1

Introduction

I. OBJECT AND PURPOSE OF THE STUDY

A. Integration as a Condition for Immigration: the Act on Integration Abroad

THIS BOOK ASKS if states, and the Netherlands in particular, may enact integration tests as a condition for the admission of aliens. Such a test was introduced in the Dutch Act on Integration Abroad (*Wet inburgering buitenland*), which entered into force on 15 March 2006.[1] Since then, several groups of immigrants – in particular family migrants from non-Western countries – have only been granted admission to the Netherlands if they can demonstrate proficiency in the Dutch language and a certain amount of knowledge about the country. Their ability to do so is assessed by means of the integration exam abroad (*inburgeringsexamen in het buitenland*), which is taken in their country of origin before the visa application is made.

The Act on Integration Abroad (AIA) is an instrument of Dutch integration policy. This policy seeks to ensure that, among the Dutch population, there exist a level of social cohesion and a degree of economic participation that are considered necessary for the continued viability of the welfare state as a political and economic institution. From the late 1970s until approximately the turn of the century, Dutch integration policy was primarily directed towards persons who had already been admitted. It aimed to achieve an equal position for these immigrants compared to that of the non-immigrant population and, at a later stage, to ensure their active participation in various domains of mainstream society, notably education and the labour market. For the past 10 years, however, integration measures have increasingly been directed towards excluding immigrants of whom it is expected that they will not successfully integrate.[2] This new

[1] *Bulletin of Acts and Decrees* 2006, 28; entry into force *Bulletin of Acts and Decrees* 2006, 75.

[2] Schinkel points out that the term 'integration' necessarily refers to a process involving different actors or elements; hence it would be wrong to state that a single person can either integrate or not integrate (Schinkel 2008, 39–40). In fact, what is required will often be a certain degree of participation, adjustment or adaptation, depending on how the concept of integration is understood at the time. Although I subscribe to this view, I was unable to find a suitable term to replace 'integration' as a general descriptor of what states expect

line of thinking has been described as a 'reversal of citizenship concepts': whereas integration (in the sense of learning the language of the host state and developing a commitment towards its society) was previously expected to follow admission and the granting of rights, the current understanding is that immigrants should integrate before they are admitted or access to rights is granted.[3] At the same time, integration policy became increasingly directed towards cultural adaptation of immigrants and their identification with Dutch society.

Besides the AIA, the augmented prevalence of this new perspective on integration has inspired several new measures, including an (advanced) integration exam which also serves as a condition for the acquisition of a permanent residence permit (the Integration Act 2007), a naturalisation test (introduced in 2003) and a legislative proposal to make the granting of social assistance dependent on demonstrated proficiency in the Dutch language.[4] Similar developments can be seen in other European countries, which have also introduced integration conditions into their immigration and nationality legislation.[5] In particular Germany, France, Denmark, the United Kingdom and Austria have introduced integration tests as a condition for the admission of family or other migrants.[6] The possibility of making residence rights dependent on integration requirements has also been expressly included in a number of EU migration directives (notably the Family Reunification Directive and the Long-term Residents Directive).[7]

With the introduction of the AIA and similar measures in other countries, language proficiency and country knowledge have become part of the criteria used to determine whether immigrants, and specifically family migrants, are granted the right of admission to the territory of the states concerned. Within liberal democracies, the use of such criteria can be seen as a democratically legitimated expression of self-determination, aiming to preserve unity and solidarity within the state. On the other hand, integration requirements can be at odds with the principles of individual freedom and equality, to which liberal democratic states are also

immigrants to do (or be). I therefore continue to refer to 'integration' as something that immigrants can do, although I try to minimise this use of the term. For reasons of readability I refrain from using quotation marks.

[3] Vermeulen 2010a, 87–89. See also Groenendijk 2004, 111–13 and Carrera and Wiesbrock 2009, 2.

[4] On the introduction of the naturalisation test see Van Oers 2010, 60–62. The proposal to introduce an integration requirement into the Social Assistance Act (*Wet werk en bijstand*) was submitted by the Liberal Party (*VVD*) in 2010 and was still pending before the Dutch Parliament at the time of writing, see *Parliamentary Papers II*, No 32, 328.

[5] Guild et al 2009a; Van Oers et al 2010a; Groenendijk 2011.

[6] Groenendijk 2011, 9–20. The Austrian requirement is laid down in Art 21a of the Settlement and Residence Act (*Niederlassungs- und Aufenthaltsgesetz*), see www.bmi.gv.at.

