

‘Cultural Defence’ of Nations: Cultural Citizenship in France, Germany and the Netherlands

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Abstract: *This article presents a new development in European immigration policy. Focusing on France, Germany and the Netherlands, I describe a process of ‘culturalisation’ of admission and citizenship rules in Europe intended to reinforce liberal values and national identity. I then suggest a two-stage set of immigration-regulation principles: in the first stage, immigrants would have to accept some structural liberal-democratic principles as a prerequisite for admission. While Europe has criteria for state admission, anchored by the Copenhagen Criteria, Europe has not yet formalised definite criteria for immigrants’ admission. In the second stage, as part of the naturalisation process, immigrants would be expected to recognise and respect constitutional principles essential for obtaining citizenship of a specific state. I call this concept ‘National Constitutionalism’.*

I Introduction

Is culture a legitimate criterion for regulating immigration and access to citizenship? This question has become a European dilemma. On the one hand, states regulate immigration and access to citizenship by means of traditional criteria, such as public health, public order and public safety. On the other hand, it is often presumed to be illegitimate to use criteria such as race, ethnicity and religion. Because culture is not firmly embedded in either category, this article questions whether culture should be deemed a legitimate immigration criterion. On the whole, my argument does not dismiss culture as a legitimate criterion for immigrant selection, yet supports a very narrow version of culture.

The article proceeds as follows: section II describes the new challenge of immigration in the light of changes in immigration patterns and in the European society. It continues with a discussion of the cultural clashes that these patterns have instigated and how radical religion and radical liberalism reinforce these clashes. A review of the current challenge will help us to understand the background against which Member

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States have lately redesigned their immigration laws to cope with increasing numbers of culturally-diverse migrants.

Section III describes new immigration policies in France, Germany and the Netherlands. I show how these countries' immigration laws have increasingly turned into a culture-based concept. First, these reforms demonstrate a move from voluntary to compulsory cultural assimilation. Second, they illustrate a trend away from cultural assimilation as a prerequisite for access to citizenship toward it being a prerequisite for admission. Third, the concepts 'culture' and 'assimilation' are shifting towards a broader scope. Fourth, assimilation is being transformed from a means of social inclusion into a means of overt exclusion of unwanted immigrants. Cultural restrictions have been introduced in response to pressures to limit immigration in general, or certain kinds of immigrants in particular, and they have become a pretext for the social engineering of European demographics. Lastly, cultural restrictions are being extended beyond foreign workers to family members.

Section IV touches upon the question of whether culture *should* be a criterion for immigrant selection. My approach stands for a narrow concept of culture under which admissions criteria should be based on principles of political liberalism, which are not a culture-based concept but a system of principles governing behaviour in liberal democracy. Similarly, citizenship criteria should be based on constitutional principles of a particular state; these principles are generally not culture-based, even though they may include some cultural elements as long as these elements become part of the national culture.

Section V shows how some of the cultural restrictions imposed on immigrants in Europe undermine the very values they seek to protect. I argue that forced integration has to be variously applied according to different visa status: family members, refugees and foreign workers. I further argue that cultural restrictions have to be implemented differently with respect to admission as opposed to naturalisation. Furthermore, while it may be legitimate to request immigrants to respect certain liberal principles, it would be less legitimate to demand that immigrants adhere to, or identify with, those principles. Finally, while it may be legitimate to focus on constitutional principles, it would be less legitimate to focus on popular culture and personal beliefs.

II The New Challenge of Immigration

A *Liberal Democracy and Immigration*

People have always moved from one place to another to obtain jobs, improve their lives, join families and escape conflicts. But the contemporary phenomenon of immigration is a new challenge. Changes in immigration patterns are a major reason to this new challenge. First, the number of immigrants has almost tripled in the recent decades. Technological changes in global transportation and communications facilitate easier and cheaper movement between states and continents, culminating in the largest wave of immigration in history. In the 1960s, the world had 75 million immigrants; today, the number is 191 million—three per cent of the world's population—and this number will most likely continue to grow.¹ Second, the composition of the current wave

¹ *Trends in Total Migrant Stock: The 2005 Revision* (The United Nations, 2005), 1.

of immigrants is different. Until the 1950s, immigration remained within the boundaries of the Western World, for example, European immigration to the USA at the turn of the nineteenth century and the early twentieth century. International migrants may have been foreigners, but they were generally not strangers to Western political ideas. Today, however, most immigrants come to Europe from non-liberal societies; their culture travels with them and it often challenges liberal values. Since these immigrants are frequently concentrated geographically and maintain close ties with their home country, they create 'inside out communities'—that is, communities which physically reside inside the country, yet culturally remain outside. Third, the goals of migration changed. Until the mid-twentieth century, migration to Europe was mainly perceived as a temporary phenomenon; most immigrants were guest workers whose admission was generally welcomed due to their economic benefits. Today, however, family rather than labour migration characterises the majority of global migration.²

It is not just immigration patterns that have changed—the face of Europe has changed as well. First, Europe is facing a demographic crisis subsequent to the numerical erosion of its population. Fewer people are getting married. The divorce rate is unprecedented—in many EU States it is above 50 per cent. Some states face a low birth rate and an aging population.³ This decline in number and size of families⁴ is countered by the conspicuous growth in the number of immigrants having a relatively high birth rate. Second, Western values and lifestyles are also different. Immigrants are arriving into societies whose values they often do not share. True, a gap between values and lifestyles of native and immigrant groups existed in the past, but today's gap is more difficult to reconcile. Europe is much more permissive, liberal, secular and modern than before. Third, it's a small world: a Turkish immigrant in Berlin can easily stay 'Turkish'—she can read *Hürriyet*, eat at the *Hasir* restaurant, watch *TRT International*, and speak with Turkish relatives through her laptop. The modern world allows people to live in their host country while retaining close ties with their home country. Cheap, easy air transport and communications facilitate the existence of what have been termed 'transnational communities'.⁵ Dual citizenship, once an exception in international law, has become common in many states.⁶

These changes—in migration patterns and in the character of European society—lead to the conclusion that today's migration is a new challenge. While it brings new opportunities, it also raises some concerns. My interest lies in the cultural challenge: how to reconcile culturally distinct mass migration with liberal democracies asking to preserve their national identity.

² In 2001, family migration constituted 70% of the total migration to the U.S., 69% to France, 65% to Sweden, 62% to Canada, 53% to Denmark, 42% to Switzerland and 35% to the UK. When excluding refugees and asylum seekers, family migration constitutes about 80 to 90 percent of total migration in many states. See *World Migration 2005: International Migration Data and Statistics* (The United Nations, 2005), 400.

³ *Low Fertility and Population Ageing: Causes, Consequences, and Policy Options*, (RAND Corp. Europe, 2004), 55–58.

⁴ L. Harding, K. Willsher, D Fuchs and B. McMahon. 'How Parenthood Lost its Charm', *The Guardian*, 3 May 2006; G. Hinsliff and L. Martin, 'How the Baby Shortage Threatens our Future', *The Guardian*, 19 February 2006; J. Graff, 'We Need More Babies!', *The Times*, 21 November 2004.

