditions of residency or citizenship are not *inherently* problematic. In fact, for a country to have a small number of integration requirements that structure the path to permanent residency

257 Kiwan 2008, 73.

258 Cooke 2009, 76.

259 See Goodman 2010a, but also 2010b (EUDO), 2011, 2012.

260 Marc Morjé Howard developed a similar Citizenship Policy Index (2009) that distinguishes ‘restrictive’, ‘medium’ or ‘liberal’ countries. Additionally, also Koopmans et al (2005, 2012) have developed an Index of Citizenship Rights for Immigrants, which measures the restrictiveness of nationality acquisition and cultural rights attribution. The argument I present in this chapter in response to the work of Goodman applies equally to these indexes.

261 The categories are ‘conditional’, ‘prohibitive’, ‘enabling’ and ‘insular’. Goodman 2010a, 765.

262 Goodman & Howard 2013, 130.

and citizenship (compared to having virtually no requirements) is qualified as the normal situation.

Additionally, in the social science literature comparisons are often made between different countries to signify that integration schemes for increased rights in different countries can serve different purposes, even if they, *prima facie*, appear similar. Mario Peucker, for example, compares citizenship tests in the United States, Canada, the Netherlands and the United Kingdom. He concludes that integration requirements can only be understood within a specific political framework to grasp their actual functioning and that their outcomes largely depend on the national context.<sup>263</sup> And from that perspective, he discerns that the citizenship tests in the United States and Canada are designed to ‘strengthen the prospective citizens’ commitment and loyalty to their new country’, whereas the Dutch test is designed as a ‘test to single out applicants who are not sufficiently integrated’ and the British test is employed as an instrument to ‘increase the significance of becoming a British citizen’.<sup>264</sup>

As a result, to my knowledge, no empirical country report or legal comparative study on the latest European mandatory integration requirements concludes that (or wonders whether) *all* integration requirements as a condition for obtaining increased rights are impermissible. In fact, the possibility that this could be the case is not even discussed. The task at hand is taken to be pointing out those requirements that fall safely within the boundaries of the permissible and those that do not, based on wider empirical explorations that connect to their (official or unofficial) purposes, preparation costs and content, timing and (intended or unintended) outcomes.<sup>265</sup>

## 2. Integration Policies in Principle or in Reality

Both liberal nationalists and social scientists thus oscillate in their assessments of integration requirements as a condition to gain a more secure legal status, between highlighting the merit of nation building and the risks of exclusionary or discriminatory outcomes. However, in my opinion, the recent developments in Europe as described in Chapter 1

263 Peucker 2008, 241. See also e.g. Bloemraad 2006, 675.

264 Peucker 2008, 257-258.

265 As a side note, it is also interesting to recall that presupposing that integration requirements are in principle legitimate is how the CJEU as well addresses the permissibility of integration requirements for family migration and permanent residency in EU states. As described in the previous chapter, the CJEU in principle allows such integration requirements. Good intentions on the side of receiving states are assumed and integration measures are perceived as helpful in facilitating integration. However, as soon as these requirements become overly demanding, costly, bureaucratic or lead to outcomes of exclusion, they are evaluated as a violation of EU law. For this reason, the CJEU, just as the social science literature discussed, also essentially approaches the permissibility of integration requirements based on the same approach as liberal nationalists. See p. 32-39.



require us to revisit the nature of the involved risks and to sharpen the underlying and most relevant questions. To start with — without fundamentally challenging the tenets of liberal nationalism or the importance of integration —, we should focus on the question: is it fair and legitimate *as such* to apply (mandatory) integration demands on legally admitted immigrants as conditions for gaining access to more secure residency rights?

Surprisingly, this narrower question has rarely been raised in academic debates, although it opens up a whole new perspective on the issue of the integration requirements applied to TCNs to regulate their legal incorporation into their new countries. In the same vein, scarcely any academic energy has been spent on the question of how to *prevent* the growth of exclusionary requirements — though an increase of such legally impermissible requirements has been repeatedly observed and disapproved of by social scientists, the European Commission and the CJEU. In the academic literature, analysis usually stops after it has been established that integration requirements should solely be used to promote the national identity, further language levels and encourage participation while ensuring that these integration requirements do not function as insurmountable and discriminating barriers for legal immigrants to obtain certain rights. However, why is the question never raised how we can *make sure* that integration requirements will not be exploited to further politics of exclusion?

The answer to this question is, I contend, a methodological one: most academic assessments of integration policies focus primarily on the question if *in principle* justifications for integration requirements can be found, instead of scrutinizing the actual political dynamics and electoral mechanisms that shape these requirements. This is most strongly the case for liberal nationalists working on this topic. Nonetheless, social scientists also choose comparable approaches for their empirical research (perhaps because the conceptual backgrounds they work with are influenced by the normative frameworks put forward by liberal nationalists). They limit their reflections to listing examples of integration requirements for residential inclusion and/or citizenship that are inclusionary or not, while barely presenting additional guidance on how to respond to the institutional risks of these policies and how to remedy the tendencies to enact increasingly impermissible requirements.

To be more specific, we see that representatives of liberal nationalism such as Miller and Kymlicka typically do not problematize integration requirements applied to legal immigrants as pre-naturalization demands *at all*. In technical terms, I believe this is the result of the fact that academic political philosophy typically engages in so-called *ideal theory* that aims to sketch whether certain public policies can be defended in situations in which all relevant agents (receiving states, citizenries, etc.) are sincerely

committed to upholding (liberal) principles of justice.<sup>266</sup> In their reflections of integration requirements, the only question liberal nationalists therefore answer is: could states and citizens that are truly motivated to act upon liberal-democratic values have legitimate reasons to authorize integration requirements as a condition for accessing citizenship?

From such an idealized point of view, linking integration measures to political inclusion is obviously unproblematic. When it is already assumed that receiving states comply with the demands of liberal-democratic justice, they will only implement such measures to benignly encourage language acquisition and societal know-how of ‘citizens-in-the-making’. In other words, in an ideal world, integration requirements for legal immigrants to obtain increased rights seemingly only have functional benefits. It offers countries opportunities to add symbolical and ceremonial aspects to the ‘path to citizenship’. This has beneficial didactical effects and can stimulate feelings of belonging. However, due to this ideal methodology, liberal nationalists pay too little attention to the non-ideal possibility that those implementing integration requirements can take advantage of the weak legal position of immigrants and may be motivated by exclusionary agendas such as reducing immigration, discrimination or stigmatization. A thorough analysis of the precarious position of legally residing immigrants without secure residency or equal democratic rights is not to be found. Nor are there concrete proposals for checks and balances, as ways to suggest how to provide institutional counterbalance for the real possibility that states may very well enforce integration policies in illegitimate ways. As a result, I believe idealized theories disregard crucial normative questions about the current requirements in EU Member States.