[7] Groenendijk 2004, 117–25; Carrera 2009, 145–225; Carrera and Wiesbrock 2009, 5–11; Groenendijk 2011, 5–9.

committed. These principles, which are considered to be of a universal nature, may stand in the way of erecting barriers for the admission of immigrants and distinguishing between those who are and those who are not considered capable of successful integration. They also impose limitations on the extent to which immigrants are asked to conform to the integration norms of the receiving state, in particular where culture and moral values are concerned.[8] This book aims to see how the law, both at the national and international level, finds a balance between these competing claims. More specifically, it clarifies the legal framework concerning integration requirements for the admission of immigrants and identifies the criteria determining their legality. To do this, relevant legal instruments are analysed and suggestions offered for their interpretation. Throughout the investigation, the Dutch Act on Integration Abroad serves as a point of departure and conclusions are drawn as to its lawfulness.

B. Approach

This book is divided into two parts. The first part, which can be read separately or as a prelude to the second part, investigates the integration exam abroad and its role in Dutch integration policy. It gives a description of the Act on Integration Abroad, including the target group, the contents of the exam and the effects measured to date, and explains the historical and political context in which the Act was introduced. To this end, a historical overview is given of Dutch integration policy, with particular attention being paid to the introduction and development of language courses and civic education for immigrants. An analysis of parliamentary documents focuses more directly on the objectives of integration policy, as defined by the Dutch legislator, and the changes in the Dutch concept of integration. At the end of this analysis, both the integration objectives pursued and the suitability of the AIA as a means to achieve them are made subject to some preliminary objections.

The second part of this study examines the legal norms and standards with which integration requirements must comply. This part of the investigation addresses the legal effect of integration tests, which is the temporary and sometimes even permanent exclusion of immigrants seeking to enter a state of which they are not nationals. The specific question examined is which standards are set by (mostly international) immigration rules regarding non-admission of aliens on the grounds that they have

[8] On the inherent contradiction between the principles of self-determination and freedom and equality see, eg, Tholen 1997; Bosniak 2006, esp 1–9; Joppke 2008, 533–36 and Vermeulen 2010, 46. See also Benhabib, who describes this stand-off as 'the constitutive dilemma at the heart of liberal democracies: between sovereign self-determination claims on the one hand and adherence to universal human rights principles on the other', Benhabib 2004, 2.

failed to meet an integration requirement. The examination covers various areas of immigration law, including legal rules on family reunification, labour migration and the right to free movement in the EU. Legal instruments on asylum are not included, the reason being that there is clearly no scope for states to enact integration requirements in relation to requests for international protection.[9] In the Netherlands, as in other states where integration is a prerequisite for admission, asylum seekers have been excluded from this condition. On the other hand, as religious servants form a specific target group of the Act on Integration Abroad, the relevance of the right to freedom of religion for the admission of aliens is considered. Lastly, given that the AIA does not apply to all immigrants alike, integration requirements are assessed in relation to the right to equal treatment.

The objective of the above examination is twofold. The first aim is to describe and analyse the legal standards that states, and the Netherlands in particular, must take into account when enacting integration requirements as part of their immigration rules. A second but related aim is to construct a comprehensive argument concerning the lawfulness of the AIA in relation to relevant norms of international and Dutch constitutional law. To the extent that such lawfulness is found to be lacking, adjustments to the Act, or its application, will be needed to ensure that the legal obligations assumed by the Netherlands are duly respected and the rights of immigrants protected.

As part of the objective of this study is to evaluate the lawfulness of the AIA, the scope and contents of the examination in the second part of the book are, to a large extent, determined in relation to this Act. By taking the (Dutch) integration exam abroad as a point of reference, it will be possible to formulate more specific legal standards (concerning, for example, the target group or the contents of the test) than if a more abstract definition of integration requirements were to be used. Nonetheless, much of the legal framework developed in this study is equally applicable to integration requirements adopted or to be adopted by other states. In particular, the interpretation of various provisions of human rights treaties – including the European Convention on Human Rights – and the EU migration directives will be equally pertinent to other EU Member States. It is hoped, therefore, that the relevance of this study will not remain limited to the national context of the Netherlands.

[9] For an overview of relevant instruments and their contents see Boeles et al 2009, 253–361.