⁵ P. Levitt, *The Transnational Villagers* (University of California Press, 2001).

⁶ R. Hansen and P. Weil, *Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe: The Reinvention of Citizenship* (Berghahn Books, 2002).

B Radical Religion and Radical Liberalism

Lately, there have been wake-up calls across Europe: an ongoing cultural clash between fundamentalism and liberalism. First, radical religious practices adhered to by minority groups have emerged across Europe, for example, female genital mutilation, honour killings, forced marriages and polygamy. Second, some minority groups have challenged liberal values such as free speech and gender equality. Opinion polls have revealed that Muslims and native Europeans often espouse different values and lifestyles.⁷ Third, minorities have challenged the authority of European Constitutions. For instance, 21 per cent of German Muslims believe that the Koran is incompatible with the German Constitution,⁸ while 17.8 per cent claim that the Koran's religious commandments are more important than democracy.⁹ In the Netherlands, a majority of Muslim pupils declared that in case of an irreconcilable conflict, they would choose loyalty to Allah over the Constitution.¹⁰ Among British Muslims, 32 per cent state that Western values are 'immoral' and should be prohibited, and 61 per cent wish 'to be governed by *Sharia* law.'¹¹

Clashing cultures are not only derived from radical religion: the host societies also have their part to play. The greater the radicalism adopted by the religious group, the more radical has liberalism become. The implications of this trend can be observed in Europe's new immigration laws, which compel newcomers to be liberal. Christian Joppke has termed this tendency 'repressive liberalism'—the promotion of liberal goals by illiberal means.¹² The confrontation of radical religion with radical liberalism has increased the intensity of the culture conflict.¹³ Immigrants experience a 'culture shock' sufficiently powerful to drive them toward radicalism.¹⁴ The French scholar Olivier Roy notes that radical Islamism is not a product of Islam, but a by-product of the collision between tradition and modernity. The requirement to subscribe to liberal ideas so alien to their own produces a crisis in Muslim identity.¹⁵ Joseph Raz likewise asserts that 'multicultural society often makes cultural groups more repressive'.¹⁶ Interestingly, surveys show that second and third-generation Muslims living in Europe identify with

⁷ *The Great Divide: How Westerners and Muslims View Each Other*, (The Pew Global Attitudes Project, 2006).

⁸ *Islam and Identity in Germany*, (International Crisis Group, 2007), 31, available at www.flwi.ugent.be/cie/documenten/islam_in_germany.pdf.

⁹ C. Schirrmacher, 'Muslims in Germany' *A Study by the Federal Ministry of the Interior*, (Europe News, 2008) 8 available at <http://europenews.dk/files/BMISStudy.pdf>

¹⁰ I. Buruma, *Murder in Amsterdam: Liberal Europe, Islam, and the Limits of Tolerance*, (Penguin, 2006), 94–95.

¹¹ M. Phillips, *Londonistan*, (Encounter Books, 2006), 82–83, 97.

¹² C. Joppke, *Veil: Mirror of Identity*, (Polity, 2009), 115 ('much as the liberal state might wish its members to identify with liberal norms (which cannot but be the goal of civic integration), it cannot legally force its members to do so. If it did, it would cease to be a liberal state.')

¹³ This is not to say that culture is the sole reason for clashes in Europe. There are other reasons for the societal unrest. Many of the immigrants who were brought to Europe during the 1960s and 1970s were needed to reconstruct Europe. As they were expected to return to their home countries, no policy aimed at their long-term residence or integration was formulated. Current clashes also derive from social failures to integrate immigrants.

¹⁴ T. M. Savage, 'Europe and Islam: Crescent Waxing, Cultures Clashing', (2004) 27(3) *The Washington Quarterly* 25, 33.

¹⁵ O. Roy, *Globalized Islam. The Search for a New Ummah* (Columbia University Press, 2004).

¹⁶ J. Raz, 'Multiculturalism: A Liberal Perspective', in *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, (Oxford University Press, 1994), 155, 170–171.

Islam more strongly compared to Muslims living in the country of their origin, and are less integrated into European society than their parents and grandparents.¹⁷

III 'Cultural Defence' of Nations

This section describes several legal counter-reactions to the new challenge raised by the growing number of culturally-diverse immigrants in three European states: France, Germany and the Netherlands. I chose these states for three reasons: First, they are the main states to receive immigrants to Europe from the 1960s until 2000, and have the highest percentage of Muslim residents.¹⁸ Second, they have witnessed the fiercest clashes between native Europeans and immigrant groups. And third, they hold different concepts of citizenship and have historically developed in different directions.

A The French *Communauté*

Faiza Silmi was legally admitted into France. She married a French citizen and gave birth to three French children. She did everything needed to become a citizen, but her application for citizenship was nonetheless rejected. Her traditional headdress, the niqab, was incompatible with French values, claimed the French officials. Silmi filed a petition in court to reverse the decision, but lost. She did not give up and took the case to the highest French administrative tribunal, *le Conseil d'Etat*, where she challenged the decision. On 27 June, 2008 the *Conseil d'Etat* backed the denial of her French citizenship based on her 'insufficient assimilation' into the French Republic. The *Conseil* ruled that Silmi adopted a 'radical religious practice', incompatible with the 'values essential to the French *communauté*, notably the principle of gender equality'.¹⁹ The *Conseil* invoked a new revision in the French Civil Code saying that 'the government may, on grounds of indignity or lack of assimilation other than linguistic, oppose the acquisition of French nationality by the foreign spouse', and that 'no one may be naturalised unless he proves his assimilation into the French community'.²⁰ It was the first time in French history that citizenship was officially rejected for this reason.

The *Conseil d'Etat's* decision is not clear. First, it is uncertain whether the reason for denying Silmi's citizenship was her beliefs, her conduct, or both. Silmi came to the immigration interview wearing a niqab. She refused to remove it when officials asked for identification and a passport photograph, even when she was offered to be interviewed by a woman. She told the officials she was not interested in voting since 'only men should vote'. She knew nothing about *laïcité*—the French concept of secularism—and declared that she was a *Salafi*—an adherent of a radical Sunni sect. Most of these facts did not appear in the decision; they were publicised by the press.²¹ Therefore, it is

¹⁷ K. Lorant, *The Demographic Challenge in Europe*, (2005), at 16 available at <http://www.europarl.europa.eu/inddem/docs/papers/The%20demographic%20challenge%20in%20Europe.pdf>.

¹⁸ France has the highest percentage of Muslim immigrants (8%, 5 millions), followed by the Netherlands (6%, 1 million) and Germany (4%, 3.5 millions). See *An Uncertain Road: Muslims and the Future of Europe*, (The Pew Research Center, 2005), 3.

¹⁹ Conseil d'Etat, 27 Juin 2008, no 286798 (noting that 'si Mme . . . adopté une pratique radicale de sa religion, incompatible avec les valeurs . . . essentielles de la communauté française, et notamment avec le principe d'égalité des sexes ; qu'ainsi, elle ne . . . remplit pas la condition d'assimilation').