This analysis does not directly apply to the work of social scientists on integration requirements. Given the empirical nature of their work, social scientists surely do not engage in ‘ideal theory’, nor would they recognize themselves as engaging in it. Moreover, the social science literature that I discussed is replete with efforts to distinguish integration requirements that *enable* successful inclusion of TCNs from those that *hamper* access to the territory, secure residency or full membership. However, and this is the crucial point, the social science literature rarely emphasizes that, due to the vulnerable position of the legal non-citizen, even supposedly enabling integration policies carry serious risks of being used for exclusionary purposes sooner or later. Furthermore, given that these risks are never specifically identified and discussed, no social science study explores how this development could be addressed, neutralized or prevented. On that account, the limits of the analytical outcomes of this literature turn

266 See e.g. Valentini 2012, 655; Rawls 1971, 4-6. Several versions of the distinction between ideal and non-ideal theory exist (see e.g. Stemplowska & Swift 2012), but I will not unpack the academic debates on this topic. For the purposes of my research questions, it is enough to establish that liberal nationalists chiefly look to see if a principled justification for (integration) policies can be construed and, as a corollary, do not focus on the actual politics behind, and institutional weaknesses at play in implementing such policies.

out to be comparable to those of liberal nationalism: the analysis ceases just after it is established that ideal states would only make granting secure rights for TCNs conditional on completing certain inclusionary integration requirements to facilitate purposes of nation-building, integration or education for ‘citizens-to-be’.

Consequently, social scientists are inclined to take official justifications of the current integration requirements in Europe (too much) at face value. If we look, for instance, at Kiwan, we saw that her positive conclusions about the British integration requirements (cited by e.g. Peucker) were immediately questioned by Cook. Moreover, since the publication of Kiwan’s research, the number of commentators highlighting the increasingly exclusionary outcomes of the British integration and naturalization schemes has only piled up.<sup>267</sup> In addition, Goodman’s research shows us that when empirical researchers qualify the integration regime of a particular country as ‘enabling’, this is at best premature. It may only take little time, and slight shifts in the ruling political parties, before a country implements an overly ‘prohibitive’ integration and citizenship regime. And indeed, not long after the research by Goodman and Howard was published in which they established that Belgium had ‘normalized’ its integration trajectory, the country has rapidly intensified its integration requirements. Today in Belgium the integration requirements for permanent residency multiply and naturalization (as a federal competence) has even become virtually impossible for most TCNs to achieve.<sup>268</sup>

In summary, the reflections of both liberal nationalists and social scientists provide us with information about circumstances under which integration requirements are permissible, but also leave important normative questions unsolved. On the one side, theories of liberal nationalists should be supplemented by (‘non-ideal’) reflections on integration requirements for increased rights for migrants in a precarious legal position, considering the possibility that receiving states and their citizenries are not truly motivated by liberal democratic values and might act partly or outright unjustly. On the other side, social scientists should broaden up the scope of their research. They should not only report which countries have inclusionary or exclusionary integration requirements. It would also be helpful if they would explore if there may be feasible solutions for preventing that integration requirements are exploited for exclusionary goals. On that account, our evaluations of the integration requirements for residential and citizenship rights should, first and foremost, be complemented by assessments of the potential *motivations* and *electoral mechanisms* as the driving forces behind the integration requirements, together with examinations of the legal and political position TCNs who are obliged to complete these requirements. Second, we should look for

267 E.g. Kostakopoulou 2010a; Van Houdt et al 2011; Van Oers 2013, Ch 5; Byrne 2016.

268 Charlotte McDonald-Giben, 18 December 2013, No one really wants to be Belgian: Country doesn’t grant a single citizenship under new laws for 2013, *The Independent*. Retrieved from: <http://www.independent.co.uk/news/world/europe/no-one-really-wants-to-be-belgian-country-doesn-t-grant-a-single-citizenship-under-new-laws-for-2013-9013013.html> [Accessed 31 May 2017].

remedies to counteract the risks of these policies. I will focus on the former in the next section and turn to the latter in Chapter 5.

### 3. The Politics of Integration Requirements

If we look at social psychological research<sup>269</sup> to explore the motivations behind integration requirements for residential inclusion (and also naturalization), we see that there is in fact little reason to *presume* that receiving states and their citizenry are always willing to accept and include newcomers such as refugees and migrants (and minority groups in general) on equal terms. Human beings habitually perceive themselves as parts of many groups and, furthermore, understand many situations in terms of group memberships. In fact, humans are prone to think in opposing dichotomies, such as ‘foreign/indigenous’, ‘established/outsider’ or even ‘friend/enemy’. Accordingly, if the social conditions to counteract these innate responses to ‘others’ are not in place, this regrettably leads to strong so-called ‘in-group orientations’ and ‘out-group rejections’ (racism, prejudice, etc.).<sup>270</sup>

Furthermore, public opinion polls and studies on societal attitudes structurally demonstrate that *across all* liberal democracies and *across time*, substantial segments of society hold negative opinions about immigration and immigrants. Recently, for example, an *Ipsos* survey indicated that, at present, around fifty percent of the population of ‘the developed world’ view immigration negatively.<sup>271</sup> When asked, high percentages of people in North-America, Australia and Europe believe that there are too many immigrants living in their country and say they would prefer more restrictive immigration policies to be implemented. If we have a closer look at EU countries, a research conducted by the Pew Research center in 2016 showed that negative views on minorities and refugees are indeed very common in Member States.<sup>272</sup> The exact opinions and trends in attitudes vary across states, but even in EU countries with relatively more positive views on migration such as Germany, Sweden and the Netherlands, at least half of the population thinks that Muslim immigrants do not want to integrate in society at large. Furthermore, in Italy, Hungary and Greece roughly a third of the population holds *very* unfavorable opinions about Muslims. In addition, high percentages in most EU states hold that refugees are a burden on the country as they take people’s jobs and receive social benefits — for example, according to the Pew report, roughly half of

269 See e.g. Verkuyten 2004.

270 Verkuyten 2004, 125.

271 See Alberto Nardelli, 6 August 2015, Immigration viewed negatively by half of the developed world’s population, *The Guardian*. Retrieved from: <http://www.theguardian.com/world/datablog/2015/aug/06/immigrationviewed-negatively-half-developed-world-population> See also <http://www.ipsos-na.com/news-polls/press-release.aspx?id=6930> [Accessed on 31 May 2017].

272 Pew Research Center, Wike *et al* 2016.

the French agree with this. Moreover, in the past year, these unfavorable opinions have increased in EU countries, most notably in the UK, Spain and Italy.<sup>273</sup>

However, for the purposes of this chapter, most relevant is whether, and to what extent, such public attitudes have the potential to influence the formation of integration policies within liberal-democracies including EU Member States. To answer that question, I will expound the insightful analytical framework presented by James Hampshire in the book *The Politics of Immigration*.<sup>274</sup> This framework maps both the exclusionary and inclusionary dynamics that shape the immigration, integration and citizenship policies of liberal-democratic states.

When confronted with immigration, Hampshire writes, the institutional response of liberal-democratic states originates from an interaction between four ‘constitutive features’ of the liberal state.<sup>275</sup> These four constitutive features are *representative democracy*, *constitutionalism*, *capitalism* and (a liberal form of) *nationhood*. The crux of Hampshire’s analysis is that these features often conflict and impose contradicting demands on the state in relation to public policies regarding immigrants, but never fully overthrow or neutralize each other.<sup>276</sup> These features of the liberal state therefore do not provide a ‘theory to predict outcomes’ but a valuable ‘framework of analysis’ as they often clash and lead to paradoxical outcomes.<sup>277</sup>

Hampshire argues that ‘representative democracy’ and ‘nationhood’ are the two features that are prone to lead to more restrictive dynamics in politics of immigration and integration, whereas ‘constitutionalism’ and ‘capitalism’ can be associated with openness. So, to oversimplify these dynamics for the moment: if through democratic processes anti-immigrant attitudes become mobilized or calls for the protection of the national identity and values become politicized, this generates pressure on the state to adopt more restrictive policies for immigrants, including more restrictive integration requirements. However, appeals to constitutionalism and human rights norms put pressure on legislation to develop more open policies, and business lobby for immigrant labor has a similar tendency. For

273 In general, the research by the Pew Research Centre indicates that older people and less-educated persons are more negative about immigration, refugees and Muslims. Yet, in most countries the largest divide in opinions tends to be political. For example, in France 57% of the supporters of the *National Front* hold negative opinions on Muslims while of the Socialist party 25% does. In the UK a similar split exists between supporters of UKIP and Labour, where respectively 54% and 22% hold negative views on Muslims.