C. Relation to Other Research

Developments in the integration policy and legislation of various EU Member States and at the EU level over the past 10 years have formed an important topic of academic research. One matter that has attracted considerable attention has been the redefining of the concept of citizenship in various EU states and the manifestation of these changes in actual integration measures, in particular naturalisation tests.[10] A prevailing theoretical perspective in this literature concerns the compatibility of these developments with liberal political theories on citizenship and integration.[11]

As far as the Netherlands is concerned, the evolution of the concept of citizenship has been quite extensively described and evaluated by different authors.[12] This literature mostly analyses the normative conception of citizenship or integration as it has been formulated in the Dutch political debate. An important strand of criticism expressed in various publications concerns the shift that has taken place, especially since 2003, towards the unilateral adaptation by immigrants to the cultural norms and values of the majority population and the presentation of these norms and values as forming part of a static and exclusive national identity. Another, related objection formulated by various researchers concerns the fact that responsibility for a successful integration process has been placed wholly or largely on the immigrant population.[13]

Given their close connection to the topic of this study, this book also includes an analysis and assessment of the conceptualisation of citizenship and integration in the Dutch political debate. The findings from the abovementioned literature are thereby taken into account. Adding to the developments that have already been described, this study also explains how the concept of integration continued to evolve between 2007 and 2011, with special attention being paid to the relationship between the political or ideological concept of integration in the Netherlands and the legal requirements of the Act on Integration Abroad. Lastly, while mindful of the comments that have already been made, this study aims to provide a brief individual assessment of the objectives of Dutch integration policy and the suitability of the AIA as a means to achieve these objectives.

[10] Michalowski 2011; Guild et al 2009a; Van Oers et al 2010a.

[11] See, esp, Joppke 2008; Michalowski 2011; Guild et al 2009a; Bauböck and Joppke 2010.

[12] Spijkerboer 2007; Driouichi 2007; WRR 2007; Schinkel 2008; Klaver and Odé 2009; Fermin 2009; Van Gunsteren 2009 and Vermeulen 2010. For earlier analyses see also Fermin 2000 and Van Blom and Van Schilt-Mol 2001, 21–31.

[13] See, esp, Driouichi 2007; Klaver and Odé 2009 and Vermeulen 2010. See also Fermin 2006.

Meanwhile another strand of academic research concerns the reinforced connection between integration and immigration measures in Europe. This linkage has been seen to represent a key development in integration policies, both at the EU level and in various Member States (including the Netherlands).[14] The introduction of integration requirements for the acquisition of residence rights and nationality has been criticised by several authors on the grounds that the objective and/or effect of such requirements is to function as instruments of exclusion and immigration control rather than as a tool for integration.[15]

This study argues that the predominant purpose of the AIA is indeed to function as a selection criterion and thus to exclude those immigrants who do not pass the integration exam abroad. It then attempts to take the discussion one step further by asking whether this 'exclusive' conception of integration is acceptable in view of the competing interests of the residents of the receiving state and those of the immigrants seeking admission. As mentioned above, a primary objective of this study is also to assess the legality of integration requirements for the admission of aliens and specifically of the Act on Integration Abroad.

Although the issue of legality has been raised on various occasions,[16] a comprehensive legal framework regarding integration requirements has not yet been formulated. Thus far the available literature has mostly provided a limited evaluation of the compatibility of integration requirements with the right to family life, the prohibition of discrimination and the EU migration directives.[17] Naturally the results that emerged from these previous inquiries have been included in this study. The legal description and analysis presented in this book are, however, more encompassing and produce a number of different outcomes.

Finally, an important question concerning integration requirements is whether those requirements actually contribute to achieving the objectives for which they were introduced. Although this is an empirical question that does not as such pertain to the object of this study, we will see that the effectiveness of the AIA is a relevant factor in determining both the political legitimacy of the integration exam abroad and its legal validity. An evaluation of these effects was conducted in 2009, three years after the Act entered into force.[18] In the same year Klaver and Odé provided a more general overview of the effects of various integration measures

[14] See notably Groenendijk 2004; Carrera 2009; Vermeulen 2010.

[15] Carrera 2009; Carrera and Wiesbrock 2009; Van Oers et al 2010; Groenendijk 2011. For a different view, see Vermeulen 2010.

[16] eg, Guild et al 2009b, 9–11; Van Oers et al 2010b, 326–29.

[17] See notably ACVZ 2004a; Oosterom-Staples 2004; Groenendijk 2004; Boeles and Lodder 2005; De Vries 2006; Groenendijk 2006b; Groenendijk 2011; Van Dam 2008; Human Rights Watch 2008; Carrera 2009; Carrera and Wiesbrock 2009; Lodder 2009 and Vermeulen 2010.

[18] Brink et al 2009.

adopted in the Netherlands.[19] This book includes the outcomes of both studies.

II. INTEGRATION REQUIREMENTS AND LEGAL RULES ON THE ADMISSION OF ALIENS

A. Scope of the Investigation

As mentioned above, the primary purpose of this book is to describe and analyse the legal standards applying to the Act on Integration Abroad and to determine whether the Act is in compliance with these standards. To this end this study examines legal instruments that are of relevance to immigration law and the admission of aliens. Limitations to the power of states to control immigration can be found in human rights treaties, as well as in the law of the European Union. Also relevant are bi- and multilateral treaties containing agreements between states on the admission of each other's nationals. As far as international instruments are concerned, the investigation is limited to treaties to which the Netherlands is a party. Finally, restrictions to the Dutch legislator's power to regulate immigration can be found in the human rights provisions of the Dutch Constitution.