²⁰ French Civil Code, Book I, Title I, Chapter III, Section I §3 Articles 21–4, 21–24.

²¹ 'Une Marocaine en Burqa se voit Refuser la Nationalité Française', *Le Monde*, 15 July 2008; L. Agustín, 'What not to Wear – if you Want to be French', *The Guardian*, 6 August 2008.

unclear what the case stands for: is the rule based on wearing a niqab, or refusing to vote; because she expressed no sense of belonging to the French Republic, or because she was unwilling to participate in French civil life? Second, contrary to what was implied by the press coverage, the ruling is not based on the principle of *laïcité* but on the principle of gender equality. The *Conseil* found that Silmi's lifestyle and clothing indicated total submission to her male spouse, which indicates gender inequality, which further indicates insufficient assimilation. It is unclear yet what exactly this concept stands for: is *le principe d'égalité des sexes* a universal concept, or a French concept of *d'égalité des sexes*? Is the niqab the only headscarf indicating the absence of gender equality, or do other headscarves transmit similar messages? Finally, the decision refers to 'values essential of the French *Communauté*' yet it does not specify what these values are. Is it the French *Communauté* or French *Nationalité*? What exactly is being defended in the French Civil Code?

The decision means that assimilation is a prerequisite for membership in the French community, and the only route to do so. In order to acquire French status, one first needs to demonstrate some sense of identity with the French Republic, some level of political participation, or both. Yet, even if one assumes that citizenship is a participation-based concept, the fact that Silmi was not willing to vote does not necessarily indicate that she did not participate in other spheres of French society. In fact, by bringing her case to several courts, she had shown a high level of political participation. And even if citizenship is an identity-based concept, the fact that Silmi was wearing a niqab does not necessarily mean that she was denying her French identity. In fact, by speaking good French, having a French spouse and three French-born children, Silmi was exhibiting her wish to attach herself to France. The case might have been different if she had refused to remove the niqab for a passport photo and identification. In that case, her application might have legitimately been rejected, but for technical rather than substantive reasons.

The *Conseil d'Etat's* decision is typical of an emerging trend. In recent years, the failed integration of immigrants from the Maghreb, together with the consequent social tensions that culminated in the 2005 civil unrest led by immigrant youths, has motivated France to embrace a forced assimilation model with respect to immigration and naturalisation. As of 1 January 2007, every immigrant has to sign a legally-stipulated 'Reception and Integration Contract' (*Contrat d'accueil et d'intégration*)²² before receiving a permanent residence permit.²³ By signing the contract, the immigrant takes on the obligation to respect the 'fundamental values of the Republic', take language lessons and participate in a one-day civic training programme.²⁴ During the session, the immigrant learns about French values through watching a film entitled *Living Together in France*; a personal interview follows to test his language skills and personal outlook. In the film, he or she is also exposed to the French idea of nationhood as based on '*liberté, égalité, fraternité.*' Non-compliance with the

²² The Reception and Integration Contract is available at http://www.anaem.fr/IMG/pdf/Contrat_2008.pdf.

²³ Décret n° 2006-1791 du 23 décembre 2006; article 5 of LOI n° 2006-911 du 24 juillet 2006 relative à l'immigration et à l'intégration, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000266495&dateTexte>

²⁴ A. Devillard, 'France', in *Comparative Study of the Laws in the 27 EU Member States for Legal Immigration* (European Parliament and IOM, 2008), 237–249 (henceforth: 'Comparative Study of the 27 EU Member States').

contract's terms can lead to the refusal to issue a residence permit, non-renewal of the permit, or a fine.

B *The German Kulturation*

In September 2005, the German Minister of the Interior of Baden-Württemberg ordered a new series of questions to be introduced, for the purpose of assessing the loyalty of people requesting naturalisation into the German 'liberal democratic basic order'. Under this policy, such loyalty is measured during an interview in which questions about personal beliefs and opinions are asked. Let's take a few examples:²⁵ 1) Imagine that your adult son comes to you and declares that he is a homosexual and would like to live with another man. How would you react? 2) Your daughter applies for a job in Germany, but she is rejected. Later, you discover that a black African from Somalia got the job. How would you react? 3) Some people accuse the Jews of being responsible for all evil in the world and even state they were behind the September 11 attacks? Do you believe in such statements?

The Baden-Württemberg questionnaire is unusual in the intrusiveness of its questions, 30 in all, about gender equality, religion, conversion, politics, marital relations and teenager culture. Significantly, these questions originally applied only to applicants from one of the 57 Member States of the Organisation of the Islamic Conference, or other applicants 'appearing to be Muslims'.²⁶

In March 2006, the Hessian *Land* issued a new naturalisation test containing 100 questions on nine subjects: Germany and Germans, German history, fundamental rights, elections and parties, state authorities, social states, Germany in Europe, culture and science, and national symbols. This test is less intrusive but still includes several questions on ethics, politics and cultural beliefs. The applicant first has to state three reasons for wanting to become a German citizen. Next, he has to explain (it is not a multiple choice exam) the concept of Reformation, the Holocaust, the right of Israel to exist, and some constitutional principles such as freedom of religion, free speech and equality. Next, the applicant has to explain 'which measures are permitted and which are forbidden' in the education of children, and whether 'it should be allowed for a woman to stay in public without being accompanied by a male relative'. In the next section, the applicant has to name German composers, musicians and philosophers, German athletes and German poems. Some questions are peculiar—they focus on German symphonies, newspapers and automobile manufacturers. Others require a high level of knowledge, for example, 'to which sport event does the film "The Miracle of Bern" refer to?' (It is the 3:2 victory of Germany over Hungary in the 1954 World Cup final.)²⁷

Since September 2008, the Federal Republic of Germany (FRG) has presented a federal test which replaces the *Länder* tests. The federal test includes 33 random multiple choice questions of which the applicant must correctly answer 17. The questions come from a catalogue of 310 questions, and the *Länder* can pick and choose their

²⁵ A copy of the questionnaire is on file with the author.

²⁶ Following criticism, the Muslims-only application had changed to any applicant 'whose loyalty to the German Basic Law is doubted.' For a comprehensive analysis of the questionnaire, see R. Grell, *Dichtung und Wahrheit: Die Geschichte des 'Muslim-Tests' in Baden-Württemberg, 30 Fragen, die die Welt erregten* (Stuttgart, 2006).