274 Hampshire 2013.

275 These facets are not, Hampshire states, an exhaustive definition of the liberal state, but rather as ‘empirically observable commonalities of the major immigrant destination states that are widely labelled as liberal’. Hampshire 2013, 13.

276 On that account, Hampshire argues it is essential for understanding ‘why effective and coherent immigration policies are so elusive’ to grasp that the contested nature of immigration and integration policies is rooted in the general institutions of the liberal-democratic state itself. Hampshire 2013, 2.

277 Hampshire 2013, 13.

the purposes of this chapter, I would argue that the tensions between *representative democracy*, *nationhood* and *constitutionalism* are most crucial and illuminating for the shape of the growth of integration requirements for TCNs in Europe, but I will also briefly discuss the influence of *capitalism*.

The feature of representative democracy is relevant as public opinions of the electorate influence the policies that politicians propose and the prominence that is given to a certain issue. This is simply how democracy works, but it is particularly true in relation to sensitive political topics such as immigration and immigrant integration. Of course, there is a chicken-and-egg question here as political parties do not only simply react to public opinion and the tone of public discourse on immigrants, but also shape it. Nevertheless, the fear of losing votes puts ongoing pressure on politicians to never be seen as ‘out of touch’ with public opinion or reality.<sup>278</sup> For this reason, European politicians must deal with research that suggests that, between 1980 and the present time, majorities of their populations became progressively more attached to their national in-group<sup>279</sup> and that immigration is increasingly perceived as a threat.<sup>280</sup> For this reason, Hampshire asserts that outcomes of public opinion polls such as the aforementioned by *Ipsos* and the *Pew Research Centre* do have the power to affect the formation of integration policies. Indeed, a growing body of academic literature maps how structural public skepticism about immigration and immigrants can influence integration and citizenship laws.<sup>281</sup> Christian Joppke, for example, argues that ‘leftist’ governments are typically in favor of increasing citizenship rights of immigrants (which Joppke coins as processes of ‘de-ethnization’ of citizenship), in contrast to right-of-center governments that tend to resist this while expanding the country’s connections to those who have emigrated (processes of ‘re-ethnization’ of citizenship).<sup>282</sup> Along the same lines, Marc Morje Howard explains in more detail that having a leftist government is for liberal-democratic countries indeed a ‘necessary’ yet not ‘a sufficient’ condition for citizenship liberalization.<sup>283</sup> The other condition is that anti-immigrant sentiments do not become ‘activated’. This activation can occur due to a variety of causes, for instance ‘a successful far right party, a popular movement or a referendum of some kind on the issue of immigration or citizenship’.<sup>284</sup> Domestic politics may hence trigger change or continuity in the policy field of integration requirements. More specifically, if immigration or integration becomes politicized, *the growth of integration requirements for increased rights is likely and a decrease improbable*.<sup>285</sup> In a similar vein, Bridget Byrne observes that the integration and citizenship tests in the

278 Hampshire 2013, 6.

279 Ellinas 2010, 22-25

280 Migration Policy Institute, Mudde 2012, 9-12.

281 E.g. Money 1999; Schain 2006.

282 See Joppke 2003.

283 Howard 2010, 744.

284 Howard 2010, 744.

285 See also Howard 2009; Goodman & Howard 2013.

UK should indeed be seen as ‘an attempt to reassure [...] public anxieties about immigration’.<sup>286</sup> In addition, also Goodman and Wright conclude in their assessment of the outcomes of the integration requirements in EU Member States that it may be that they are ‘simply designed to signal to voters that the government is “doing something” about immigration’.<sup>287</sup>

Nonetheless, Hampshire writes, given its divisive nature, mainstream political parties generally aim to keep the issue of migration depoliticized. But, if this strategy fails or becomes impossible — for one reason or the other — they often opt for, either, not directly rebutting anti-immigrant discourses and policy proposals, or endorsing them. Center-left parties then habitually take the stance that the national workforce has to be protected from immigrants, while center-right parties argue that the national culture has to be preserved.<sup>288</sup> Moreover, it is certainly not uncommon that mainstream political parties start to support or copy anti-immigrant parties in order to win or retain votes.<sup>289</sup> In this context, Tjitske Akkerman found that in EU countries the ideological differences between center-right parties and the far right have *diminished* on issues of immigration and integration since the 1990s. And indeed, over the last two decades center-right cabinets have installed most of the novel restrictive integration and citizenship laws in Europe.<sup>290</sup> For example, the former French interior minister Nicolas Sarkozy of the political party *UMP* (now *Les Républicains*) publicly announced his intention to carry back ‘one by one’ the voters of Le Pen’s anti-immigrant political party *National Front* into ‘the Republican Family’ by enacting new laws on immigration and integration.<sup>291</sup>

In the context of representative democracy, it is also relevant to note that immigrants who are affected by the integration requirements that monitor their residential and political inclusion are themselves inherently structurally underrepresented in the political community that receives them. Non-citizens (such as TCNs) cannot make themselves heard through most of the political forums of their receiving country, most obviously because they lack citizenship: this excludes them from voting (and also from standing for public office).<sup>292</sup> Furthermore, because they do not belong to the electorate, politicians have little incentive to pro-actively consider them as a group whose interests must be taken into account. Also, the political exclusion of non-citizens is commonly strengthened by the fact that they are confronted with language barriers, relatively weak socio-economic status, discrimination and often also the lack of social, political and professional networks. For all these reasons, it is simply unlikely that the political representation of legal non-citizens in

286 Byrne 2016, 3.

287 Goodman & Wright 2015, 1891.

288 Hampshire 2013, 30.

289 E.g. Norris 2005, 29.

290 Akkerman 2012.

291 Nicolas Sarkozy, quoted in La Croix, 4 May 2006. See Joppke 2007, 11.

292 In some countries, long-term immigrants do have voting rights on the level of municipalities.

a representative democracy is forceful enough to influence the formation of integration requirements, whereas anti-immigrant attitudes fostered by citizens in fact do wield influence on policies. At best, the political voices of immigrants are indirectly represented in public debate through investigative journalism, academic research, NGOs and social movements that support the interests of immigrants and minorities. On that account, Hampshire even concludes that there are strong reasons to doubt whether a representative democracy will *ever* generate demand for enabling immigration and integration policies ‘given the inherently exclusionary tendency in populations towards newcomers’.<sup>293</sup>