The question of whether the admission of aliens to the Netherlands may be conditioned upon fulfilment of integration requirements is preceded by the question of whether any right to admission exists at all. Such a right is expressly laid down in several legal instruments, in particular in the field of EU law (see, for example, Art 21 TFEU). In many other situations, however, the existence of a right of admission is not self-evident. This is the case, for instance, with regard to most of the human rights provisions discussed in this study, as well as in the Association Agreement concluded between the EU (then EEC) and Turkey. To give an example from the human rights arena, it is not immediately evident whether Article 8 of the European Convention on Human Rights (ECHR), which protects the right to respect for family life, also includes a right of admission for aliens in situations where the members of one family do not share the same nationality. A relatively large part of the examination in the second part of this book consequently focuses on determining the scope of the provisions under investigation. Only when it has been established that a right to admission exists is it necessary to determine whether this right may be restricted and, if so, whether an integration exam in the country of origin constitutes a lawful restriction.

[19] Klaver and Odé 2009.

B. Sources of Immigration Rules

As stated above, legal rules regarding the admission of aliens can be found in different instruments of national and international law. The sources of immigration rules addressed in this study are listed below, together with some general remarks on their interpretation and legal effect. A distinction is made between instruments of international law, EU law and Dutch constitutional law.

i. International Law

a. Instruments

For the purpose of this study, the main sources of immigration rules in international law are the human rights treaties concluded at the level of the United Nations (UN) and the Council of Europe (CoE). These include the ECHR and the (revised) European Social Charter (ESC), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Rights of the Child (CRC). None of these treaties are directly concerned with the admission of aliens. Nevertheless, some provisions can be (or have been) interpreted to include admission rights. Furthermore, the equality norms laid down in some of the above treaties, including the CERD, are also applicable in the field of immigration. In addition to the above instruments, some relevant legal standards can be found in treaties that are more specifically concerned with the regulation of international migration. These include the European Convention relating to the Legal Status of Migrant Workers (ECMW) and various bilateral treaties concluded between the Netherlands and other states.

b. Legal Effect

Self-executing provisions (*een ieder verbindende bepalingen*) of international law have direct effect in the legal order of the Netherlands and take precedence over national law.[20] This means that such provisions may be relied upon by individuals before Dutch courts and administrative bodies and can provide grounds for invalidating Dutch immigration legislation and any decisions based upon it. Whether an international provision is self-executing is ultimately determined by the court before which it is invoked. The criterion that has traditionally been applied in this respect is whether the provision is formulated sufficiently specifically to allow it to be

[20] Arts 93 and 94 of the Dutch Constitution.

applied without prior intervention by the legislator.[21] To date, the Dutch courts have labelled most of the relevant provisions in the above treaties (including the provisions in the ECHR and ICCPR) as self-executing. Where, however, this is not the case, the existence of direct effect has been assessed separately.

c. Interpretation

The meaning of the above treaty provisions has been determined in accordance with the interpretation rules laid down in Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT).[22] In itself this Convention applies only to treaties concluded after it entered into force for the states concerned.[23] However, its rules on treaty interpretation are generally regarded as corresponding to rules of customary international law.[24] The same rules may therefore be applied to treaties concluded before the VCLT entered into force.

Where available, decisions and comments by treaty-monitoring bodies have been taken into account to aid the process of interpretation. In this regard the case law of the European Court of Human Rights (ECtHR) has been especially significant.[25] Final judgments by the ECtHR are legally binding on the State Parties involved in the particular case.[26] In addition, it has been assumed for the purpose of this study that all State Parties to the ECHR are legally bound by the Court's interpretations of the Convention's provisions. This seems reasonably to follow from the fact that the Court is ultimately authorised to decide whether the Convention has been correctly interpreted and applied.[27] To take an example from chapter 4 of this study, the ECtHR has repeatedly held that Article 8 ECHR (on the right to respect for family life) may give rise to an obligation to admit aliens for the purpose of family reunification. Given this case law, it would appear rather pointless (from a legal perspective) for a State Party not involved in these proceedings to maintain that it is not bound by such an obligation until such time as the Court decides otherwise. In this

[21] Dutch Supreme Court 3 May 1986, case no 12698, LJN: AC9402 (*Spoorwegstaking*), para 3.2; Dutch Supreme Court 14 April 1989, case no 13822, LJN: AD5725 (*Harmonisatiewet*), para 5.3.