²⁷ A copy of the questionnaire is on file with the author.

own questions. It is a far less intrusive exam, focusing on history, geography, constitutional principles, Europe, national symbols and German customs, such as ‘what Germans traditionally do at Easter’. However, passing the test is not the sole criterion to become German. Recent revisions of the Nationality Act require every applicant who wishes to become naturalised to show an ‘adequate knowledge of German’ language by taking 600 hours of compulsory integration courses,²⁸ and to ‘confirm *commitment* to the free democratic constitutional system’.²⁹ This commitment has to be proved by a written ‘declaration of loyalty’ to the rule of law, judicial independence, human rights, foreign interests of the FRG, and a continuing list of values.³⁰ Spouses of German citizens can be naturalised only if ‘it is ensured that they will conform to the *German way of life*’.³¹ An adequate knowledge of the language and a capability to integrate into the German ‘way of life’ is also a prerequisite for getting a residence permit under the Residence Act.³²

Citizenship tests often mirror the natives’ perception of themselves. The *Länder* tests have just been replaced by a federal test but their existence provides an example of ideological concept of *Kulturnation*. The rationale for this new process was explained by Jörg Schönbohm, the Minister of the Interior: ‘those who come here have to adopt the German *Leitkultur*. Our history has developed over a thousand years. We cannot allow that this basis of our community be destroyed by foreigners’.³³

In order to understand the current development in German immigration laws, one needs to get back to the evolution of German concept of citizenship.³⁴ Contrary to France, German citizenship was originally based on ethnicity, that is, where the immigrant’s ancestors come from. Until recently, there was generally no right to naturalisation; a person could have lived in Germany for decades without an option to become German. Access to citizenship had been based on blood (*jus sanguinis*) rather than on a place of birth (*jus soli*). A person should have been born German in order to qualify as German. The expectations were that non-ethnic Germans would become culturally German by lasting residence in Germany. The residence requirement for citizenship is currently eight years (it was fifteen in the past), and has aimed to hasten cultural assimilation. This assimilation, however, has not fully occurred. Immigrants—notably from Turkish origin—have not always been culturally ‘Germanised’. Consequently,

²⁸ See sections 10(1)(6), 10(3) and 10(4) of the 1913 Nationality Act, available at <http://www.bmi.bund.de/>.

²⁹ *ibid* Section 10(1)(1).

³⁰ Section 85.1.1.1 of the *Allgemeine Verwaltungsvorschrift zum Staatsangehörigkeitsrecht (StAR-VwV)*, (13 December 2000) GMBL 2001, 122 (General Administrative Provision to the Nationality Law), available at http://vwwbund.juris.de/bsvwwbund_13122000_V612400513.htm.

³¹ Section 9(1)(2) of the *Nationality Act*, *op. cit.* n28 *supra*.

³² The 2004 Residence Act (*AufenthG*), section 9(2)(7) (acquiring ‘adequate knowledge of the German language’ as a prerequisite for getting a settlement permit), section 9a(2)(4) (possessing ‘a basic knowledge of the legal and social system and the way of life in the Federal territory’ for getting a EC long-term residence permit), sections 43–45 (‘the aim of the integration course is to successfully impart the German language, legal system, culture and history to foreigners. In this way, it is intended to acquaint foreigners with the way of life in the Federal territory’).

³³ N. Kumanoff, ‘What is Leitkultur? In a Raging Debate, Leitkultur is the Operative Term’, *The Atlantic Times*, December 2004.

³⁴ For the development of German immigration laws, see N. Cyrus and D. Vogel, ‘Germany’, in J. Niessen, Y. Schibel and C. Thompson (eds), *Current Immigration Debates in Europe* (The Migration Policy Group, 2005); R. Gutmann, ‘Germany’ and *Comparative Study of the 27 EU Member States*, *op. cit.* n 24 *supra*, at 251–263.

Germany has modified its immigration laws by asking every immigrant to conform culturally to its way of life before being able to be German.³⁵

C The Dutch Inburgering

Like France and Germany, the Netherlands has a growing foreign population—about three million of its sixteen million people—notably of Turkish and Moroccan origin. Failures of the multicultural policy have shifted the focus from social inclusion to exclusion of immigrants.³⁶ The first reform took place in the Integration of New Immigrants Act, 1998 (*Wet Inburgering Nieuwkomers*).³⁷ The Act requires immigrants, including family members, to take integration courses of Dutch language and Dutch society once they are in the Netherlands. A few years later, another reform was made with the Integration Abroad Act, 2005 (*Wet Inburgering in het Buitenland*). This Act is a new concept: every person aged between 16 and 65 asking to enter the Netherlands on a non-visitor visa should go to the Dutch embassy in his or her country of citizenship or residence and participate in language courses and civic training.³⁸ On completion, he or she has to pass two examinations in the Dutch embassy: an oral examination testing elementary knowledge of Dutch language and a computer-based exam testing elementary knowledge of Dutch society. Passing the examinations does not guarantee Dutch status, but merely admission. After being admitted, the applicant has to participate in further integration courses in order to obtain citizenship. The applicant has to pass additional examination, testing a higher level of Dutch language, and another exam testing a higher level of knowledge of Dutch society. Failing to pass the exams within the time limit of three-and-a-half years may end with administrative fines (up to €1000) and denial of the application for citizenship. This process is now regulated by the Civic Integration Act, 2007 (*Nieuwe Wet Inburgering*), which replaces the 1998 Immigrants Act.³⁹

In spite of its title as a 'civic integration examination abroad', the Dutch test is a culture-based concept. For example, the applicant has to watch a two-hour film about the Dutch society. The film gives the impression that it would be better to stay out of the Netherlands: it treats the immigrant as an alien from Mars who has to deal with the complexity of an escalator and computers. The applicant is also exposed to Dutch customs, such as leaving house curtains open, shaking hands with women and bringing birthday presents. One of the scenes shows topless women and homosexuals kissing, and no exemption is made to religious scholars like Jewish rabbis or imams.⁴⁰ The film provides a glance into the Dutch perception of themselves and their sense of

³⁵ *Immigration Law and Policy* (Federal Ministry of the Interior, 2006), 41–47, 80–86.

³⁶ C. Joppke, 'The Retreat of Multiculturalism in the Liberal State: Theory and Policy', (2004) 55(2) *British Journal of Sociology* 237, 247–249; J. Doornik, 'The State of Multiculturalism in the Netherlands', (2005) 4(1) *Canadian Diversity* 32.

³⁷ For the new Dutch policy, see V. Marinelli, 'The Netherlands', in *Current Immigration Debates in Europe*, *op. cit.* n 34 *supra*; T. de-Lange, 'Netherlands', in *Comparative Study of the 27 EU Member States*, *op. cit.* n 24 *supra*, at 355–368.

³⁸ See *The Civic Integration Examination Abroad* (Justitie, Immigratie- en Naturalisatiedienst, 2006); *Residence in the Netherlands* (Justitie, Immigratie- en Naturalisatiedienst, 2008), available at www.ind.nl/en/Images/VIN_ENG_0806_tcm6-595.pdf.

³⁹ L. F.M. Besselink, *Integration and Immigration: The Vicissitudes of Dutch Inburgering*, (Liberty & Security, 2008), available at <http://www.libertysecurity.org/article2124.html>.

⁴⁰ Details about the film, 'Coming to the Netherlands' (*Naar Nederland*), are available at: <http://www.naarnederland.nl/documentenservice/pagina.asp?pagkey=53768>.

'Dutchness'. The Dutch method is quite different from the German Muslim-only test. The process is 'universal' and seemingly applies to all immigrants. However, one has to look at the endless list of exemptions to get the impression with whom the tests are really concerned. The whole process is not applicable to EU citizens, and citizens of Australia, Canada, Japan, New Zealand, Switzerland and the USA: the Western world is then exempted.. The reasons for this are EU laws relating to freedom of movement in the EU, and bilateral agreements between states. However, some states do not fall within these categories; in such cases, the exemption is based on a premise that people from certain states are presumed to be liberal.

