



Commissioned papers for the  
**Voices for the *Res Publica*: The Common Good in Europe**

# The law

A jpr/ Institute for Jewish Policy Research project sponsored by the Ford Foundation

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## France: The law

### Claire Thépaut

Heir to the Enlightenment philosophy and the 1789 Revolution, France reveres the Law: as the expression of the popular will, inscribed in the very foundations of our democracy, as guarantor of the Republic and its values and as the instrument of the common good. Law, according to Rousseau, cannot but be just, as it is the expression of the general will. It is the means by which inalienable human and civic rights are protected; it provides detailed definition and thereby makes real the universal republican values of liberty, equality and fraternity. It is simultaneously the instrument and the expression of republican universalism, and as such, is conceived of in quasi-sacred terms. As all citizens are equal before the Law, so it provides the foundation-stone of the social contract, making good the inequalities of nature by conferring equal rights on all.

Thus, any legislation which is aimed at specific groups in the population is impermissible, even where it seeks to address inequalities by which they are affected. Such legislation is deemed incompatible with republican universalism, as it opens the door to the despised and feared privileges which were abolished on 4 August 1789 by the Constitutional Assembly. Add to this fear the spectre of the racist laws passed during the Occupation.

Grand historic laws are part of the fabric of the republican mythology, often invoked to exalt it: the 1881 law on the freedom of the press, the 1881 and 1882 laws creating free, compulsory and secular public schooling, the 1884 law on the freedom of the trade unions, the 1901 law on the freedom of association, and the 1905 law on the separation of Church and State. All these laws, passed during the Third Republic, are characterized by a luminous clarity and their continuing longevity is often quoted to prove their universality. Along with the declaration of human and civic rights in 1789, and the preamble to the Constitution of 1946, they make up the core of the French republican tradition.

In a direct line from this incantation in praise of

universalism (though derived in fact from motives which were essentially nationalistic) Republican assimilationism at the end of the nineteenth century envisaged a grouping of all the nation's individuals divested of their local particularities (dialects, for example, and regional customs), a homogeneous national body created in the name of Republican equality.

Republican universalism did not prevent, it must be said, the discriminatory, segregationist legislation in the French colonies, where the status of citizen was denied to the indigenous peoples. It allowed the exclusion of women until universal suffrage was granted in 1945. And today, it is able to accommodate other kinds of discrimination whose victims are the country's visible minorities.

### The law in crisis

Meanwhile, there have been a number of developments which threaten the law's prestige; the executive has made steady inroads into the power of the legislative. Since 1958 the law has seen its remit limited, circumscribed by the constitution, its place filled by the deployment of regulatory power. In the name of combating governmental instability, Parliament has seen its authority diminished, voting for laws whose origin is essentially governmental. These laws are, moreover, very numerous, often quite rhetorical in form and contain very few normative principles. The obligation to transpose European directives into domestic law and the multiplication of fiscal rules and incentives have given rise to a new kind of law, highly technical and detailed in the extreme. Now acting as instruments of economic and social policy, laws are passed in response to the unfolding day-to-day problems governments seek to solve, often driven by an agenda defined by the media. Such law-making is expressed in terms which are directed solely at public perception with no new normative content (such as the law which enabled the right to housing to be invoked in court, theoretically making the homeless capable of suing the state). As a result, every facet of penal process or social policy is submitted to incessant modification, often in line with the televised pronouncements of the head of state. Laws accumulate, sometimes contradicting each other, endlessly piling modification

upon modification. This legislative inflation and instability have caused widespread ignorance of legislation, not only on the part of ordinary citizens but also among practising lawyers and the public servants whose job it is to apply the country's laws. As a result the effectiveness of laws is reduced and respect for them in the public's mind is damaged.

Slowly disintegrating and with public reverence for it diminished, French law is a long way from its universalist ideal. It emanates from a Parliament composed almost entirely of white men aged 50 or older, who are almost always constrained by the demands of party discipline. These elected officials are most often members of the public service or professional classes, and thus barely representative of contemporary French society with all its social and ethnic diversity.

Worse, some of these laws have the effect of promoting the kind of discrimination they are supposed to prevent. To take a notable example, the repressive legislation passed very recently. In blatant pursuit of the politically and electorally expedient twin themes of controlled immigration and security, ever more repressive measures have been voted on a wildly accelerated timetable. Resorting to the threat of imprisonment, these laws are aimed directly at young people living in impoverished districts where unemployment is rife, though, of course, this is never stated explicitly. Already disadvantaged by their social class and by the colour of their skin, the young people of the *banlieues* are the chosen targets for these penal reforms which impose ever more severe sanctions against 'juvenile delinquency' and 'urban violence.' To this effect, highly specific new offences are created, such as 'occupying the entrance hall of a block of flats', while the right to impose a curfew is allowed in certain areas. Both are only applied in all their severity in those *banlieues* districts which are suffering from massive unemployment. The criminalizing of misery in this way, imported from across the Atlantic all over Europe to a greater or lesser extent, goes hand in hand with growing job and social insecurity. Following the same pattern, protests and demonstrations by these young people, such as those in November 2005, are never analysed in terms of political revolt but merely as the symptoms of criminally deviant behaviour.