Considering these exclusionary perspectives on migration in representative democracies, the question rises why countries do not (at least periodically) simply deny all immigrants entry to their countries and political communities. If there are inherent exclusionary tendencies towards immigrants, it seems more rational and coherent to close the border rather than to install integration trajectories for newcomers. The explanation lies in constitutionalism, as the second relevant constitutive feature of the liberal-democratic state. In its thinnest form, the constitutional state (or *Rechtsstaat*, or ‘rule of law’) is a ‘state of laws’ in which the authority of the government is derived from and limited by law. For EU Member States, these laws are founded upon the core liberal principles of individual freedom and equality that are robustly enshrined in an international human rights regime. These norms, Hampshire states, ‘are the essence of liberalism and they act as a kind of moral baseline: equal treatment is the default setting and divergence requires special justification, otherwise a state loses its liberal credentials’.<sup>294</sup> For Member States, the exercise of their state power is therefore ‘self-limited’<sup>295</sup> meaning that they uphold their laws in their treatment of individuals, importantly, not only if citizens are involved but also in important respects in relation to non-citizens. To be sure, this does not mean that liberal-democratic states do not engage in illegitimate or illegal practices of coercion towards citizens or immigrants — unfortunately, they do so often enough — but that the values that underpin constitutional states provide a resource to challenge and legally contest this coercion. Yet this self-limitation explains why Member States, though admittedly at times with great reluctance, continue to accept immigrants, and in particular family migrants<sup>296</sup> and refugees — even if they are unwanted in the popular political arena. The constitutionalism of liberal states thus warrants that the potential presence of

293 Hampshire 2013, 60-61.

294 Hampshire 2013, 8.

295 Joppke 1998, 268.

296 However, it must be noted that the power of constitutionalism, in relation to mandatory integration requirements that family migrants have to fulfill outside the territorial domain of the receiving state (‘integration requirements abroad’) is vastly weaker, for practical reasons. Nonetheless, also in this case, there are — admittedly time-consuming and difficult to access — legal avenues available to challenge European Member States that perpetually obstruct the right to family migration. See Case C-153/14 *Minister van Buitenlandse Zaken v K and A*. See in previous chapter, p. 33.



strong anti-immigrant mobilization (representative democracy) cannot entirely subsume certain core humanitarian norms (constitutionalism). Consequently, ‘accepting unwanted immigrants is inherent in the liberality of liberal states’.<sup>297</sup>

The power of constitutionalism has already been illustrated in this study by the several CJEU cases referred to in Chapter 1: the CJEU repeatedly held that integration requirements based on the Family Directive and LTR Directive must facilitate the integration processes of newcomers, not form barriers or result in exclusionary or discriminating outcomes. Another recent example in this regard is the *Biao v. Denmark* case in which the Grand Chamber of the European Court of Human Rights (‘ECtHR’) issued a decision in May 2016.<sup>298</sup> In that case, the so-called ‘28-year rule’ was challenged, which entailed that if a Danish national with immigrant background<sup>299</sup> was married to a non-EU citizen she or he had to prove, to enjoy the ‘privilege’ of family reunification, that the residing spouse has stronger ties with Denmark than with any other country. The threshold for establishing whether such ties to Denmark were sufficiently strong was that the spouse had to be residing in Denmark for at least 28 consecutive years. The Grand Chamber of the ECtHR ruled that these laws constituted indirect discrimination on the basis of ethnic origin as it ‘places a disadvantage, or has a disproportionately prejudicial effect on persons who acquired Danish nationality later in life and who were of ethnic origins other than Danish’.<sup>300</sup> As a result, the Danish authorities, committed to the rule of law, amended their Aliens act and abolished the 28-year rule.<sup>301</sup>

The next constitutive feature Hampshire lists is nationhood. The first section of this chapter described how liberal nationalists theoretically delineate the boundaries of a liberal national identity and how they see the limits of permissible nation-building policies. From his more empirical perspective, Hampshire observes that Western liberal-democratic states are indeed committed (and recently increasingly dedicated) to upholding and promoting their national identity. Moreover, Hampshire holds, appeals to nationhood are presupposed to be exclusionary and prone to being utilized to, for example, substantiate the frames that newcomers are a threat to the cultural characteristics of the nation or (presumably) hold illiberal views.<sup>302</sup> However, with all due respect to Hampshire, Irene Bloemraad responds by pointing out that receiving states do

297 Joppke 1998, 292.

298 ECtHR (*Grand Chamber*), Judgment of 24 May 2016, Application no. 38590/10.

299 Danish-born citizens were exempted from this attachment requirement.

300 ECtHR (*Grand Chamber*), Judgment of 24 May 2016, Application no. 38590/10 §138.

301 Another recent example is in the United States: President Trump’s executive orders *Protecting the Nation From Foreign Terrorist Entry Into the United States*. These were supposed to ban residents from particular (Muslim) countries entering the United States for 90 to 120 days, but were blocked by federal judges. The first travel ban concerned Iraq, Iran, Libya, Syria, Somalia, Yemen and Sudan. The second Iran, Libya, Syria, Somalia, Yemen and Sudan. See [bbc.com](http://bbc.com), 2017 March 30, Trump Travel Ban: Hawaii judge places indefinite hold. Retrieved from: <http://www.bbc.com/news/world-us-canada-39439595> [Accessed 31 May 2017].

302 Hampshire 2013, 32-35.

not *necessarily* promote an exclusionary national identity and henceforth install restrictive integration requirements. For instance, she writes, most academic commentators who evaluate the integration and naturalization regimes of North American countries concur that the United States and Canada do not foster exclusionary national identities or pursue restrictive agendas through integration requirements, in the same way as European regimes.<sup>303</sup>

Nonetheless, national identities — through history and today — are all too often invoked for exclusionary purposes. For example, in Chapter 4 I refer to an Austrian politician who stated after a new integration law had been installed that with ‘this law we can make one thing clear, Austria is not an immigrant country and it will never be one. We will make sure of that!’<sup>304</sup> In other words, here a version of nationhood was promoted through the enactment of integration policies that conveyed a national self-definition based on alterity: *one of our main characteristics is that we are not like you/them*. Moreover, it is indeed often asserted that there are fundamental differences between the national identities of European and North American countries, as the latter see themselves as ‘nations of immigrants’ while European states have populations with deeper historical roots and are more used to understanding their identity in terms of ethnicity and religious composition. In my view, however, the relevance of these differences is easily overstated in relation to the risks of potential exclusionary policy making. Of course, the (immigration) histories of these countries are different — and so are their national identities. But all European countries are also characterized by histories of migration and diversity<sup>305</sup> and all Western countries — including North America — periodically perceive(d) immigration as a threat to their national identity. For example, in the first half of the 20<sup>th</sup> century both Canada and the US explicitly prohibited (allegedly undesirable) Asian immigrants from entering their countries based on the concern that the national identity would erode.<sup>306</sup> And today, in the United States there is a debate about Latino immigration that would divide the American nation into two cultures, creating a ‘crisis of national identity’.<sup>307</sup> Moreover, I think no one would be very surprised if the Trump administration would advocate extra integration requirements for immigrants (from Muslim countries) in the near future. Lastly, it has been argued that Europe is now going through a nativist backlash, which implies that its national identities used to be more inclusive (which was the case, one could argue, during the initial decades following the Second World War<sup>308</sup>).