[22] UNTS Vol 1155, 331, *Treaty Series (Traktatenblad)* 1972, 51 and following, entry into force for the Netherlands on 9 May 1985.

[23] Art 4 VCLT.

[24] Dixon and McCorquodale 2003, 64. See also Battjes 2006, 14–15 with references to relevant case law.

[25] Before 1998 the admissibility of complaints about violations of the ECHR was decided by the European Commission of Human Rights (EComHR), see Harris et al 2009, 5. In this study some references are made to EComHR decisions.

[26] Art 46(1) ECHR.

[27] cp Battjes 2006, 23–24 and Gerards 2010, 231–33. Battjes claims that the binding effect of the interpretations provided by the ECtHR is supported by state practice (23).

connection it is also relevant to note that the ECtHR considers itself bound to follow its own case law unless there are 'cogent reasons' to the contrary.[28] This being said, it is often not easy to determine the extent to which previous interpretations by the Court are also relevant with regard to new and different situations. This requires careful consideration of the judgments and the arguments and formulations employed, which is precisely what this study sets out to do.[29] Inevitably, the interpretations provided will be subject to discussion. However, whatever the content of these interpretations, it follows from the above that failure by the State Parties to the ECHR to respect the provisions of the Convention will be considered a failure to comply with a legally binding obligation.

Other interpretations by treaty-monitoring bodies that have been used to clarify the provisions discussed in this study include the general comments and recommendations, communications and concluding observations issued by the Human Rights Committee (for the ICCPR), the Committee on the Elimination of Racial Discrimination (for the CERD) and the Committee on the Rights of the Child (for the CRC).[30] None of the aforementioned treaties provides for these statements to be legally binding, and so state actions cannot be considered violations of these treaties solely on the grounds that they are not in accordance with the interpretations of the monitoring bodies. Nevertheless, the specific function and expertise of these bodies endow them with a guiding role in establishing the meaning of the various treaty provisions. For this reason it may be assumed that any divergence from the interpretations proposed by the treaty-monitoring bodies needs to be explicitly substantiated.[31]

ii. European Union Law

a. Instruments

At the time of writing, European Union (EU) law has become one – if not the most – important source of rights for immigrants to the Netherlands (and to other EU Member States). Since the Lisbon Treaty entered into force on 1 December 2009, the core of EU law has been formed by the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).[32] The latter contains provisions concerning both the free movement of EU citizens and third-country nationals within the

[28] Battjes 2006, 23; Harris et al 2009, 17–18.

[29] As Harris et al put it: 'Any statement by way of interpretation of the Convention by the Court, and formerly the Commission, is significant, although inevitably the level of generality at which it is expressed or its centrality to the decision on the material facts of the case will affect the weight and influence of any pronouncement'. Harris et al 2009, 17.

[30] The competence of these treaty-monitoring bodies is laid down in Art 40(4) ICCPR, Art 5(4) Optional Protocol to the ICCPR, Arts 9(2) and 14(7)(b) CERD and Art 45(d) CRC.

[31] cp Battjes 2006, 22.

[32] [2010] OJEU C 83.

EU and the immigration of third-country nationals from outside the Union.[33] In addition to these treaty provisions, various instruments of secondary EU law have been adopted in these areas.[34] For the purpose of this study, the main instruments of secondary law discussed are the Family Reunification Directive, the Long-term Residents Directive, the Residence Directive and the Blue Card Directive.[35]

For some categories of immigrants, entitlement to admission and residence stems from international agreements concluded between the EU (sometimes together with the Member States) and third countries. This study considers those agreements that most closely reflect the provisions of the TFEU concerning the free movement of persons. These include, first of all, the Agreement on the European Economic Area and the EC-Switzerland Agreement on the free movement of persons. Account is also taken of the provisions of the Association Agreement between the EEC and Turkey (including its Additional Protocol and the decisions adopted on the basis of the Agreement) and the Stabilisation and Association Agreements concluded with several Western Balkan countries (Macedonia, Croatia, Albania and Montenegro).

When investigating EU law as a source of rules concerning integration requirements and the admission of aliens, account must also be taken of the EU Charter of Fundamental Rights (CFR) and the general principles of EU law. The CFR gained legally binding force in 2009 with the entry into force of the Lisbon Treaty.[36] Its scope of application is limited to the sphere of EU law: the CFR is directed towards the EU institutions as well as to the Member States when they are implementing EU law.[37] Article 6(1) TEU explicitly states that 'the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties'.[38] It can be inferred from this clause that individuals cannot, for example, rely on the freedom of assembly as protected by the Charter of Fundamental Rights

[33] The term 'third-country nationals' is used here to indicate persons with a nationality of a state that is not a Member State of the European Union.

