

**RACISM AND XENOPHOBIA:
DIFFICULTIES FACING THE COURTS
IN IRELAND AND SWEDEN
IN DEALING WITH ETHNIC MINORITIES**

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I. INTRODUCTION

In May 2001, six judges from the Irish District Court¹ travelled to Sweden to meet with their Swedish counterparts and to visit the Chief Prosecutor's office, the Bar Association and the Ministry of Justice. This project began as an initiative by the Judges of the District Court in Ireland, organised with the co-operation of both the National Courts Administration and the Ministry of Justice in Sweden and established under the auspices of the Grotius programme of the European Commission, with the support of the Irish Judicial Studies Institute. It is proposed to commence this report by the provision of comparative data relating to the two countries. A brief *aperçu* of both country's experiences of immigration will be recounted. Each stage of the initiative will then be detailed, before concluding by issuing a number of recommendations.

II. OBJECTIVE

The specific focus of the project was to examine the difficulties confronting courts in dealing with ethnic minorities and the issues of racism and xenophobia, by comparing social and judicial trends and discussing proposals for reforms of existing legislation, and the report will focus

* Judge of the District Court. This is the report of a Grotius Programme visit to Sweden by the judges of the Irish District Court organised by Judge Leonard, 28 May-1 June, 2001.

¹ For a list of all participants in this project, see Appendices I, II and III.

on this. We visited the Uppsala District Court, the General Administrative Court in Stockholm, the Swedish Bar Association, the Stockholm Public Prosecution Office and the Ministry of Justice. We learned a great deal about the workings of the courts and the legal system, about the country and its people, experienced first hand the famed efficiency of the Swedes, and, we hope, strengthened the ties between the Swedish and Irish District Court Judges.

III. BACKGROUND

The total land area of this Scandinavian peninsula is 411,479km², almost three quarters of which is either cultivated or consists of forest and lakes.² There is an almost exact gender balance in a total population of 8.848 million, with 49% being male. Moreover 19% are under the age of 15 and 17% aged 65 and older.³ Sweden, a member of the European Union since 1995, is a constitutional monarchy, governed by a prime minister and a single chamber parliament (*Riksdag*) of 349 elected members.

The legal system is a codified one, tracing its origins back to the National Law Code of 1734. Much of this code was replaced during the twentieth century, with new legislative regimes governing marriage, wills, succession, real estate, criminal offences and judicial procedure. Furthermore a considerable but separate body of legislation amassed in such areas as company law, copyright, labour relations and public law. Constitutional law is also codified - the Instrument of Government of 1975 replaced an earlier code of 1809. Sweden ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms three years after Ireland, in 1956. Although the Convention was incorporated into Swedish legislation in 1995, the Irish European Convention on Human Rights Bill, 2001 has not yet been enacted. An interesting point to note is that Ireland

² *The Cambridge Encyclopedia* (2nd ed., 1994), p. 1073.

³ *Eurostat Yearbook 1998*, p. 2.

and Sweden were the first two Member States to accept the critical right of individual petition to the Court of Human Rights.

The general courts and the general administrative courts constitute the two limbs of the Swedish courts system. The general courts deal with criminal cases and civil disputes between individuals and the general administrative courts primarily deal with matters between the public authorities and the private individual. Both courts are parallel and three-tiered and both consist of district courts, courts of appeal and a Supreme Court. There are also special courts; some like the Labour Court, the Market Court and the Court of Patent Appeals are wholly detached from the general courts, while Land Courts, Environmental Courts and Maritime Law Courts are wholly or partly integrated into the general courts.

Although Ireland is almost six times smaller in land area, its total population, of 3.693 million exactly split between male and female, is almost half that of Sweden's.⁴ The Irish population is relatively younger: 23% is under the age of 15 and 11% is aged 65 and over.

Ireland, already a member of the E.U. twenty two years before Sweden's accession, is a republic headed by the President and consisting of a two-chambered parliament, led by a Prime Minister.