303 Bloemraad 2016, 2-3. See also e.g. Joppke 2013, 9; Peucker 2008.

304 Permoser 2012, 185.

305 E.g. for an overview of migration in Western Europe since 1650, see Moch, 2003.

306 See e.g. Backhouse 1996.

307 Huntington 2004, 3.

308 Hampshire 2013, 18.

In any event, Hampshire writes that when a nation thinks its national identity is under threat, exclusionary tendencies are most likely to prove persistent. If, for example, people collectively think that immigration forms a threat to their way of life, this ‘perception is difficult to contest because, unlike, say, a belief that immigration depresses wages, a belief that immigration threatens national identity is not easily disproven’.<sup>309</sup> Therefore, in all liberal-democratic countries, ideas about national identity can profoundly shape discussions about integration policies. It matters how the national identity is imagined — in particular if immigration and immigrant citizens are perceived as part of the national narratives, or as eroding them.<sup>310</sup>

Finally, Hampshire writes that all contemporary liberal states are capitalist states and he agrees with Gary Freeman who wrote that migrant labor is ‘not merely a temporary convenience or necessity, but a structural requirement for advanced capitalism’.<sup>311</sup> So even though immigration is unpopular with voters (in a representative democracy), liberal-democratic states must respond to demands of employers for immigrant labor, particularly in relation to so-called ‘3D jobs’ (dirty, dangerous and degrading) that nonimmigrant majorities are often reluctant to do.<sup>312</sup>

If we relate this feature of capitalism to integration requirements for TCNs in EU countries, we indeed see that during the last century such requirements were deliberately absent to expedite the migration and desired inclusion into the labor market of actively recruited ‘guest workers’ from countries as Turkey and Morocco, especially for ‘3D jobs’. However, a few decades later, when it turned out these guest workers would not return ‘home’ but instead turned out to be ‘guests who stayed’<sup>313</sup>, Member States tried to hamper the inclusion of their (low-educated) family members by enacting integration requirements as ‘criteria’ for migration (see p. 32).<sup>314</sup>

Moreover, currently, the (integration) strategies of Western states to monitor the rights of different types of immigrants (for e.g. family migrants, exchange students, refugees, highly skilled immigrants) seem increasingly conditioned based on economic considerations. Particularly high-skilled immigrants are wanted and attracted with attractive packages of rights, and such targeted groups are often exempted from mandatory integration hurdles.<sup>315</sup> According to Lydia Morris, this ‘monitoring and control of migration management’ reveals which immigrants are deemed useful and which ones are not.<sup>316</sup> On that account, Hampshire’s

309 Hampshire 2013, 32.

310 In Chapter 4, I return to this point, when I discuss integration requirements in Member States that have been defended as securing the universal values that characterize the national cultures of European Member States.

311 Freeman 1979, 3.

312 Hampshire 2013, 11.

313 Castles 1985.

314 See e.g. Lucassen & Lucassen 2011, 118-140.

315 Hampshire 2013, 133.

316 Morris 2002, 9.

claim that capitalism *always* pressures liberal countries to enable immigration as it ‘cannot afford — literally as well metaphorically — not to solicit immigrants’, should be nuanced. Rather, capitalist liberal states tend to opt for open immigrant policies towards those migrant workers whom they think can fill vacancies and address labor shortages across the labor market of their economies.

Hampshire’s framework brings us closer to a better understanding of the dynamics of inclusion and exclusion, in the actual motivations and electoral mechanisms that shape the integration and citizenship laws in liberal democracies. Therefore, it also provides helpful insights about the distinctive legal and political circumstances created by the integration requirements for TCNs discussed in this study. These (obligatory) integration conditions, we have seen, are predominantly targeted at legal immigrants who have a right to residency and enjoy relatively strong protection against expulsion according to EU and international laws, if necessary enforced by national and institutional courts (‘constitutionalism’). These *integration* policies are legally thus explicitly not meant to function as *immigration* policies. Nonetheless, the potentially restrictive nature and the content of the integration trajectories they stipulate for TCNs to obtain full residential security and potential citizenship, strongly depend on prevalent public perceptions in relation to immigration and integration (‘representative democracy’) and the extent to which the image of the national identity welcomes immigrant citizens or is more ‘nativist’ (‘nationhood’).

However, before turning to analyzing the normative implications for the legitimacy of European integration requirements as conditions for attaining increased rights, I believe it is important to extend this analytical framework. To be more precise, I think it is essential to deepen the analysis of the feature of ‘constitutionalism’ as highlighted by Hampshire by supplementing it with the work of Linda Bosniak on the position of non-citizens and the ‘Janus-face of citizenship’.<sup>317</sup> As we assess the integration requirements for TCNs in Europe, we should both understand the *potency* and *limits* of constitutionalism protecting legally residing non-citizens (such as TCNs in EU Member States) in liberal democracies.

Bosniak writes that *within* liberal-democratic political communities, citizenship stands for inclusion, equality and universalism. But for those *outside* of the political community, citizenship means exclusion. This ‘Janus-face’ of citizenship, Bosniak observes, does not only affect foreigners who are physically excluded from the territory, but also — and this is what she focuses on in her work — immigrants who are legally residing on the territory of a receiving state, without national citizenship. Legal immigrants remain ‘outsiders’ in a significant sense, even though they spatially share the same territory as ‘insiders’ who operate on the basis of equal citizenship.<sup>318</sup>

317 Bosniak 2008, 99.

318 Bosniak 2008, 4. See also Ballin 2014, 7.

This legal inequality enables, amongst other things, the relatively limited packages of social benefits and political rights that non-citizens enjoy compared to citizens. If such social rights would be unequally distributed between *citizens*, or if groups of citizens were required to meet certain standards in order to gain access to them, this would be considered as an unacceptable infringement of constitutional equality norms. Nonetheless, in relation to legally residing immigrants such as TCNs, the unequal distribution of such rights is not unconstitutional per se: individuals on the territory with different legal status are treated differently on (supposedly) objective legal grounds.<sup>319</sup> The Janus-face of citizenship thus allows states to institutionally treat legally residing non-citizens on the territory in ways that would be discarded as discriminatory public policies in relation to citizens. For this reason, Bosniak concludes that the concept of citizenship in modern liberal democratic countries is ‘soft-on-the-inside’ but ‘hard-on-the-outside’, also for citizens and non-citizens that live side-by-side.<sup>320</sup> ‘Alienage matters,’ she writes ‘not merely at the border for the allocation of rights and benefits in the interior as well.’<sup>321</sup>

Hence, Hampshire is right when he contends that ‘constitutionalism’ produces strong inclusionary dynamics on the formation of integration requirements: it secures the human rights and a number of domestic constitutional and civil rights of legal non-citizens, including their residency rights and protection against expulsion. Nevertheless, it must be noted too that this does not mean that TCNs are recognized as *full equals under the law*. On the contrary, the integration requirements for residency rights and citizenship discussed in this dissertation are in fact a case in point of the type of unequal legal treatment the Janus-face of citizenship can produce: since TCNs are still non-citizens and reside with a precarious legal status, Member States have the power to ask them to demonstrate certain efforts and achievements before they obtain a more secure legal status.

As a result, if we combine the analyses of Hampshire and Bosniak, we see that the integration requirements in European countries create a

319 It has been argued that the distinction between citizens and ‘denizens’ is normatively not most relevant anymore, because progressively constitutional, civil and social rights are decoupled from citizenship (See e.g. Jacobson 1996). For instance, in most liberal democracies denizens have full due process rights in criminal proceedings, expressive and religious freedom rights, voting rights in local (municipal) elections, protection of state’s labor and employment laws and certain social benefits, based on both human rights law and constitutional norms. Nonetheless, as will become clear, I do not agree with the statement that the distinction between citizens and denizens is not relevant anymore. Although the legal protection of denizens under the rule of law has improved over the past centuries (particularly since the rise of an international human rights regime), to state that the distinction is not relevant anymore is simply unsustainable. In the world of today, it is empirically measurable that residing immigrants always have less political rights, less social rights and sometimes even less civil rights. In Europe, since the 2000s, the gap has moreover increased again. The UK, for one, clearly enacted policies that further the exclusion of residing immigrants from welfare and many countries have placed restrictions on non-contributory social programs, such as housing benefits and income support. See, e.g. Howard 2006, 445.