The Dutch ask applicants to subscribe to their values in advance—before getting temporary residence permit (*mvv*). This is due to a change in the premise: Citizenship is not seen anymore as a Dutch in-the-making but as the peak of Dutch assimilation. As Joppke notes, it is a 'philosophical shift from naturalisation as a tool of integration to naturalisation as end-point of successful integration'.⁴¹ However, it is much harder to speak Dutch and to be familiar with the Dutch society by watching movies in the Dutch embassy in Pakistan. As Joan Scot rightly notes, this it is like 'asking them to pass final exams at the beginning of the course'.⁴² This process applies to non-exempted family members as well, which can result in harsh cases. If a Dutch man fell in love with a foreign woman, he has to wait until she will speak Dutch—English, French and German are not acceptable even though many Dutch speak them—and pass tests about Dutch society before they can live together in the Netherlands. In a recent case, the Amsterdam district (*Rechtbank*) court ruled that the policy is illegal as long as it applies to family members. In that case, a Moroccan spouse of a Dutch citizen was refused citizenship. She was illiterate and failed to pass the examinations—which, like other tests, assume that the person knows to read and has basic computer skills. The court rebuked the Dutch policy as far as it applies to family immigrants. The court's reasoning, however, is based on a technical statutory interpretation rather than a substantive Dutch or European law regarding equal protection and family life.⁴³ Therefore, and because there is no constitutional judicial review in the Netherlands other than that available under EU laws,⁴⁴ the ruling of the *Rechtbank* Amsterdam does not have a national binding effect.⁴⁵

In adopting these policies, the Netherlands has drastically moved from one extreme to another. Like other European countries, the Netherlands initially welcomed labour migration after World War II as temporary guest workers from former Dutch colonies. Until the 1970s, there was no integration policy because the expectation was that the guest workers would eventually return to their country of origin. By and large, until 1998, admission and naturalisation requirements were minimal—applicants had to show that they had no criminal record and to pass a short interview for identification.⁴⁶ Integration had been seen as a Dutch in-the-making triggered by residing in the Netherlands and having Dutch citizenship. Yet, failures of fully integrating immigrants have led to the adoption of an opposite policy. As Evelyn Ersanilli rightly notes, since

⁴¹ C. Joppke, 'Comparative Citizenship: A Restrictive Turn in Europe?', (2008) 2(1) *Journal Law & Ethics of Human Rights*.

⁴² J. W. Scott, *The Politics of the Veil* (Princeton University Press, 2007), 103.

⁴³ LJN BD7189, *Rechtbank 's-Gravenhage, zittingsplaats Amsterdam*, AWB 07/18932.

⁴⁴ Articles 94 and 120 of the Dutch Constitution.

⁴⁵ The Dutch policy is still in force in spite of the decision; an appeal is pending before the Court of Appeal.

⁴⁶ E. Ersanilli, 'Netherlands, Country Profile', (2007) *Focus Migration*, 4.

1998, 'granting citizenship is no longer seen as a means of facilitating integration, but more as a reward that should only be given to people who have proven that they have integrated successfully'.⁴⁷ Social segregation of Turkish and Moroccan communities, a high level of unemployment, and social unrest culminating in the assassination of the Dutch film maker Theo van Gogh—have led to the feeling that the multicultural dream is over. Pim Fortuyn, the assassinated Dutch politician, summarized this philosophy: 'This is our country, and if you can't conform, you should get the hell out, back to your own country and culture.'⁴⁸ Fortuyn promoted a romantic ideal of nation whose members share the same culture. Under this concept, immigrants are welcomed but only after they can show a high level of assimilation before admission, and a higher level before naturalisation.

IV A Two-Stage Solution: Admission, Citizenship and Culture

France, Germany and the Netherlands illustrate a new process of 'culturalisation' in Europe's immigration and naturalisation laws. Each state embraces policies aimed at protecting certain liberal values and cultural identity. In this section, I argue that the criterion of culture should be given a very narrow interpretation in immigration contexts. As to admission criteria, I resist the use of culture as a criterion. Rather, I claim that states can ask migrants to subscribe to core political liberal principles. These principles are not culture-based but are a system of rules governing behavior in liberal democracies. As to citizenship criteria, I advocate asking migrants to conform to constitutional principles which are essential for obtaining citizenship of a specific state, as long as these principles are just given the state's circumstances; I call this *National Constitutionalism*.

A Admission and Political Liberalism

What are the principles of political liberalism to which every immigrant has to conform in Europe? The EU is anything but consistent on this issue. Under *The Hague Programme: Strengthening Freedom, Security and Justice in the EU*, Member States decided to develop a common integration policy for newcomers.⁴⁹ Soon after, they agreed upon the Common Basic Principles for Immigrant Integration Policy.⁵⁰ These principles include 'basic knowledge of the host society's language, history and institutions', 'basic values of the EU and fundamental human rights,' and 'participation of immigrants in the democratic process'.⁵¹ More recently, the EU adopted the *Pact on Immigration and Asylum*, a document directed, among other things, at formulating the fundamental principles of immigrant integration. The Pact 'recalls that it is for each Member State to decide on the conditions of admission of legal migrants to its territory and, where necessary, to set their number.' It allows Member States to regulate admission criteria and thereby ask immigrants to accommodate to the state's language, and to respect the 'identities of the Member States and the European Union and . . . their fundamental

⁴⁷ *ibid.*

⁴⁸ *Buruma*, *op. cit.* n 10 *supra*, at 67.

⁴⁹ *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union* (European Council, 2004), Points 1.2 and 1.5 in the Presidency conclusions.

⁵⁰ *Justice and Home Affairs, 2618th Meeting* (Council of the EU, 14615/04, 2004).

⁵¹ *Ibid* at 17–18.

values, such as human rights, freedom of opinion, democracy, tolerance, equality between men and women, and the compulsory schooling of children'.⁵²

The EU has not yet established admission criteria for immigrants. A set of admission criteria exists for states, but not yet for individual memberships. State membership is ruled by the Copenhagen Criteria, which are principles that every Member State has to sustain before being eligible to join the EU.⁵³ These principles, universal in character, are configured in a European variant, defined by European legislation and case law.⁵⁴ They indicate that Europe is not demarcated only by geography, but also by a family of rules presupposing any political membership. What is missing is a set of membership criteria for individuals requesting admission into Europe. These principles can capture basic political structure of European democracies. The EU should develop harmonized, coherent terms for admitting immigrants into the EU, and some guidelines for immigrant integration in the EU. Different policies among Member States may affect the whole Union and, therefore, it is a *European* interest to set framework and some shared norms.