Equally suspect motives were at work in the high profile media event known as 'the affair of the veil.' The entire affair led to the enactment of a law which only reiterated the interpretation of the 1905 law given fifteen years earlier by the Conseil d'Etat, which stressed the separation of Church and School. The law forbids 'ostensible' signs of religious affiliation, (although the judges used the term 'ostentatious'.) In fact, very few students had refused to remove the veil on their entry into school; quite clearly, the principle of secularity and republican values themselves had been invoked and used in order to stigmatize the Muslims in France.

### **What future for the French model? What will be the role of the law?**

France may formally proscribe all legislation which permits the unequal treatment of individuals on the basis of their origins or religion. Nevertheless, French society as a whole is beset with wide-scale discriminatory practices, even if there are no systematically gathered statistics allowing precise measurement of their extent.

Statistics concerning France's ethnic composition are limited to a tiny number of academic studies. In November 2007, the Conseil Constitutionnel criticized a law which extended their (carefully controlled) use, citing the constitutional principle of equality. But France cannot continue to deprive itself of such important statistical knowledge. The Veil Commission is currently deliberating this question.

Can we say that the French model is obsolete? Some figures suggest that integration in this country is functioning well enough; for example, those which show that mixed marriages between French people and foreigners have risen to one in fifteen in 2006, more than doubling over a twenty year period.

The French model has the clear advantage of avoiding the pitfalls of communitarism, but it is disfigured by its failure to offer any political representation to minorities, while it ignores – even denies – the existence of the discrimination of which they are victims.

However, over the last ten years, there has been a growing acknowledgement of this question in society and in public life.

For example, since 2001, some of the most prestigious universities (Grandes Ecoles and especially the elite Parisian School of Political Science) have exercised a form of positive discrimination to promote the admission of students from the *banlieues*. As long as they relate to specific 'under-privileged' geographical areas, and not to groups of people characterized by their race or their religion, these various measures are compatible with French law. The same applies to the 'free zones' – areas in which start-up businesses are provided with fiscal and social support.

Some instruments of public policy aimed at combating discrimination have been put in place: in 1999 a group set up to study discrimination, with a concomitant commission to study discrimination in the accession to citizenship, and FACILD, (*Fonds d'Action et de soutien pour l'Intégration et la Lutte contre les Discriminations*). In 2000, the central government facilitated the recording of complaints about discrimination by setting up a helpline. A law of 2001 reversed the burden of proof in cases of discrimination in recruitment; it became the employer's responsibility to prove himself not guilty. In 2004, HALDE was created (*Haute Autorité de Lutte contre les Discriminations*) to receive complaints, carry out investigations and refer cases to the Public Prosecutor (Procureur de la République).

Public awareness of the secular Republic's unequal treatment of Islam has grown, even if its institutions have been slow to address the matter. The Stasi Commission, reconvened in 2003 at the time of the 'headscarf affair', had the merit, at least, of bringing out into the open the very small number of mosques in France, the absence of Muslim chaplains in prisons or the army and the insufficient attention paid to the dietary requirements of Muslims in public catering. On the other hand, the commission's suggestion that *Eid* and *Yom Kippur* become public holidays was not accepted.

In line with these developments, newly formed pressure groups have emerged, representing

France's visible minorities. One of these is CRAN (*Conseil Représentative des Associations Noires de France*) representing black minorities, founded in 2005. It remains to be seen over the coming years how effective its lobbying will prove to be. The 'Beurs' movement in the early 1980s achieved no gains in representation for the Arab minority, probably because it failed to make any serious political demands.

The French republican model is profoundly original, quite distinct from the Anglo-Saxon. It has chosen to privilege equality over liberty, secularism over tolerance, unity over diversity, universalism over communitarism. It has proven its effectiveness in a country which has received and integrated a huge number of foreign immigrants since the 19<sup>th</sup> century. However, today it is struggling to cope with a dislocation between its theoretical ideals and its actual practice. Massive unemployment and its brutal effects on the immigrant communities and their descendants require the injection of a certain dose of pragmatism which would in no way threaten the fundamental principles of the Republic. New legal texts and practices are moving in this direction. The Law will have to find a just balance between respect for difference and respect for Republican *égalité*. But for this to happen, it will have to stop being the compliant instrument of populist discourses (and policies) bent on stigmatizing the country's minorities.