320 Bosniak 2008, 4.

321 Bosniak 2008, 48.

unique set of circumstances for liberal democracies. While liberal-democratic states are strictly bound to stipulations of equal treatment towards their citizens while implementing public policy, these requirements do not prevent states from imposing extra obligations for legal and residential security on TCNs since they are not (yet) full members of the legal order (the 'limit of constitutionalism'). Yet, at the same time, TCNs often cannot be legally deported due to humanitarian law and EU law that prescribes that they should in principle obtain permanent residency after a given number of years of residency (the 'potency of constitutionalism'). Nonetheless, calling for extra integration demands for TCNs is, more often than not, in the interests of politicians, while TCNs themselves can hardly make themselves politically heard ('representative democracy'). Therefore, structurally (latently) present anti-immigrant political dynamics are predisposed to, sooner or later, take advantage of the precarious legal position of TCNs. And if this happens, integration requirements are often not primarily enacted to benignly facilitate the successful societal incorporation of TCNs with public policies that have proven to be effective. Rather, they convey the political message that the government is 'taking care of migration' and the national and culture is protected ('nationhood').<sup>322</sup> Nevertheless, from a constitutional perspective, installing integration requirements for TCNs is not necessarily in breach with the rule of law, as citizens and non-citizens can be treated unequally (again, 'limit of constitutionalism'). Integration requirements can always be defended through the explanation that they do not deny TCNs the possibility to obtain increased rights: they only make the accessibility to these rights contingent on an extra requirement, as is permitted by the Family and LTR and Directives and/or the discretion of Member States to enact integration requirements for naturalization.

Based on this analysis, it must be concluded that integration requirements as conditions for obtaining increased rights in Member States carry the structural risk to take advantage of the inherent power-imbalance between receiving EU states and their legal immigrants who are not yet equal members of the political community and legal order yet. Despite the power asymmetry between the state and the TCN, these requirements namely grant the *strong party* in this relationship, that is the state, the power to (constantly re-)define a set of performances, achievements, efforts and costs that the *weak party*, that is the TCN as legal non-citizen (without secure residency and political voice), must demonstrate and fulfill to obtain a more secure legal status and to be released from residential unpredictability. Moreover, the TCN is not only in a precarious legal position, but also (often) politically belongs to a relatively unpopular group in society. Therefore, if immigration and integration become hotly debated political issues, the integration requirements as conditions for increased rights provide politicians and governments with a unique political tool to assure voters that immigrants are not easily included or to even scapegoat

newcomers. Nevertheless, in EU countries there are currently no strong institutional precautionary measures in place to counteract the possible growth of exclusionary and stigmatizing integration policies or to neutralize the exceptionally precarious position of TCNs, who are not full members of the legal order or political community yet.

#### 4. Contractualized and Individualized Integration

So far, the analysis in this chapter indicates that if we limit our normative reflections on integration requirements in Member States to evaluating whether states in principle might have legitimate reasons to install them (such as liberal nationalists do), we fail to give enough normative attention to the fact that these policies are structurally prone to take advantage of the vulnerable legal and political position of TCNs, given the power imbalances at play and the influence of political interests.

In this section, I will fortify this conclusion by zooming in on the main consequences of the recent history regarding both the notion and policies of ‘integration’ in Member States as highlighted in Chapter 1 (see p. 43-47). This provides an important normative contribution. It, first, illustrates that the current integration requirements in Member States do not only hypothetically carry certain structural risks, but that these risks actually already manifest themselves in existing integration policies in Europe. Second, it becomes clear that this *only* becomes visible if we do not merely approach these requirements based on the normative guidelines that liberal nationalists sketched on integration requirements. Instead, we should also understand and analyze integration requirements as state policies dominated by profound power imbalances, due to their current legal configuration.

That said, in Chapter 1, I established that in Member States there are clear tendencies to, 1) perceive and discuss the relationship between arriving TCNs and their receiving states as *contractual* and, 2) to understand the notion of integration as *individualized*. More precisely, I concluded that the *raison d’être* of integration requirements in Europe increasingly became to monitor a contractually laid down ‘test phase’ in which TCNs must demonstrate their personal integration to (legally) belong. Furthermore, I observed that the integration trajectories that have resulted from these developments, often do not support desirable broader societal outcomes, or do not support them as well as other integration trajectories would. I will now discuss these developments, in light of the analysis of this chapter.

##### The Contractualization of Secure Residency and Citizenship

If we assess integration requirements solely based on the assumption that benign states might have legitimate interests to enact them, we

might be inclined to accept that these policies can be seen as part of a reasonable contract between receiving states and newcomers. However, if we consider the vast power inequality between the TCNs and their receiving states, we see that a contractual approach of these policies is unhelpful and normatively misleading. Contractual discourses are often invoked both in relation to the mandatory integration requirements for family migration and permanent residency and to optional integration requirements for naturalization. In both cases, I will show, these discourses hide the involved power inequalities between the alleged parties of the contract. However, the legal particularities of these two types of integration requirements are unlike, so it is important to discuss them separately. The difference between these requirements, we have seen in Chapter 1, is that those integration requirements for permanent residency, based on EU law, both regulate the prescribed residential inclusion of TCNs and *simultaneously* mandatorily require efforts on the side of these TCNs (by imposing fines or denial of certain residency right in case non-fulfillment). The legal delicacy of these requirements is hence that they are compulsory conditions for TCNs and monitor their access to increased rights, but at the same time legally may only *facilitate* the integration of TCNs with rights to family migration and permanent residency that Member States in principle cannot refuse to grant them (see p. 32-39). In contrast, potential integration requirements for citizenship are never mandatory for TCNs as there is no obligation to naturalize. In other words, TCNs can always opt out of completing potential additional integration requirements for full citizenship, as they can decide to merely obtain or keep a permanent residency status.

To begin with the first type of integration requirement, if we assess these based on their structural susceptibility to be used for exclusionary purposes, it is clear that the position of TCNs who are compelled to complete mandatory integration requirements for family migration and permanent residency as permitted under current EU law, is troublesome. Given their provisional legal positions and the punitive measures connected to the non-fulfillment of integration requirements (in addition to, presumably, their lack of political and social networks and language barriers), they simply have no other choice than to submit to all possible integration requirements, whatever the content or cost. Accordingly, they shall and must enter any alleged 'integration contract' installed by their receiving states, irrespective of the terms — also if the state in this contract frames 'integration' as being fully *their* responsibility in terms of efforts, qualities, behavior and costs. In the same vein, if the results of integration policies turn out to be disappointing, this is one-sidedly framed as *their* failure to fulfill their side of the integration contract instead of, at least partly, also the result of deficient state policies.

As a result, in this context, state-promoted public discourses in European countries that suggest that the relationship between the state and TCNs is contractual — implying that integration requirements are based on a voluntary agreement — misrepresent the situation and, with that,



exploit the vulnerable position of TCNs.<sup>323</sup> Given the power imbalance between receiving EU states and TCNs, integration requirements that demand certain performances on the side of TCNs are *never* the result of an exchange between equals, but *always* of a coercive measure between radically unequal parties. TCNs do not possess a legal position that enables any negotiation on the terms of their residential inclusion, even not if integration requirements become unfeasible, counterproductive, outright silly or stigmatizing.