Let's take an example. When an American comes to France, she does not have to take driving lessons before being permitted to drive in France if she has an American driving licence. The situation would be different if she does not have a driving licence—or if she comes from a country where the basic traffic laws are different from those in France. In these cases, it would be legitimate to demand that she take driving lessons and learn the local traffic laws before allowing her to drive. Refusing to accept these rules, or failing to pass tests demonstrating knowledge of the rules, may legitimately enable France to prevent her from driving. If she consistently violates the traffic laws, France can legitimately ask her to take more driving lessons and—if she fails rescind her licence.

My point is that if living in a liberal democracy means obeying some structural principles—which apply to every person—states can require acceptance of these principles as a prerequisite to admission. In addition, states can legitimately implement appropriate means to ascertain a person's declared acceptance and deny admission otherwise.⁵⁵ These principles obligate every person who voluntarily immigrates to Europe.⁵⁶ However, different visa statuses may lead to the application of different tests and different levels of scrutiny. Persons who are unable or unwilling to follow these principles can be removed.

Obeying this framework of principles is justified because the principles themselves are just. In *A Theory of Justice*, John Rawls elaborates on the concept of natural duties. He notes that 'if the basic structure of society is just, or as just as it is reasonable to expect in the circumstances, everybody has a natural duty to do his part in the existing scheme'.⁵⁷ Rawls's premise assumes that the principles are just in themselves but leave room for the localisation of justice by noting that the principles have to be just 'in the circumstances'. Accordingly, if the minimal framework of political liberalism is just, in Europe's

⁵² *European Pact on Integration and Asylum* (Council of the EU, 24 September 2008).

⁵³ *Copenhagen European Council, Presidency's Conclusions*, EC Bull. 6-1993.

⁵⁴ The European application of these universal principles is embodied in the *acquis communautaire*.

⁵⁵ I avoid the question of the legitimate means (citizenship tests, oaths of allegiance, 'integration contracts' etc).

⁵⁶ Refugees are a different case, which I do not discuss, because their migration is not purely voluntary.

⁵⁷ J. Rawls, *A Theory of Justice* (Harvard University Press, 1971), 115.

circumstances, every immigrant should be required to accept this framework. It does not follow that immigrants must adopt any culture-based content, only that they agree to some framework and its procedures. Immigrants should agree that in a system of the rule of law, people should obey the law whether they like it or not, follow court decisions and resolve conflicts by peaceful means. Immigrants are compelled to recognise that in a liberal democracy, some laws may contradict their customs and beliefs, but that they are nonetheless duty-bound to follow them. A person who is unwilling to accept these principles, or consistently fails to accept them, can therefore be inadmissible. This statement reflects the idea that intolerance is intolerable. Raz notes that 'some cultures, or aspects of some cultures, are unacceptable'; states should tolerate them only when it is 'possible to neutralise their oppressive aspects'.⁵⁸ This idea also appears in *The Social Contract*, where Rousseau notes that intolerant groups are often unacceptable:⁵⁹ 'It is impossible to live at peace with those we regard as damned . . . we positively must either reclaim or torment them . . . tolerance should be given to all religions that tolerate others, so long as their dogmas contain nothing contrary to the duties of citizenship.'

In Rousseau's view, members of an intolerant religion should be excluded from the community, and only tolerant religions should be tolerated by joining the social contract. Thus, for example, if there is tangible evidence that a migrant is a fascist, then it would be legitimate to keep her out. This practice still stands if the migrant does not want to accord rights to Blacks, Jews or minorities. The circumstances may be less clear, however, if he or she is merely against the state's desired 'way of life.' In this case, it is necessary to explore to what he or she objects; different answers may lead to different conclusions.

B Naturalisation and National Constitutionalism

Political liberalism says nothing about 'Dutchness', 'Frenchness' or 'Germanness'. It does not establish any special relationship between immigrants and specific states. Therefore, another element is required because citizenship means joining a concrete, well-defined community. This element should take into account the locus of political liberalism in the concrete community, what Raz calls 'liberalism—*here and now*'.⁶⁰

What are these contextual elements of liberalism? Different schools of thought may reach different conclusions. From a communitarian perspective, a state is like a club whose members enjoy the right of closure, meaning that they can set up cultural criteria to control the size and character of immigration. A state is viewed as a 'community of character' and migrants are to accord with that character.⁶¹ David Miller asserts that states can legitimately limit migration in order to retain their 'cultural preservation and continuity'; defining the boundaries of the culture is a decision belonging solely to the community's members.⁶² From a liberal-nationalist perspective, a state can require immigrants to conform to core elements of national liberalism. Will Kymlicka notes

⁵⁸ Raz, *op. cit.* n 16 *supra*, at 169.

⁵⁹ J. J. Rousseau, *The Social Contract*, Book IV(8), (M. Cranston trans., Penguin Classics, 1968).

⁶⁰ Raz, *op. cit.* n 16 *supra*, at 155.

⁶¹ M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, 1984), 31–49, 61–64.

⁶² D. Miller, 'Immigration: the Case for Limits', in A. Cohen and C. H. Wellman (eds), *Contemporary Debates in Applied Ethics* (Wiley-Blackwell, 2005), 193.

that immigrants have to integrate into a ‘societal culture’.⁶³ This abstract idea includes a thin concept of linguistic integration and history; other elements can be encouraged, but not imposed. Christian Joppke mentions that liberal democracies can ask immigrants to subscribe to a ‘thin and procedural’ liberalism.⁶⁴ He seems to agree that a ‘thick, substantive liberalism’ is, in principle, a better choice to preserve social cohesion; yet, due to limitations of human rights law, he eventually embraces a thin, procedural idea of liberalism.

I would follow a similar, though slightly different, direction. My approach is divorced from concepts of societal and national culture and focuses on what I call National Constitutionalism. Under national constitutionalism, immigrants would have to be familiar with, and accept, a state’s essential constitutional principles before becoming its citizens—as long as these principles are just in the state’s circumstances. This formula is constructed of four elements: It refers to *constitutional* principles, factors *essential* for citizenship, which are *just given the circumstances* of a respective state, and need to be *accepted* by the immigrants. It allows states to strive to preserve their national constitutionalism by means of naturalization laws, yet it is not generally culturally-oriented.

Every state has a constitutional uniqueness reflecting its history, traditions and contextual background. In order to understand its basic constitutional principles, one should look at the state’s formative documents, such as its Constitution, its Preamble and its Declaration of Independence.⁶⁵ These documents reflect the national creed or constitutional trademark, what George Fletcher calls ‘constitutional identity’.⁶⁶ In Germany, for example, national constitutionalism is embodied in concepts of human dignity and Kantian morality. Other countries, such as Israel, have a constitutional conception of human dignity but it differs from than the German *unantastbar* dignity.⁶⁷ Similarly, the rule of law is a universal concept, but the German *Rechtsstaat* is quite different from the Anglo-American one; it requires substantive and procedural fairness, an idea closer to American due process.⁶⁸ A Social State is a universal concept but, again, the German *Sozialstaat* has a local meaning; it requires affirmative acts to promote the public weal—it is more like the American idea of ‘general welfare’.