Although Brehon law was one of the earliest forms of law in Ireland, from the late twelfth century Ireland became increasingly governed by English common law and when the Act of Union was passed in 1800, the country was fully integrated in the British legal system. However in 1937, fifteen years after independence, the present day Constitution was enacted and it remains the founding document of the Irish State today. The courts are one of the four institutions established by the Constitution and in contradistinction to Sweden consist of the District and Circuit, which are courts

⁴ *Eurostat Yearbook 1998*, p. 2.

of local and limited jurisdiction, and the High and Supreme Courts. There is also a Special Criminal Court, a nonjury court trying subversive and similar offences. There does not exist in this jurisdiction any structure analogous to the administrative courts in Sweden.

In an evolving Ireland of May 2001, to partake in a programme concerning immigration proved particularly apposite. As Mac Éinrí notes

Until the recent past, Ireland was a country of emigration. From the Great Famine of 1845-1847 to the 1950s, the natural increase in the population was continually offset by out-migration on a scale which was relatively higher than any other European country, leading to an almost continuous decline in the population for more than a century.⁵

However the celebrated 'Celtic Tiger' has heralded in an era of dramatic changes. No longer is Ireland "a relatively poor peripheral European country with strong and sustained emigration, limited employment opportunities..."⁶ Real growth rates in the late 1990s, at more than 8% of GDP, were the highest in the OECD area: indeed they exceeded any other member State by a factor of more than two. In addition, the economic boom generated many new jobs. In the period 1995-2000 about a quarter of a million persons migrated to Ireland, of whom approximately half were returning Irish. The aggregate figure for immigrants in this period is 7% approximately of the 1996 population (3.6 million). This figure would be the equivalent of close to 4 million persons in France. Moreover, this situation of substantial net immigration is likely to continue in the near future, although

⁵ Mac Éinrí, "Immigration into Ireland: Trends, Policy Responses, Outlook" at <http://migration.ucc.ie/irelandfirstreport.htm>, accessed on 22 February 2002.

⁶ Mac Éinrí, <http://migration.ucc.ie/irelandfirstreport.htm>.

the actual figures will clearly be influenced by international and internal economic developments.⁷

In light of the foregoing, Swedish history proves to be particularly pertinent. It has already encountered much of what Ireland is now experiencing in terms of economic boom and the consequent surge in immigration. Furthermore the country must now deal with the legacy of this influx, in the shape of first, second and third generation immigrants.

Historically the Swedes were a seafaring people and have had well documented traditions of interaction with other races. From as long ago as the late eighth to the mid-eleventh centuries, the Vikings ventured further east than other Europeans to Jerusalem, the Caspian sea, Baghdad and Constantinople. Many of them returned with vast riches from their combined trading/plundering expeditions. In the seventeenth and eighteenth centuries, Sweden was the dominant power in northern Europe, its empire comprising the whole of Finland, large parts of the Baltic and important areas of Northern Germany. However as in Ireland there was a period of emigration. From the 1850s to the 1930s, about 1.5 million people left Sweden mostly destined for North America. Post World War Two, Sweden's neutrality begat an economic boom and during this time the country became a place of asylum for hundreds of thousands of war and political refugees. Currently about one million of its total population are immigrants or children of immigrants.⁸

IV. INDIGENOUS ETHNIC MINORITIES

It seems appropriate at this juncture to draw attention to the existence in both countries of indigenous ethnic minorities. It has been remarked⁹ that often racism has been

⁷ Mac Éinrí, <http://migration.ucc.ie/irelandfirstreport.htm>.

⁸ I am grateful to the Swedish Embassy, Dublin for providing many of the facts contained in this report.

⁹ By Ronnie Fay of Pavee Point, the Travellers' support group; see "'Symbolic' conference soured by political posturing", *Irish Times*, 25

understood in terms of colour rather than ethnicity and culture. The Travellers, Ireland's largest ethnic minority, have been an integral part of Irish society for centuries. Their distinctive identity and culture is based on a nomadic tradition and they have been and continue to be much discriminated against in a society which seeks to absorb and assimilate them. Travellers are in general fearful of the legal process. Similarly, Sweden has an indigenous ethnic minority, the Laplanders, who have also suffered the intolerance and prejudices of others, for example in relation to their language and their traditional rights regarding herds of reindeer.