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*erre.*

## Germany: The law

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After decades of ignoring the fact that a large proportion of the population had immigrated to Germany or were not of German origin, German politicians and the Government introduced an 'integration policy' in the last couple of years. The declared aims of the integration policy and of the new laws which were introduced in parallel reveal the characteristics required to become an accepted part of German society and what is deemed as 'German'.

### Official definition of 'person with migration background'

In 2005 the German Federal Agency for Statistics collected data for the first time about so-called 'persons with migration background' and published them in 2007<sup>2</sup>. According to these statistics there are about 15 million of them in Germany. This number is equivalent to one fifth of the 82 million inhabitants of Germany. 8 million of them have German citizenship. The Agency and the Representative of the Federal Government for Migration, Refugees and Integration apply the following definition of the term for their work: A person has a migration-background, if (1) the person was not born within the territory of the Federal Republic of Germany and migrated to Germany in 1950 or later and/or (2) the person does not have German citizenship or was naturalized. (3) The person is German but at least one of its parents fulfils one of the above-mentioned conditions. According to this definition the statistics also include ethnic German immigrants as defined by Article 116 of the German Basic Law, who are officially Germans (*Aussiedler/Spätaussiedler*).

### The relevant law

From the 1960s to the 1990s, official policy and laws were not supportive of the integration of immigrants and migrants into German society. Nor did the existing laws aim to encourage this group to participate in civil society or to naturalize. The official German policy was that immigrants/migrants were clearly not Germans but 'guest workers' (*Gastarbeiter*), whose primary aim was to earn money and return to their countries of origin with their children. This was also how most migrants viewed their life in Germany.

The German Citizenship Law, the *Reichs- und Staatsangehörigkeitsgesetz*, dates back to 1913. It remained in force until the end of 1999. Its main principle was that of *ius sanguinis*: a person had to be born to a German parent/parents to receive German nationality, whereas *ius soli*, as practised in other countries, requires a person to be born within the country's territory. For that reason, by the end of the 1980s, more than twenty years after the first 'guest workers' came to Germany, only a very small number of them had German nationality. Another reason for this was that foreign citizens could not apply for naturalization. According to section 8 of the *Reichsstaatsangehörigkeitsgesetz* naturalization was at the discretion of the authorities. It was seen as an exceptional way to acquire citizenship and was not meant to increase the population of the nation in a planned manner. The status of migrant-workers was equal to that of German citizens with regard to most social security and economic issues, but they lacked political rights. The main requirements for naturalization, according to Section 8 of the Citizenship Law, were that the applicant for naturalization had not been sentenced by a criminal court for committing a crime, had accommodation and was able to support him/herself and his/her family.

A first step was taken in 1990/92 with the introduction of section 85 and 86 of the Aliens Act (*Ausländergesetz*): a person of foreign nationality aged between 16 and 23 had the right to receive German nationality if he had permanently resided for eight years in Germany, had not been sentenced for committing a crime, had renounced his previous citizenship and attended school in Germany for

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<sup>2</sup> Statistisches Bundesamt, Bevölkerung und Erwerbstätigkeit, Bevölkerung mit Migrationshintergrund – Ergebnisse des Mikrozensus 2005, published: 4 May 2007.

six years. Other people could apply for naturalization if they also fulfilled these requirements but had lived for fifteen years in Germany and were able to support themselves and their families without receiving social or unemployment benefits. A facility existed for their children and spouses. These regulations were mainly aimed at integrating the younger generation, most of whom were born in Germany but did not have German citizenship.

In 2000 when the Citizenship Law was reformed (the title of the law was changed to *Staatsangehörigkeitsgesetz*) there was a noticeable shift from the principle of *ius sanguinis* to *ius soli*. According to Article 4, a child whose parents did not have German nationality but who was born in Germany may receive German nationality if at least one parent had lived in Germany for eight years and possessed a permanent residence permit. The child may hold dual nationality until it turns eighteen. This right is one of the most controversial and debated issues within German society because, according to German citizenship rules, dual nationality is undesirable. Only a few exceptions are made in specific cases: for example, for refugees, or if the country of origin does not allow its citizens to change their nationality. Exceptions also apply to applicants from other EU member states and some other countries such as Switzerland or Liechtenstein. Members of the biggest migrant community in Germany – people of Turkish origin – feel particularly discriminated against by this law. They argue that it forces them to neglect their cultural identity, as assimilation, rather than integration, is required by the German authorities. This right is the reason why a large number of them still do not hold German citizenship, even people of the second and third generation living in Germany. They argue that German politics and the authorities should not deny their dual cultural existence. The new regulation is therefore much debated, especially these days, now that the first children have already had to choose their nationality under this new law<sup>3</sup>. The

3 There was a special regulation for children who were under ten years of age at 1.1.2000 and were born in Germany and whose parents fulfilled the requirements. In 2008 the first children had to opt for one nationality or the other. Some of them are currently suing over their obligation to give up one of their citizenships.