Under national constitutionalism, an immigrant seeking citizenship must be familiar with the state’s essential constitutional principles, accept and respect them. He is not required to agree with them—in fact, he may legally act to change them—but he must accept and respect them as the law of the land. This does not mean respect solely for values such as ‘all men are created equal’ and free speech. Rather, in the American case,

⁶³ W. Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (Oxford University Press, 2001), 51–54, 155–174.

⁶⁴ C. Joppke, ‘Immigration and the Identity of Citizenship: The Paradox of Universalism’, (2008) 12(6) *Citizenship Studies* 533, 535.

⁶⁵ Constitutional principles are not necessarily derived from a formal, written Constitution. They are often embodied in other constitutional paper such as case-law, especially in common-law states, and codes, especially in civil-law states.

⁶⁶ G. P. Fletcher, ‘Constitutional Identity’, (1993) 14 *Cardozo Law Review* 737.

⁶⁷ E. J. Eberle, *Dignity and Liberty: Constitutional Visions in Germany and the United States* (Praeger, 2001), 41–45.

⁶⁸ D. P. Currie, *The Constitution of the Federal Republic of Germany* (University Of Chicago Press, 1994), 1–32; D. Grimm, ‘Human Rights and Judicial Review in Germany’, in D. M. Beatty (ed), *Human Rights and Judicial Review: A Comparative Perspective* (Springer, 1994), 267.

it means respecting the high level of free speech declared in the American Constitution, which is part of the American culture; or in the Dutch case, the high degree of same-sex and gender equality, which is part of the Dutch constitutional tradition. It also means respect for people's right to live by these principles, either inside or outside the immigrant community. To borrow an American term, migrants should exhibit 'attachments to the principles of the Constitution'. These attachments, required of each person who requesting American citizenship, are to the Constitution of the USA.⁶⁹ To be clear, national constitutionalism does not imply national culture but it may include cultural elements as far as constitutional principles become part of the national culture. National constitutionalism focuses on the Constitution; it does not refer to Dutch culture, German way of life, or French *communauté*. It does not mean that immigrants must morally identify with these principles, only that they legally recognise and accept them. From this perspective, 'attachments' and 'adherence' may not be the best terms since both imply a certain degree of emotional identification.⁷⁰ Recognition, respect and acceptance, on the other hand, are inherently legal rather than moral concepts.

National constitutionalism is justified for at least two reasons: First, it is based on consent. The decision to become a citizen of a specific country implies agreement with constitutional essentialism of that country.⁷¹ Second, it is based on the principle of fairness.⁷² Persons who become citizens of a state enjoy its benefits, resources and protection; it is only fair to ask them to accept its constitutional essentials in return.

Practically speaking, I believe that the acceptance and respect of essential constitutional principles should be ascertained by interview questions, a method implemented by the German *Land* of Baden-Württemberg. The would-be citizens' knowledge of their new country's rivers and mountains is less relevant. Such knowledge merely indicates that the applicants are well-prepared for the test, but not that they accept constitutional principles. Joppke notes that citizenship tests about history and institutions 'are unproblematic . . . because such matter is merely cognitive: it can be learned and mechanically reproduced'.⁷³ Joppke is right: These tests are less problematic from a liberal point of view. The question is what do these cognitive skills prove, and are they essential for obtaining citizenship? Mathematics and physics too are cognitive skills, but they are certainly not essential in this context.

National constitutionalism builds on Habermas's Constitutional Patriotism⁷⁴ but in a slightly different direction. In both, the object is the nation's constitution—neither the French *Communauté* nor a German *Kulturnation*. Both leave room for constitutional particularity, and both are divorced from any romantic conceptions of citizenship. In both, the constitutional system as a whole has to be justified, rather than each single constitutional principle and both include what Michelman calls as constitutional essential.⁷⁵ Yet, some elements of national constitutionalism differ from constitutional patriotism. The motivation for national constitutionalism is not creation of 'a just

⁶⁹ Section 316(a) of the Immigration and Nationality Act (INA), 8 U.S.C.A., section 1182.

⁷⁰ G. F. Fletcher, *Loyalty: an Essay on the Morality of Relationships* (Oxford University Press, 1993), 42–57.

⁷¹ D. Martin, 'Membership and Consent: Abstract or Organic', (1985) 11 *Yale Journal of International Law* 278.

⁷² J. Waldron, 'Special Ties and Natural Duties', (1993) 22(1) *Philosophy & Public Affairs* 3, 5–11.

⁷³ Joppke, *The Paradox of Universalism*, *op. cit.* n 64 *supra*, at 542.

⁷⁴ J. Habermas, 'The Postnational Constellation and the Future of Democracy', in M. Pensky (ed), *The Postnational Constellation: Political Essays* (The MIT Press, 2001), 58–112.

⁷⁵ F. I. Michelman, 'Morality, Identity and "Constitutional Patriotism"', (1998) 76 *Denver Law Review* 1009, 1015–101.

constitutional regime' that 'expresses universal norms of justice and fairness in specific contexts'.⁷⁶ Its aim is to protect core constitutional principles because they are ours and because 'we'—the French, the German and the Dutch people—have an interest in preserving them. Its *raison d'être* emerges from a new reality and the need of nations to preserve their constitutional essentialism. National constitutionalism is thus less universal than is constitutional patriotism, *inter alia* because it applies to naturalisation, the second stage, whereas universal principles apply mainly to the first stage, that of admission. It also entails the introduction of different formats of scrutiny, depending on the type of migrant and visa status. Furthermore, national constitutionalism does not require emotional connectedness nor allegiance; there is no need for patriotism nor devotion to any principle. It is a stipulation for a legal, non-emotional belonging in a specific political body. Hence, its essentialism does not relate to constitutional principles indispensable to the maintenance of society, but merely for obtaining citizenship.

V From Theory to Practice

Let me turn now to the application of my approach to the French, German and the Dutch cases. I would argue that these states' immigration policies have gone too far in at least three issues and, thus, suggests ways to modify them in a more liberal discourse.

A 'Recognise, Respect, Accept' and 'Adhere, Identify With'

The first issue touches on the Kantian distinction between 'recognise, respect, accept' and 'adhere, identify with'.⁷⁷ The former attitudes are legal commitments; the latter are moral obligations. Only the first, I believe, can be legitimately involved in processes of admission and citizenship. Take the *Länder* tests: it is fair to enquire what would-be Germans think about Germany's constitutional principles, but the questions should be framed so as to ignore private beliefs and focus on external respect. Thus, it is preferable to ask if one respects the principle of gender equality than if he or she 'considers gender equality to be a progressive concept'. Or, instead of asking whether polygamy is 'acceptable', it is better to ask if one would respect the fact that polygamy is illegal in Germany. Similarly, a person's 'opinion about homosexuals holding public office' in Germany is less essential for citizenship; what is more essential is the applicant's acceptance of that reality. In the Netherlands, the law embarrasses religious scholars by forcing them to see topless women and homosexuals kissing. Yet the purpose of raising the issue should not be to inquire into the migrants' personal beliefs but whether they are willing to respect them in overt behaviour and to recognise other people's desire to live accordingly.