Against this analysis, a possible reply might be that TCNs in fact do have a choice as they can decide to settle elsewhere in the world. If they cannot agree with the prescribed integration requirements of a particular state that wants to receive them, why not live in a different country? Seen this way, it could be argued that there is actually some sort of contract between TCNs and states based on mutual consent. Yet in Chapter 1, we saw that TCNs are confronted with mandatory integration requirements *after* being legally granted a right to migration and residency (predominately based on asylum and family migration). Most of these TCNs, moreover, arrive from less stable countries, flee from violence or political persecution and/or want to join their spouses or close family members. For these TCNs, objecting to integration requirements of their receiving state that already granted them a right to residential inclusion would result in losing these opportunities. The argument that TCNs can always move elsewhere therefore fails, because at the point that TCNs are obliged to integrate, they already gained partial rights in a particular state. For this reason, our normative reflections on these integration policies should recognize that TCNs lack any bargaining position and have no real exit-option.

If we turn to the integration requirements for naturalization, we see that the legal and political situation is indeed somewhat different. Nevertheless, potential problems with asking permanent residents to fulfill integration requirements for naturalization are in Europe clouded as well by the contractualization of the relationship between states and TCNs. First of all, the residency rights of permanent residents are strong but not *as* strong as those of citizens. For example, Article 9 of the LTR Directive states that if the migrant constitutes an actual and sufficient serious threat to public policy or public security, permanent residency rights can be revoked. In other words, if permanent residency is obtained, as Martijn Stronks puts it, ‘the migrant is allowed to stay permanently and [...] his corresponding status consists of a stronger residence entitlement, [...]but...] this does not entail [...]an...] *unconditional permission to stay*.<sup>324</sup>

323 Kostakopoulou 2010a, 951. Additionally, Kostakopoulou argues that, from a legal perspective, it is also problematic that a major imbalance exists between the two parties in relation to the consequences for not complying with the integration contract. The TCN is vulnerable to heavy consequences such as denied residency rights, fines, the loss of social benefits or not obtaining naturalization, while it is unclear what sanction would follow for the state if it does not perform or unilaterally changes the conditions of the contract.

324 Stronks 2016, 53.

To understand what this residential insecurity amounts to, it is worth to highlight a package of laws recently enacted in Belgium. In Belgium, the Aliens Department ('Dienst Vreemdelingenzaken') can now revoke permanent residency rights if TCNs are *deemed* as a threat for public order and national security, while this decision does not require a ruling of a court.<sup>325</sup> Permanent residents that (might) apply for naturalization and are then confronted with integration requirements are thus still in a precarious legal situation. For this reason, in the social science scholarship on immigration and citizenship, the *communis opinio* remains that if immigrants fully want to escape precarity 'citizenship still matters'<sup>326</sup>, despite the considerable packages of rights that permanent residents have.

Furthermore, all the political and legal dynamics and risks as expounded by Hampshire and Bosniak apply as much to integration requirements for naturalization as to mandatory integration requirements for family migration and permanent residency. Permanent residents are politically structurally underrepresented, as they are a numerical minority in society and lack full active and passive political rights.<sup>327</sup> The liberal or restrictive nature of the integration regimes that shape the conditions under which they can obtain full equal rights are responsive to public attitudes and democratic dynamics. And politicians, particularly in times that migration becomes politicized, have an interest in increasing integration requirements for naturalization to, for instance, convey the message that the privilege of national citizenship is not easily given to immigrants. At the same time, there will be barely political or electoral repercussions for them if they enact (unreasonably) stringent integration requirements for naturalization.

For this reason, if we engage in the normative strategy to evaluate integration requirements by assessing their institutional risks to exploit power imbalances, it must be established that the integration requirements for naturalization indeed create a different set of circumstances than those for family migration and permanent residency. But also in the context of naturalization, normative weight must be given to the fact that the growing contractualization of immigrant integration takes place against the backdrop of a severe power asymmetry between the state and TCNs. If the state describes its relationship with TCNs as contractual — which it can simply unilaterally decide to do — this leads to a situation that the structural dangers of asking permanent residents for integration as a condition to obtain full citizenship can be structurally underestimated

325 Joël de Ceulaer 2016 09 July, Theo Francken is trots op een plan dat niet deugt [Theo Francken is proud of a flawed plan]. Retrieved from: <http://www.demorgen.be/nieuws/theo-francken-is-trots-op-een-plan-dat-niet-deugt-bf4d963a/> [Accessed on 31 May 2017].

Moreover, we have seen, the requirements for naturalization — that would relieve immigrants from the chance of being subject to this measure — in Belgium also were made considerably stricter over the last few years. See p. 88.

326 E.g. Bauböck, 1994; Hansen, 2009; Hampshire 2013.

327 Hampshire 2013, 31.

or even (deliberately) misused for political or arbitrary reasons.<sup>328</sup>

### Individualized Integration

Considering the analysis on the contractualization of integration, it is also informative to examine the individualized conceptualization of integration that increasingly underpins the integration schemes of Member States. This involves that TCNs must personally integrate to be deemed as ‘standing inside of’ society to merit secure residency rights or citizenship and to deserve to belong. In Chapter 1, I mostly emphasized that this leads to *unfairness* as citizens without immigrant backgrounds are exempted of meeting personal integration standards to obtain (or maintain) their entitlement to their citizenship. I will return to the potential normative consequences of this double standard in Chapter 4 and 5. However, if we evaluate these integration policies against the background of the severe power inequality between TCNs and their receiving states, we see that integration requirements as conditions to attain increased rights are also problematic because they make laws that regulate the allocation of rights to TCNs contingent on a notion that is *arbitrary*.

The content of integration requirements is potentially arbitrary, because if governments underpin them with individualized conceptualizations of integration — as is currently the case in multiple European Member States — no one can tell who exactly would be an ‘integrated person’ that is ‘compatible’ with society. All European countries are characterized by heterogeneous citizenries in terms of individual differences, such as education levels, careers, family lives, ethnic backgrounds, religious outlooks, political orientations, socio-economic positions and are particularly diverse in what Saskia Sassen calls their ‘global cities’.<sup>329</sup> To be sure, this does not mean that it is impossible to observe that countries have certain common characteristics (e.g. in France people do relatively eat a lot of baguettes, in the Netherlands a relatively high percentage of citizens support gay rights, etc.). Instead, the point is that it is factually impossible to create a list of qualities and efforts that an individual can fulfill that demonstrates her *personal compatibility* with the ‘real society’ to *deserve* secure rights and citizenship (as e.g. some French citizens do not eat bread; and homophobia is also pervasive amongst Dutch citizens, and has been so for centuries).<sup>330</sup> In other words, it is simply untrue that *all* citizens of any European Member State share degrees of knowledge about the national history, income levels, moral outlooks, democratic views and so forth. Accordingly, it is also incorrect that certain characteristics are

328 To be sure, if TCNs do not or cannot naturalize, this is not a problem from the perspective of EU or domestic law. But it is problematic from the normative perspective that there should be safeguards against the outcome that individuals (perpetually) suffer from precarity and the general risk of being excluded.