Government's view is that naturalization should come at the end of the entire integration process and that one has to choose one's identity. A person has to decide whether he/she wants to belong to German society by choosing German nationality.

Further amendments to the Citizenship Law were made in 2005. The administrative execution of federal laws such as this one falls within the competence of the federal states. That means that the German 'Länder' are allowed to decide on their own whether the applicant for naturalization fulfils the criteria of the law. For this reason some states, especially Baden-Württemberg, have carried out a value-based citizenship-test since 2005. The loyalty of the applicant towards the liberal-democratic order of the constitution is tested. Critics interpret the questions in these tests as a demand to assimilate to a special value-based *Leitkultur*. They argue that a liberal and pluralistic society cannot give public specifications relating to moral and social standards. The law was amended again in 2007: after 1 September 2008 a citizenship test in the form of multiple-choice questions will be mandatory. This test is less value-based than the test in Baden-Württemberg. It consists of questions about the political organization of the state and civic issues (*staatsbürgerliche Rechte und Pflichten*) such as politics and democracy. The knowledge of the applicant of German politics and history is also tested. There will be questions about Germany's past in the Nazi era and questions such as: 'Why did Willy Brandt kneel down in 1970 in the Warsaw Ghetto?' It is expected that migrants applying for German citizenship will also have to grapple with this chapter in German history.

In 2000 the German Aliens Act, *Ausländergesetz*, was renamed the *Aufenthaltsgesetz*. After reforms in 2005 and 2007 the Act stipulates that permanent residence permits can only be granted if 'proof of German living-standards' is provided. This criterion not only requires adequate knowledge of German, but also knowledge of the historical, political and cultural fundamentals of Germany<sup>4</sup>. Migrants who attended a German school or have equivalent

4 The Dutch legislation and politics constitute a model for the new German laws.

diplomas and do not fulfil the criteria in other ways have to attend an integration course. If they do not do so state benefits or the residence permit may be denied. Attending such courses can help to reduce the mandatory time of residence in Germany for naturalization from eight years to seven. The content of the courses has been criticized, since there has been a shift from the previous requirement that the applicant for a permanent residence permit only had to prove a sufficient period of residence, or that he was in employment and had a sufficient income, whereas the new requirement introduces criteria concerning loyalty and identity<sup>5</sup>.

### Policy background

The new integration policies and the new laws had their starting point in the era of the coalition between the Social Democrat Party and the Green Party under Chancellor Gerhard Schröder. The Minister of the Interior, Otto Schily, set up an independent commission for Immigration (*Zuwanderungskommission*). This commission articulated that immigration/migration should be seen not as a threat but as a positive enrichment and it could also be to the advantage of mainstream society. For the first time this acknowledgement was accepted by official German policy. According to the final report of the commission in 2001<sup>6</sup>, the aim of the new government integration policy is equal participation in social, economic, cultural and political matters, while at the same time taking cultural diversity into consideration. The report stressed the need for efforts to be made by both sides, by mainstream society and the immigrants/migrants. Accordingly integration should be achieved by a combination of 'support and requirements' (*Fördern und Fordern*). Crucial points of the current government's integration policy can be found in 'Good living together – clear rules' (*Gutes Zusammenleben – klare Regeln. Start in die Erarbeitung eines Nationalen Integra-*

*tionsplans*, Beschluss des Bundeskabinetts) of 12 July 2006. This position paper forms the framework for the integration dialogue within the National Integration plan. As a consequence, ten task-forces dealing with interdisciplinary issues were formed. Their work is coordinated by the relevant Federal Ministry and by the 'Representative of the Federal Government for Migration, Refugees and Integration'. One of the aims of the National Integration plan is that migrants should participate equally and take responsibility in society. There is an emphasis on the fact that one should talk *with* migrants rather than *about* them. On 11 July 2007 the 'National Integration plan' was announced. It envisages a far-reaching dialogue within society, especially in the area of education. It defines new ways of public responsibility for private initiatives and private foundations where the support of pupils and students with migration background are concerned. It also obliges state agencies such as the federal states and municipalities to provide support services, especially in educational issues for children with migration background. At the initiative of Chancellor Merkel two national integration summits have been held to-date.