I do not claim that under the legal concepts of 'recognise, respect and accept' it is possible to ask about everything. There are some substantive limitations to these concepts. An example is the question that Germans ask regarding an applicant's reaction if he finds out that his son is homosexual. This question is tricky: A person may

⁷⁶ J. W. Müller, *Constitutional Patriotism* (Princeton University Press, 2007), 58–60.

⁷⁷ P. Kleingeld, 'Kantian Patriotism', (2000) 29(4) *Philosophy & Public Affairs* 313.

dislike the fact that his own son is homosexual, or dislike homosexuality in general, but are these feelings pertinent to the issue at hand? Would it not be better to explore whether the applicant's reactions to this reality would be legal? The illustrative question may verily represent an invasion of privacy, which may violate Germany's concept of human dignity, enshrined in the *Grundgesetz*; it is also doubtful if it could stand the test of proportionality.⁷⁸

B Constitutional Essentialism

The second issue relates to the essential constitutional principles required for obtaining citizenship. Application of this criterion reveals that the German law requiring immigrants to 'conform to the German *way of life*' might be incompatible with national constitutionalism since it departs from constitutional principles. In addition, some questions in the *Länder* tests—about sport, poems, car manufacturers or popular culture—have nothing to do with constitutional principles while others—questions about World War II and the Holocaust—can be understood in light of the contextual evolution of German constitutionalism. It is also doubtful if other questions—such as those regarding conversion and homosexuality and—are essential for obtaining German citizenship, even if they are part of German constitutionalism. The same applies into the Netherlands: Even if nudism and homosexuality represent unwritten principles of Dutch constitutionalism, it is doubtful whether they are essential for Dutch citizenship. To be clear, I do not claim that illiberal practices of immigrants that do not fall within the concept of national constitutionalism are desirable or practicable; I am only saying that these practices pass the *sine qua non* required for obtaining citizenship in liberal democracies.

Under national constitutionalism, different states can ask different questions according to their essential contextual constitutionalism. The crucial factor is not whether monogamy, for instance, is a core liberal value but whether this value is a constitutional principle in the respective state. Therefore, state X may demand a different answer from state Y. Protecting and improving the environment is an important constitutional principle in the Netherlands,⁷⁹ while it may not be in other states. In addition, states may require immigrants to respect the same constitutional principles in diverse modes. A migrant in the Netherlands may be legitimately required to respect the legality of abortion under Dutch constitutionalism, whereas he may be legitimately required to respect its illegality under German constitutionalism.⁸⁰ The controlling factor is the Constitution. Therefore, it is appropriate to ask about history as long as that history is constitutional history; not the history of France but the history of the French Constitution, its evolution, principles and institutions. In the Netherlands, for example, it is legitimate to ask about constitutional monarchy, pillarisation and social tolerance but less so about Rembrandt, Huygens and Anne Frank. In Germany, it is legitimate to ask about Bismarck's 1871 Constitution, the Weimar Republic and World War II, but less so about Beethoven, Karl Benz and how Germans celebrate Easter.⁸¹ This rationale applies to other fields, such as political philosophy. Grotius, Kant and Rousseau are

⁷⁸ See R. Wolfrum and V. Röben, *Gutachten zur Vereinbarkeit des Gesprächsleitfaden für die Einbürgerungsbehörden des Landes Baden-Württemberg mit Völkerrecht* (2006) on file with author.

⁷⁹ Article 21 of the Dutch Constitution.

⁸⁰ *Entscheidungen des Bundesverfassungsgerichts*, BVerfGE 39, 1 (1975).

⁸¹ The former questions appeared in the Hessian test; the latter question appears in the federal test.

not merely philosophers: their manuscripts have influenced the Dutch, French and German constitutions. Furthermore, because the French, the German and the Dutch citizenships leads to a European citizenship, it would be legitimate to ask would-be citizens to recognise and accept essential principles of European constitutionalism, that is to say, EU constitutional principles and institutions.

C Family Members, Refugees and Foreign Workers

The third issue of concern relates to the distinction between different types of migrants: foreign workers, refugees and family members. Their migration is derived from different causes, and involves different interests. Traditionally, family migration has been viewed as a key factor in assimilation. The EU Directive on the Right to Family Reunification states that family reunification ‘helps to create sociocultural stability facilitating the integration of third country nationals . . . [and] promotes economic and social cohesion’.⁸² Nevertheless, EU states treat families the same as other migrants. The *Conseil d’Etat* asked Silmi to show ‘assimilation other than linguistic’; German laws require spouses of German citizens to conform to the German way of life; and the Dutch ask family members to take integration-from-abroad courses.

While EU countries do not distinguish between family members and other migrants, EU laws take a different route. The Directive on the Right to Family Reunification allows Member States to ask families to ‘comply with integration measures, in accordance with national law’.⁸³ However, the relationship between EU ‘integration measures’ and assimilation into the French *communauté*, the German way of life and the Dutch society has yet to be clarified. What does ‘integration’ mean, and which ‘measures’ are legitimate? The Directive says very little on these issues.⁸⁴ It is clear that EU laws require some degree of integration before migrants can become citizens of Europe. It is unclear, however, if the degree of integration and the measures taken are equal to family members compared to other immigrants. At least with regard to admission policies, EU states’ integration policies might be at odds with a recent decision of the European Court of Justice (ECJ). In that case, the ECJ recognised the authority of Member States to regulate terms for entry and residence of non-EU family members but noted that these terms must be based only on ‘grounds of public policy, public security or public health’.⁸⁵ The ECJ dismissed other terms, such as economic need and culture. It ruled that EU citizens have a protected right to freedom of movement within the EU, which includes the right to reside freely in another Member State with the non-EU family members who accompany them.⁸⁶ Interestingly, the decision is not based on the right to family life of EU citizens but, rather, on their right to freedom of movement. The ECJ held that ‘if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of [their freedom of movement within the EU] would be seriously obstructed’.⁸⁷

⁸² Council Directive 2003/86/EC on the Right to Family Reunification, [2003] OJ L251.

⁸³ *ibid* at Art 7(2).

⁸⁴ K. Groenendijk, ‘Legal Concepts of Integration in EU Migration Law’, (2004) 6(2) *European Journal of Migration & Law* 111.

⁸⁵ Case C-127/08, Judgment of the Court of Justice (25 July 2008).

⁸⁶ *ibid*.

⁸⁷ *ibid*.

VI Conclusion

Immigrants have long ceased to be merely an immigration issue. Immigrants shape global politics, make up the economy, and redefine national identity. While immigration brings to the fore new opportunities, it also raises concerns. Immigrants do not come alone. They travel with their language, lifestyle, dress code, and attitudes on sex and sexuality. Some people are not satisfied with this situation. They feel strangers in their own country. They see diversity as a threat. From this stance, it is often easy to leap the conclusion that the Government should either assimilate the immigrants—that is, compel them to become ‘like us’—or keep them out. Coping with this challenge is a challenge in itself: How can nations protect liberal values while, at the same time, refrain from violating the same values they wish to protect? This article seeks to fill the gap on these jurisprudential issues by providing a theoretical and comparative analysis.