[34] Under Art 79(4) TFEU, the EU also has competence to enact measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories. However this provision has not served as a legal basis for any instruments of secondary law examined as part of this study.

[35] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, [2003] OJ L251/12; Council Directive 2003/109/EC of 25 November 2003, [2004] OJ L16/44, as amended by Directive 2011/51/EU of the European Parliament and the Council of 11 May 2011, [2011] OJ L132/1; Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L158/77 and Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, [2009] OJ L155/17.

[36] Art 6(1) TEU.

[37] Art 51(1) CFR.

[38] See also Art 51(2) CFR, which states that 'The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the treaties'.

to invoke a right to admission where such a right does not already have a legal basis elsewhere in EU law. Where, however, the Union does have competence to act, it will have to do so in accordance with the Charter. In addition, the EU institutions and the Member States, when acting within the scope of application of EU law, must respect the general principles of EU law established in the case law of the Court of Justice of the European Union (CoJ).[39] These general principles include the fundamental rights, as guaranteed by the ECHR and as resulting from the constitutional traditions common to the Member States.[40] At the time of writing, it is still unclear as to whether the fundamental rights as general principles of EU law will remain of significance in addition to the guarantees laid down in the CFR.[41] At present, however, it seems plausible that the CoJ case law with regard to these rights will serve as a point of departure for interpreting the corresponding CFR provisions.

Lastly, the general principles of EU law also include several principles regarding good governance or administrative legality. The principle of most relevance to this study is the principle of proportionality. At a general level, the requirement of proportionality requires measures adopted by the EU institutions, or by the Member States when acting within the scope of EU law, to be suitable and necessary to achieve the objective pursued and not to impose an excessive burden on the individual concerned. The contents of the principle vary, however, depending on the nature of the case and the interests involved.[42] It must also be observed that, like the rights laid down in the CFR, the general principles of EU law do not constitute an independent source of rights for individuals, including aliens seeking admission. Instead they are viewed in this study as interpretative guidelines for establishing the meaning of the above provisions of primary and secondary EU law and EU agreements with third countries.

b. Legal Effect

Regarding the legal effect of the above instruments, the CoJ has long since held that EU law constitutes an autonomous legal order that applies in the

[39] The question of when exactly a member state is 'acting within the scope of application of EU law' is still subject to discussion. Part of this discussion concerns the relationship of this criterion to the seemingly narrower criterion used in Art 51(1) CFR ('the member states when implementing EU law'). For an overview, see Toner 2004, 125–27; Craig and De Búrca 2008, 395–402 and Chalmers et al 2010, 252–56.

[40] Art 6(3) TEU.

[41] According to its preamble, the CFR 'reaffirms' both the rights that result from the constitutional traditions of the Member States and those laid down in the ECHR, as well as the case law of the ECtHR. Moreover, where overlap exists between the rights protected by the Charter and those laid down in the ECHR or resulting from the constitutional traditions of the Member States, the Charter itself stipulates that it is not to be interpreted in a more restrictive way (Art 52 CFR).

[42] Craig and De Búrca 2008, 544–51; Chalmers et al 2010, 367–72.

Member States of its own accord (regardless of the constitutional arrangements of those states) and takes precedence over national law.[43] This stance is accepted by the Supreme Court (*Hoge Raad*) of the Netherlands.[44] Provisions of EU law have direct effect, providing they are sufficiently clear, precise and unconditional, in which case individuals may rely on them before the national courts of the Member States to challenge national measures concerning integration requirements. As far as directives are concerned, the possibility of direct effect occurs when the time limit for their implementation has expired and no adequate implementation has taken place.[45]

With regard to the above international agreements between the EU and third countries, the CoJ has held that they belong to the EU legal order.[46] Consequently these agreements also form part of the domestic legal orders of the Member States in the same way as other EU law and take precedence over national law. The agreements examined in this study can moreover be considered as agreements creating 'special relations of integration' with the EU.[47] According to the CoJ, the provisions of such agreements can be directly effective, providing they meet the above criterion of being sufficiently clear, precise and unconditional.[48]

c. Interpretation

While the national courts of the EU Member States are competent and even obliged to apply EU law, the responsibility for interpreting EU law ultimately lies with the Court of Justice of the European Union.[49] The Court itself has held that, at least in the context of preliminary rulings, its judgments establish the meaning of EU legal instruments from the moment of their entry into force. These interpretations must therefore be followed by the national authorities of the Member States, to the extent that these authorities are bound by the legal instruments concerned.[50]

As regards the means of interpretation, the CoJ has determined that the EU does not constitute a regular treaty-based organisation, but instead a