I find it very alarming that the principle of prohibiting dual citizenship is handled so inconsistently in German law. From a legal perspective, it would seem to suggest that dual citizenship should be avoided, that it is undesirable under international law, because it creates further problems in this field. Such problems would arise in political crisis situations, for example, where a person with dual citizenship remains in an area of conflict. The question then arises: which nation is responsible for this person? Politically it suggests that the very issue of identity advocates single citizenship; one has to decide which society one wishes to belong to. Indeed, the ban on dual citizenship creates considerable identity problems for large sections of the German population and a significant potential for society to drift apart. Wide sections of society feel excluded – I refer particularly to those migrant groups, which are not from those western countries for whom dual citizenship is recognized. Because it is by no means the fact that only citizens of other EU States can receive dual citizenship, for European legal reasons. Even non-EU citizens, from Switzerland for example, do

<sup>5</sup> See Groenendijh, *Europäische Entwicklungen im Ausländer- und Asylrecht 2006*, *Zeitschrift für Ausländerrecht und Ausländerpolitik* 9 (2007), p. 320 (325); Thomas Groß, *Das deutsche Integrationskonzept – vom Fördern zum Fordern?*, in: *Zeitschrift für Ausländerrecht und Ausländerpolitik*, 9 (2007), p. 315 (316).

<sup>6</sup> *Bericht der unabhängigen Kommission Zuwanderung, Zusammenfassung*, S. 11, [www.bmi.bund.de](http://www.bmi.bund.de).

receive this privilege. Members of other migrant groups, in particular those of Turkish origin, feel discriminated against and subjected to assimilation through the negation of their cultural roots. Given that the fundamental ban on dual citizenship was accelerated through the reform of the Nationality Act in 1999/2000, and in particular by the CDU campaign and the Premier of the Federal State of Hessen, Roland Koch, it can be considered to be more an assertion of political objective, rather than an incontrovertible legal requirement of international law.

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## The Netherlands: The law

Lydia Heuveling van Beek<sup>7</sup>

In the late Middle Ages (1581) the seven northern provinces of the Netherlands removed themselves from the Hapsburg *Statenverband* [Union of States] to which they had belonged until then.

The states (*standenvergaderingen*) of these seven northern provinces of the Netherlands sent a written declaration to Filips II, the so-called *Acte van Verlaetinghe* and joined together to form a new union: the States-General.

After a failed attempt at finding a new sovereign, these seven provinces continued as the Republic of the United Netherlands. Instead of a sovereign they had a (hereditary) *stadtholder* [governor] from the House of Orange. This *stadtholder* had considerably less power than a sovereign. The States-General were the most influential body of the new republic. The Reformed Church became the religion of the state.

After a short period of Napoleonic rule, the Kingdom of the Netherlands assumed its present form of government. However, the Netherlands is still considered to be a republic ruled by a royal family house, the House of Orange.

Church and state have been separated ever since, but through several religiously oriented political parties, Christian standards and values, in particular, still play a significant role in the judicial process.

The separation in 1581 and the new form of republican government (*res publica*) have led to the fact that from very early on in the history of the Netherlands it has been necessary to balance individual (civil), decentralized (states and provinces) and central (republic) interests.

While balancing these various interests, there was always an attempt to reach a compromise. In our times this has developed into the so-called *polder*

*model*, which is highly praised by some.

This emphasis on the individual as well as on the general interest, and the constant weighing up of these two, is still a defining characteristic in the drafting and upholding of legal rules in the Netherlands. Partly because of this, legal rules are often formulated as open norms (where the law provides general guidance but not a detailed rule book), so that they can be made more concrete by interpreting them in daily practice. The judicial role of the judge is crucially important in this process.

When it comes to criminal law, the principle of discretionary powers results in the Public Prosecutor not having to prosecute every criminal act. It is possible not to do so on grounds of public interest. The Public Prosecutor makes liberal use of this and has developed a policy on the basis of it. Civilians are aware of this, and they can also appeal to it in front of a judge.

In civil and family law there is a(n) (open) norm, which says that a person who has legal authority, cannot exercise this authority if he abuses it. In short: where there is no (reasonable) interest, there is no judicial remedy.

Even when, for instance, a garage had been built, and is extended 3 cm onto somebody else's land, the other person cannot demand that the garage be taken down. In the majority of cases this person would be paid compensation. Even though his right of ownership had been violated, he would not get his land back. An example in family law would be that a judge could order a mother to stop fighting against the recognition of her child by the (biological) father, if she has no reasonable interest in her resistance, even though she has a legal right to resist. The interest of the child to know his biological father prevails over the interest of the mother, who, in all likelihood, no longer wants to have anything more to do with that man.

Finally, in administrative law, there is a rule that the government needs to weigh up all the interests involved in the decision-making process, and that the negative consequences of a decision should not be disproportionate to the purpose served. When this is the case, the civilian receives compensation.

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Another related development, which is often followed with Argus' eyes in other countries, is the so-called 'tolerance' approach by the government. In essence this is an expression of the principle of discretionary powers. The government tolerates that an illegal situation continues to exist, because implementing the law could have far greater negative consequences. An example of this is the Dutch policy on soft drugs. The sale of small amounts of cannabis is tolerated because this way the authorities are able to keep a tighter control on the quality of the drugs, and thus can better guarantee public health, than when the sale takes place in a completely illegal realm.