329 Sassen 2000.

330 In fact, from the perspective of liberal democratic principles, this would be an unjust and inappropriate ideal. See Chapter 5, p. 148.

what make citizens ‘real citizens’, deserving their citizenship and equal protection under the law in these countries. And as a result, standards of integration have no natural ending point and it, as Lubomira Radoilska puts it, ‘exposes immigrant groups to arbitrary critique for being insufficiently integrated’.<sup>331</sup>

Take, for example, the public letter that Dutch Prime Minister Mark Rutte wrote to ‘All Dutch’, in which he advised Dutch citizens with immigrant backgrounds to ‘act normal or leave’, instead of ‘not adapting and reviling our customs and values’.<sup>332</sup> In this explanation, he gave insight in what he saw as un-Dutch behavior that would make immigrant citizens unwelcome. He mentioned: ‘Those who scorn homosexuals, harass women in short skirts or call normal Dutch people racists’. In addition, he clarified that ‘acting normal’ in the Netherlands means with ‘shaking hands and treating each other equally. [...] That you show respect to teachers and that you do not tease people with online *vlogs*. It is normal that you work for your money and make the best of life. Help each other if things are difficult and embrace each other in dark times. It is normal that you are committed and do not walk away from problems. That you listen to each other carefully, instead of shouting each other down if you disagree with something’.<sup>333</sup> Thus, indeed, it seems that ‘Being Dutch’ and ‘being integrated’ can be attributed to nearly anything — from ‘not making certain vlogs’ to ‘giving hugs’ — and that failing to exhibit ‘normal’ Dutch behavior could influence the entitlement of persons with immigrant backgrounds to belong. Of course, standards of ‘personal integration’ mostly tend to involve a package of desirable behavior or competencies, but, at the same time, it essentially remains an open-ended term. In this context, in research on the relationships between non-Western immigrant groups and the non-immigrant majority in the Netherlands, a respondent (with a non-Western immigrant background) stated: ‘You can never be Dutch *enough*’.<sup>334</sup>

On that account, if we assess the integration requirements in Member States as conditions to attain increased rights based on their possible predispositions to be misused (in addition to whether states might have legitimate reasons to install them), we see that ‘integration’ is an ill-suited notion to serve as a requirement for TCNs for obtaining residential and political rights. Given its open-ended nature, it namely gives — already very powerful — states the opportunity to constantly redefine requirements for inclusion upwards. Amongst other things, states can demand: arrays

331 Radoilska 2014, 111.

332 Ceylan Yeginsu, 2017, 24 January, Dutch Lead Takes Trump-Like Turn in Face of Hard-Right Challenge, *New York Times*. Retrieved from [https://www.nytimes.com/2017/01/24/world/europe/mark-rutte-netherlands-muslim-immigrants-trump.html?\\_r=0](https://www.nytimes.com/2017/01/24/world/europe/mark-rutte-netherlands-muslim-immigrants-trump.html?_r=0) [Accessed on 30 May 2017].

See also Mark Rutte, 22 January 2017, Aan Alle Nederlanders [To all Dutch], VVD. Retrieved from: <https://vvd.nl/nieuws/lees-hier-de-brief-van-mark/> [Accessed on 30 May 2017].

333 He later reassured he was talking to *all* citizens, but if one rereads the public letter this is simply not true. Moreover, it remained unclear where nonimmigrant citizens should ‘leave’ to then.

334 SCP, Huijk *et al* 2015, 166.

of standards that would indicate ‘good’, ‘national’ or ‘cultural’ behavior or customs; very specific knowledge of historical facts that are unknown to most (nonimmigrant) citizens; series of oaths promising active citizenship; levels of language proficiency that exceed the level of (some) groups of citizens; having a stable job; acts of civic responsibility such as taking up volunteer work; the presentation of portfolios to demonstrate (labor market) participation; and so forth.<sup>335</sup>

So, taking stock, several problematic aspects of the present-day tendencies in European integration policies are indeed only made visible if assessed in light of the vulnerable position of the TCN, without political voice and secure rights. Or put differently, if we merely adopt the ‘idealized’ liberal nationalist approach to integration requirements, we disregard the normative problem that EU states currently have the power to perpetually change and increase integration requirements and the task ‘to integrate’ — including the option to frame it as the sole personal responsibility of the TCN.

For this reason, in view of this conclusion, the unequal power-relationship between European states and their TCNs should be *at the center* of our normative and political debates on the growth of integration requirements in Europe. Might there be (legal) strategies to counteract the involved structural risks? Still, most of the academic assessments of these policies exclusively approach the legitimacy of these integration requirements based on the assumption that they are *in principle* permissible as a condition that may be imposed by states for obtaining citizenship.

## 5. Conclusion

In this chapter I established that normative reflections on integration requirements for legal immigrants as conditions of attaining increased rights should be attentive to that these policies carry great risks to be used for exclusionary purposes. I reviewed the work of liberal nationalists and the social sciences on the recent increase of integration requirements in EU Member States and concluded that their research approaches are helpful, yet incomplete. Both liberal nationalists and social scientists work with the assumption that states have legitimate interests to implement such legislation. As a result, they tend to give too little normative attention to the Achilles’ heel of these policies. For in practice, integration requirements are imposed on legally residing immigrants who do not yet have a secure and equal position in the legal order and political community.

Furthermore, based on the work of Hampshire and Bosniak, I deduced that in liberal democracies the mobilization of anti-immigrant attitudes that demand restrictive policies is not an exception to the rule, but rather an ever-present lurking possibility. Due to the combination of

335 This also explains the peculiar questions in citizenship tests as referred to in the first paragraph of the introduction of this dissertation (see p. 14).

structural anxiety about migration and immigrant integration, party politics and democratic election dynamics, the issues of migration and national identity can easily become politicized. And if this scenario unfolds, a vicious circle is established that puts pressure on all political parties on the ideological spectrum to propose, or at least not explicitly refute, exclusionary integration policy proposals, reflecting anti-immigrant sentiments.

Also, I scrutinized the legal and political situation in which TCNs are placed if they must fulfill integration demands to obtain secure residency and citizenship. I observed that this situation creates a unique set of circumstances and, with that, creates a challenge for general liberal-democratic practice. It demands efforts from individuals who are to a high degree subject to the discretionary powers of the state, while empirical research indicates that this power-imbalance is predisposed to be exploited when the political issue of migration becomes politicized (as integration requirements can be employed to create popular impressions, such as that foreigners are incompatible with 'society', the source of problems, or other messages along those lines that scapegoat migrants as solely responsible for wider problems in society).

Finally, I applied these conclusions to my findings in Chapter 1. I found that these illustrate that the normative fragility and problem of the integration laws in EU countries is indeed that they grant states discretion to impose (increasingly more) requirements on individuals who are already in a vulnerable legal and political position and not in the position to be able to object. To be more specific, I observed that in the context of contemporary Europe, the growing prevalence of a contractual perspective on immigrant integration and the utilization of 'individualized integration' conceptualizations within immigration and citizenship laws, both take advantage of the precarious position of TCNs as legal non-citizens. They contribute to, and also obscure, that receiving EU Member States are currently in the position to demand all possible integration requirements for TCNs in order to secure their rights.

Nonetheless, there are no institutional or legal checks and balances in place to counteract the possible growth of unreasonable, stigmatizing or counterproductive integration requirements for TCNs, who possess precarious residency rights and lack a political voice. Nor have I encountered academic or political debates on how to potentially counterbalance such illegitimate integration requirements in the future.

For this reason, the task at hand is to propose an institutional strategy that would *remedy* the risks of the current integration requirements for TCNs in EU Member States. In Chapter 5, I will pick up this challenge. But before that I will, first, in Chapter 4, explore another effect of the current integration requirements in Member States, reflecting on their potential stigmatizing societal implications and how these might affect the ambition of European countries to uphold the liberal-democratic value of maintaining 'communities of equals'.