[43] CoJ 15 July 1964, C-6/64 [1964] ECR 585 (*Costa/ENEL*), 593–94.
[44] Dutch Supreme Court 2 November 2004, case no 00156/04E, LJN: AR1797, para 3.6.
[45] Craig and De Búrca 2008, 268–303.
[46] CoJ 30 April 1974, C-181/73 [1974] ECR 449 (*Haegeman*), para 5.
[47] CoJ 23 November 1999, C-149/96 [1999] ECR I-8395 (*Portugal v Council*), para 42.
[48] Craig and De Búrca 2008, 206–13.
[49] Arts 267 and 274 TFEU, cp Chalmers et al 2010, 149–50. The Court of Justice of the EU comprises the Court of Justice, the General Court (formerly the Court of First Instance) and the specialised courts (Art 19(1) TEU). Cases resulting in interpretations relevant for this study will normally be decided by the Court of Justice. Often such cases will concern preliminary rulings requested by national courts (Art 267 TFEU). Relevant interpretations of questions of EU law can also, however, be given in the context of enforcement actions brought by the Commission or other Member States (Arts 258 and 259 TFEU) or requests for judicial review (Art 263 TFEU).
[50] Craig and De Búrca 2008, 466–74; Chalmers et al 2010, 169–71.

'new legal order', characterised by a (limited) transfer of sovereignty by the Member States.[51] Consequently the CoJ does not apply the interpretation rules of Articles 31–33 VCLT (see above) when explaining EU law, except in regard to international agreements between the EU and third countries.[52] Instead the Court applies a combination of textual, contextual (or systematic), historical and teleological arguments to support its explanations of provisions of EU law.[53] In general the CoJ tends to put considerable emphasis on the purpose of the instrument or provision concerned. Nevertheless, when faced with more detailed provisions (especially in secondary legislation) it is easier for the Court also to rely on textual and contextual arguments.[54] Moreover, as commented above, instruments of EU law need to be interpreted in conformity with the Charter of Fundamental Rights and the general principles of EU law.

To determine the purpose of instruments of secondary EU law (including the directives examined in this study) regard may be had to the text of those instruments, including the considerations of the preamble, as well as to the underlying treaty provisions.[55] Contextual arguments may be drawn from a variety of sources, specifically including the preamble, references to instruments of international law or systematic interpretations in relation to other provisions (within the same directive or in other directives relating to the same subject matter).[56] Furthermore, regard may be had to the preparatory acts (*travaux préparatoires*) of instruments of EU law, where available, as a means of historical interpretation.[57] Such acts function as subsidiary means of interpretation and are mostly used to confirm interpretations reached on the basis of other arguments.[58] Their use is possible only if the content of the preparatory acts is reflected in the actual text of the instruments concerned.[59] If, however, these preparatory

[51] CoJ 5 February 1963, C-26/62 [1963] ECR 1 (*Van Gend & Loos*).

[52] Battjes 2006, 42; Dhondt and Geursen 2008, 282.

[53] Battjes 2006, 42–46; Dhondt and Geursen 2008, 282–83.

[54] Dhondt and Geursen 2008, 283. See, eg, CoJ (Grand Chamber) 25 July 2008, C-127/08 [2008] ECR I-6241 (*Metock and others*), paras 49–54 and 82–90 and CoJ 4 March 2010, C-578/08 [2010] ECR I-01839 (*Chakroun*), paras 42–48 and 59–62.

[55] It will often be possible to discern multiple objectives, some of which will be formulated at different levels of abstraction. See, eg, the case of *Metock and others*, where the CoJ referred both to the objective of 'strengthening the right of free movement and residence of all Union citizens' (as laid down in the preamble to the Residence Directive) and to the broader aim of creating an internal market (formulated in Art 3(1)(c) of the EC Treaty). In such situations, the outcome of the interpretation exercise is obviously likely to be influenced by the objective chosen as a point of reference. Where multiple objectives are available, it is arguably up to the interpreting body (or scholar) to decide which interpretation is the most persuasive, taking into account the various objectives and other means of interpretation.

[56] See, eg, *Metock and others* (n 54), paras 52–53, 69 and 83; CoJ (Grand Chamber) 23 February 2010, C-310/08 [2010] ECR I-01065 (*Ibrahim*), paras 45–46, 48 and 56–57 and CoJ 4 March 2010, C-578/08 [2010] ECR I-01839 (*Chakroun*), paras 48 and 62.

[57] For an overview of relevant documents, see Battjes 2006, 44–45.

[58] cp *Ibrahim* (n 56), para 47 and *Chakroun* (n 56), para 62.