In this way a flexible system has come about in every legal domain. This system gives newcomers to the Netherlands the possibility to advance their interests and thus to set in motion a reappraisal of the rules and their maintenance. Their interests and needs will be weighed up alongside older, better-known interests, for instance while creating their own schools and houses of prayer.

Fundamental rights are weighed up against each other as well. In the case of a conflict of fundamental rights, for instance between freedom of expression and freedom of religion, these two fundamental rights, and the interests which are related to them in the concrete case of implementing those rights, will be weighed against each other. Thus it can happen that a vicar can afford to say more about homosexuality during a sermon than a Christian author can in a newspaper article.

A much more recent development is that the traditional institutions responsible for implementing the law are no longer considered satisfactory in the eyes of the government.

In addition to the classical political triad of parliament, government (central government of ministries and decentralized at the provincial and municipal levels) and judge, new implementation authorities have come into being. Examples of this are the Dutch Competition Authority (which controls the free market mechanism), the OPTA (market for telecommunications), the Food and Goods Authority (food safety), the Dutch Health Authority (health-

care) and the Authority for Financial Markets (stock market and banking world).

These authorities carry out criminal investigations. In the case of an offence they can impose penalties. Only when a penalty has been imposed can a judge give his views on it when asked by the interested parties. These authorities therefore combine several duties, namely to investigate, prosecute and punish, which, under previous constitutional insights, had to remain separate. Judicial control only takes place at the very last stage, where another balancing act often takes place between public and private interests.

All these authorities have in common that they mainly uphold EU law (free market mechanism). This new system seems to lead to a situation where more upholding takes place without there being a prior integral weighing-up of interests in order to keep up with 'Brussels'.

European law is not yet perceived by the average Dutchman as Dutch law. Sometimes there is a certain resistance to the repercussions of EU law in the Dutch judicial system. Nevertheless, a large proportion of Dutch law nowadays arises from the European system. A hesitant conclusion would be that within this system there is less scope for the traditional Dutch method of trying to find a solution, which is acceptable to all judicial partners by means of weighing up mutual interests.

According to my analysis, because of the free market mechanisms proposed by the EU, the Dutch public feels less, or not at all, protected by its own national government. This government does indeed declare that it takes a step back to enable the market to flow freely. This might well explain the Dutch 'no' vote during the referendum about the European Constitution. The insight that the increase in economic welfare following the World War II in Europe and therefore also in the Netherlands is due to a large extent to the EU, plays a much less significant role for the public.

Finally, I would like to mention the (international) law formation following 9/11. Taking advantage of a growing feeling of insecurity, a whole range of (national) control powers are being created, which can be exerted without there being a case

of suspicion of a concrete penal offence. Some of these powers delve deeply into the personal lives of citizens. Telephone conversations and data exchanges can be listened to and recorded, as well as international travel information. Databanks can be linked and information compared under the supervision of the National Security advisor, who in this way carefully tries to map out the national security situation. Until now these new control powers have been used to investigate crimes related to terrorism, carried out by 'extremist Muslims' according to the Public Prosecutor. Up to now, judicial control has taken place through the criminal court.

There is still some discussion among Dutch jurists regarding how far the government is allowed to go when delving into the private lives of its citizens. The public does not seem to be too upset by it, on the principle that 'security comes before the fundamental right to respect for one's private and family life (art. 8 EVHRM)' and 'I have got nothing to hide'. The manner in which the criminal Court has limited the new powers of control, has, in turn, led to new jurisdiction, in which these new powers of control have been refined, a development which is still ongoing.

The flexibility of the Dutch judicial system in which all judicial partners can advance their interests and needs, after which these are weighed against each other, seems to have been pushed somewhat to the sidelines by more recent developments.

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## Sweden: The law

*Swedish immigration law and refugee policy*

**Qaisar Mahmood**

### Swedish law is based on a universalist perspective

Those who have permanent residence permits and those who have Swedish citizenship are entitled to the same social, civic and economic rights and are subject to the same laws. They also have equal opportunities to move freely within the European Union. In other words Swedish law is based on a universalist perspective.

Citizenship laws of different countries are built on one of two basic principles for the acquisition of citizenship by birth:

- the pedigree principle (the child takes the nationality of its parents).
- territoriality (the child takes the nationality of the country where the child is born).

Swedish citizenship law is based on the pedigree principle. It means that the parents' nationality determines the nationality of their children.

Compared to other European countries, Sweden has rather generous regulations for obtaining citizenship. A person who has received permission for permanent residence must have lived in Sweden for five years without interruption in order to apply for citizenship. Anyone who has been married, lived in a registered partnership or has cohabitated with a Swedish citizen for at least two years can apply for citizenship after three years. For Scandinavians, it is enough to have lived for two years in Sweden to apply for citizenship.

The main difference between residents with citizenship and other long-term residents is that Swedish citizens are allowed to vote in national elections and have the opportunity to be elected to the national Parliament. Those with residence permit are only permitted to vote in municipal elections.

There are, however, some professions in the public sector that require Swedish citizenship, particularly in the military sector. But the trend is that those

professions which require citizenship are becoming fewer and fewer.

There are two areas where citizens, regardless of their nationalities, are granted different sets of civic, political or cultural rights. The first is within the educational area. All pupils who do not have Swedish as their mother tongue have the right to receive education in their first language in primary and secondary schools. This 'mother tongue education' has replaced home teaching and is optional. The authorities are obliged to organize language classes for everyone whose mother tongue is not English.

There are some exceptions to this rule. Authorities, for example, are not obliged to offer instruction in immigrant languages where there is no access to adequate teachers, or fewer than five pupils.

### The political and cultural rights of national minorities

The other area to which the multicultural perspective is applied is that those who are acknowledged as national minorities are granted some cultural rights to which other citizens are not entitled.

In 2000 Sweden introduced a minority policy. Five minorities with longstanding ties to Sweden were included and their cultures were granted additional rights of protection. The national minorities are Jews, Roma, Tornedalians, Swedish Finns and Lapps.

The areas where national minorities are granted specific cultural rights are listed below:

### Teaching in the mother tongue

National minorities are also entitled to receive education in their mother tongue, even if that language is not used in daily life at home. The right of national minorities to receive teaching in their mother tongue is strictly regulated in educational law. The authorities are obliged to offer language classes even if it is difficult to find teachers, or if there are fewer than five students from the national minorities. There is also no time limit on how long they have the right to this education as there is for

other immigrants or cultural minorities.

### Cultural activities

The Swedish National Council for Cultural Affairs allocates funds for initiatives to promote national minority languages and culture. Those who want grants for activities linked to the national minorities have increased chances to receive grants for such cultural activities.

### Education

According to the national curriculum for Swedish schools one of the objectives is that 'every student should have knowledge of the culture, language, religion and history of national minorities'. These objectives are more specific in the national curriculum for Swedish and history.

### Minority language legislation

Specific minority language legislation applies to certain geographical areas, where Sami, Finnish and Meänkieli have a long tradition. This legislation applies to certain municipalities in Norrbotten, called administrative areas, and entitles individuals to use Sami, Finnish and Meänkieli in their dealings with administrative agencies and courts. The legislation also gives the right for pre-school and care of the elderly to be carried out partly or completely in the minority language.

### Undocumented migrants

The contemporary debate about achieving a cohesive society in Sweden focuses mainly on the right of undocumented migrants to health care. In order to create a *res publica* identity, the situation of undocumented migrants and their legal status has to be solved.

In Sweden there are people who live completely outside the society's social welfare system. Some of these are so-called undocumented migrants who lack valid documents in order to stay in the country. Those who live in Sweden without a residence permit can be roughly divided into two groups: asylum seekers, and others (Social Report, 2006:9).

The other group consists primarily of hidden refugees, but also of victims of trafficking and illegal workers.

It is by its very nature difficult to obtain adequate figures on the number of hidden refugees who are in the country. According to an estimate made by the International Centre for Migration Policy Development, the number of undocumented migrants in Sweden was around 20,000 in 2003-2004. According to the Swedish National Police, approximately 15,000 asylum seekers went missing after a negative decision from the migration authorities. This does not mean that they all stay in hiding in the country; they could also have left the country on their own.

### Who cares for refugees in hiding?

Asylum seekers in Sweden only have the right to emergency medical care that cannot be postponed. Medical care is not free of charge for undocumented migrants, as it is for other residents. Undocumented migrants could be forced to pay anything from 2,000 Swedish kronor for a medical consultation to as much as 20,000 kronor for childbirth. Children who are undocumented migrants are, however, still entitled to receive the same care as Swedish children.

Despite the fact that undocumented migrants have the right to seek immediate care, many of them live in such fear that they would not dare to turn to the public health system. An investigation made by the organization *Médecins sans Frontières* showed that 82 per cent of refugees in hiding 'have encountered barriers to accessing care'. These barriers may be purely practical, such as the lack of personal or financial means to pay for their care, or indirect barriers caused by fear of contact with the authorities (*Médecins sans Frontières*, 2005).

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## The United Kingdom: The law

In this brief paper, I sketch a personal view of modes of interrelation between law and the *res publica*, framed against the background of inter-cultural debates stoked by 9/11 and subsequent events, though those debates are, of course, of a somewhat older vintage. I also set out what I regard as the greatest threat to the law, insofar as it supports the *res publica*, namely the demise of its myth.