[59] Battjes 2006, 45 and Dhondt and Geursen 2008, 282–83, both with reference to case law.

acts are to be relied on, the information derived from them must be sufficiently clear and unambiguous. The mere fact, for instance, that a Member State has either supported or objected to a particular interpretation of a term in a directive is insufficient to confirm or dismiss that interpretation if the reaction of the other Members States remains unknown.

As a final remark, it should be noted that the different language versions of EU legal instruments are equally authentic.[60] Interpretations must take these different versions into account; where disparities occur, these must be reconciled in the light of the 'purpose and general scheme' of the instrument concerned.[61] Where necessary, this study has compared the different language versions within the limits of my linguistic capabilities.

iii. The Dutch Constitution

Integration requirements in the immigration legislation of the Netherlands must also remain within the limits set by the Dutch Constitution (*Grondwet*). The relevance of this instrument for the purposes of this study is, however, rather limited. The Constitution does not contain any material norms regarding the admission of aliens, nor does it lay down a fundamental right to respect for family life (which is one of the main legal standards examined in this book). Two constitutional norms are nevertheless discussed in this study: the right to equal treatment and the prohibition of discrimination (Art 1 Constitution) and the right to freedom of religion and belief (Art 6 Constitution).

According to Article 120 of the Dutch Constitution, laws enacted by the parliament and government acting together as the national legislator (*wetten in formele zin*) are not subject to judicial review. Instead the compatibility of this legislation, which includes the AIA, with the Constitution is decided by the legislator itself. As a result, there is no extensive body of case law in which the meaning of the above constitutional provisions is explained in relation to individual situations. The fact that the legislator has adopted the AIA also implies that it has thereby interpreted the Constitution, in a legally binding manner, so as to allow for the conditions laid down in that Act. This study examines how this interpretation fits into the broader legal context of the relevant provisions. To this end, where possible, it examines how the said provisions have been interpreted in related situations. In addition consideration is given to interpretive statements by the Dutch government and to relevant case law of the Dutch courts (concerning legislation not enacted by the national legislator).

[60] Art 55(1) TEU and Art 358 TFEU.
[61] Battjes 2006, 45–46, with reference to case law.

III. STRUCTURE OF THE BOOK

The first part of this study, concerning Dutch integration policy and the Act on Integration Abroad, is made up of chapters 2 and 3. Chapter 2 contains a description of the AIA and of the effects measured to date. This same chapter includes a historical overview of integration programmes in the Netherlands, which has thus far largely not been provided.[62] Chapter 3 focuses on the objectives of Dutch integration policy (including the integration exam abroad) and the reasons why integration has been made into a requirement for admission.

The second part of the book focuses on formulating legal standards for integration requirements in immigration law and on assessing the Act on Integration Abroad in relation to these standards. Section A examines various provisions of international human rights treaties, as well as corresponding provisions of EU law and the Dutch Constitution. These provisions concern the right to family life and family reunification (chapter 4) and the right to freedom of religion (chapter 5).

Section B concerns integration requirements in relation to EU law and other international agreements. It addresses the rules of EU law on the right to free movement of EU nationals, their family members and (other) third-country nationals (chapter 6). Given their close connection to these rules, the EEA Agreement and the EC-Switzerland Agreement on the free movement of persons are discussed in the same chapter. Chapter 7 then examines a number of international agreements concluded at a European or Dutch national level and containing rules on the entry and/or residence of aliens, including the EEC-Turkey Association Agreement.

Thirdly, Section C reviews integration requirements in relation to the right to equal treatment as guaranteed in international human rights treaties, EU law and the Dutch Constitution. As well as explaining the general legal framework regarding equal treatment, chapter 8 sets out specific standards regarding direct differential treatment on the grounds of nationality and residence purpose. Chapter 9 addresses indirect differential treatment on the grounds of racial or ethnic origin. Lastly, chapter 10 examines the issue of 'reverse discrimination' that arises when nationals of one EU Member State have fewer rights than nationals of other EU Member States due to the workings of EU law. Chapter 11 concludes.

As noted above, this study sets out to evaluate the lawfulness of the Act on Integration Abroad and to formulate legal standards regarding integration requirements for the admission of aliens that are also relevant out-

[62] An exception concerns the report of the parliamentary committee of enquiry that investigated the Dutch integration policy in 2003 (*Commissie Blok*), *Parliamentary Papers II* 2003–2004, 28 689, No 9. An abridged version of this history can also be found in Odé and De Vries 2010, 15–17.

side the Dutch context. For this reason the chapters in the second part of this book mainly begin with a general assessment of the legal norms under examination and their relevance to integration requirements. The compatibility of the AIA with these norms is then addressed in a separate section.

The book manuscript was concluded on 31 August 2012. Later developments could only be taken into account in exceptional cases.