Ever since Roman times, Western notions of statehood and government have been inflected by an underlying regard for law and attendant order. Indeed, Cicero defined the *res publica* as an association held together by law, for the Roman lawyer and statesman maintained that law was constitutive of the *res publica*.

Increasingly the challenges to the *res publica* itself are being played out in the legal arena, wherever a public dispute cannot be worked out through public processes or civic negotiation, and recourse is sought either in the courts or through legislative assemblies and the laying down of laws.

We see this, for example, in the decisions of European courts to uphold the Turkish state's right to ban the wearing of headscarves in state universities. We see it in the efforts of the British government in parliament to extend detention periods for suspected terrorists. We see it too in the increased efforts to counter so-called 'honour killings' and forced marriages. And we see it across the Atlantic in the latitude afforded by the US Supreme Court to its government in pursuing the excesses of internment without due process, although, of course, more recently that court has retreated somewhat from its former stance.

In fact, in this last example the retreat itself (the court's ruling in June 2007 that the writ of the Constitution, and its human rights' protections, extended to Guantanamo Bay) is telling of a general dynamic operating between law and the public consensus. For, some would say, the ebb and flow of judicial protection of civil rights matches the ebb and flow of public consensus (a consensus shifting

as the true natures of our military interventions emerge), even where the courts claim that they are uninfluenced by the transient passions that dominate the press, the public and politicians.

The challenge to the *res publica* comes from many fronts. There appear to be many who perceive a challenge from Islam. In conservative quarters they characterize themselves as the silent majority, though their numbers are augmented by prominent vocal commentators who would otherwise style themselves as left-leaning, such as the commentators Nick Cohen and Christopher Hitchens. To these conservatives the threat to the *res publica* is presented by alien ethical systems that encroach upon Western liberal traditions, which alien systems they see as vying with established values for recognition and wider acceptance. But they cannot abide this because they perceive those claims as being inconsistent with the norms and values they hold dear (however much difficulty they may have in articulating precisely what either their norms or the alien Islamic norms are – consider the tedious Britishness debate).

Other liberals do not perceive a threat from inconsistent values, primarily because they place their faith in the sturdiness of the *res publica* and its capacity to provide the clearing-house of values and ideas, so that a settlement can be brokered through the tussle.

The law has always swayed to political tides, and one should generally balk at a description of any period of human history, barring those with major advances in science, as unique in any significant way.

However, the interrelations between the *res publica* and the law at this moment in time are, if not unique, then at least quite interesting.

Three things happened in tandem to bring us here, roughly speaking. For many in the human rights community, the twentieth century's triumph, perhaps obscured by the misery that littered the century, was the crowning of the human rights agenda. International courts, tribunals and protocols sprang up like spring flowers everywhere, until the end of the century was suffused with the

scent of rights.

At the same time, the world began moving and talking: mass migrations, instant news everywhere, and of course globalization, whatever that means to you.

And again at the very same time, and particularly towards the end of the century, the conflict, perceived or otherwise, between Islam and the West, reared up. This is what makes things interesting and, quite possibly, deadly. As the grand human rights agenda in the West advanced, so it penetrated the rest of the world further. In the field of international development, for example, 'rights-based development' took root. This often involved projects and programmes with decidedly Western liberal agendas that ran counter to local customs and values. In the foreign policy of Western states, however, 'the national interest' was always the only game in town. All this also led to more and more individuals, such as Osama bin Laden, and others living among us, raising the cry of hypocrisy, accusing the West of double standards. Bosnia and Chechnya are only two famous examples.

So what about the law in all this? In all the major legal disputes, even those where government seeks to introduce anti-liberal legislation – in all those disputes that pit culture against culture (supposedly, actually or otherwise), at their cores is a dispute about values, a dispute that is framed for the purposes of the law's adjudication in terms of fundamental Western human rights. And when a dispute is framed in terms of human rights, which, *ex hypothesi*, are Western, the disputes are not readily intelligible in those terms to many non-Westerners.

All this leads us to reappraise the myth of law and the courts. No longer can we sustain the myth (however erroneous it might have been anyway) that our courts stand outside the hurly-burly of politics, wars, immigration; that our courts are neutral towards newcomers with funny habits, ideas and strange ways of doing things; that Justice is blind, aloof and timeless. The newcomers, after all, could blow us up.

So the courts lose their lustre, their enchantment,

and the fairy-tale is no more. This is of dire consequence to the *res publica* if, like me, you believe that democracy, of any decent variety, is founded on a myth of law, and that this myth stands squarely on a myth of judicial independence, not impartiality, but a delicate independence in the courtroom from the annoying fracas on the street.

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*The author wishes to remain anonymous in the spirit of the 'off the record' status of the round tables*

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