V. THE COURTS

The project commenced in the beautiful city of Uppsala. Steeped in history, it has the largest Cathedral in Scandinavia, on which work began in 1260. Its University was founded in 1477. Incidentally Uppsala was also the boyhood home of Dag Hammarskjöld, former Secretary General of the United Nations.

A. The District Court

We met in session with the President and some members of Uppsala District Court where we learned a great deal about the workings of the Court. We also attended a court hearing.

The generally law-abiding immigrant population come from of Chile, Bangladesh, the Balkans, the Middle East and certain African countries.

A significant statistic is that two-thirds of the juveniles committed to secure institutions are immigrant or the children of immigrants. The District Judges cited unemployment as the chief cause of crime amongst immigrants. In Sweden unemployment runs at 4-6% on average, but it can rise as high as 50% among the immigrant population. The judges feel that a further aggravating factor

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is that fathers, the traditional male authority figure in an immigrant family may lose their controlling influence within the family as a result of being unemployed. But they note that crime figures can be distorted because immigrants tend to settle in certain areas on which the police tend to focus.

It is in the area of family law that ethnic minorities particularly come to the attention of the Courts. Some of the many difficulties that have become apparent are those of abduction or the threat thereof, custody disputes, problems arising from the clash of different cultures and a lack of understanding of Swedish law. Furthermore there have been instances of girls as young as twelve who have been given in marriage. In general the difficulties arise with first generation immigrants. There are no special difficulties experienced with second generation immigrants.

Some debate arose on the issue of affording people of alternative cultures special consideration. Our Swedish colleagues cited a very extreme case from Northern Sweden where it was argued that because an accused man came from a tradition where it was acceptable to beat his wife to ensure her obedience, this should be taken into account in his defence. A firm view was expressed that those who come to live in Sweden must accept the laws as they find them.

It was noted that if a non-national who has lived in Sweden for less than five years commits an offence, part of the sentence can consist of expulsion for a specific period of time i.e. three to four years.

A concern was aired over a perceived lack of specific training for Judges and our Swedish colleagues remarked on the importance of maintaining channels of communication with legal practitioners, social workers and the police so as to maintain an awareness of developments within the community.

B. General Administrative Court

We next visited the General County Administrative Court in Stockholm and met with the President of the court and some of its judges. This Court deals with disputes between citizens and community and has 25,000 incoming cases per annum, handling tax, social security and deprivation of liberty cases. This jurisdiction is not necessarily crime related but encompasses cases involving the community, such as children who are abused, the mentally disturbed and drug addicts requiring institutional care.

Again it was noted that apart from family law issues it is the children of immigrants who tend to appear before the courts. The first generation are committed to staying in Sweden and creating a new life. It would appear that in the 1960s migrants came from Greece, Yugoslavia and Turkey in response to the economic need for workers and seem to have integrated well into the society of their host country. Many of the difficulties with immigrants and their children emerged from the 1980s onwards when the economic climate was not as favourable.

A problematic issue is that many immigrant women have not learned Swedish, engendering difficulties when their children left home to attend school. There are also huge problems for such women (and the courts) in the event of marital breakdown. Moreover many children do not wish to adhere to a traditional way of life. A very serious example of this was the case of an Iraqi girl murdered by her two uncles. In addition many narcotic crimes may be related back to immigrants from South America.

Of particular interest is the Swedish asylum process. In 2000 there were 14,000 asylum seekers, an increase of 2,800 on the previous year. 32% of applications came from Iraq, 20% from Yugoslavia, 4% from Russia, 3% from Afghanistan, with miscellaneous countries accounting for the remaining percentage. Of the 10,938 asylum applications in Ireland in 2000, Nigeria and Romania accounted for 31.3% and 28.9% respectively. The Democratic Republic of Congo

comprised 3.6% and Algeria 3.5%; 3.6% were from Kosovo, while other countries accounted for the remaining 29.5%.

A person who is found by the police in Sweden without papers will be taken into custody pending their application for asylum. Appeals against retention in custody come before the General Administrative Court which usually confirms detention, but in less harsh custodial circumstances. Unlike this country, asylum seekers are permitted to work pending the result of their application if there is likely to be a delay.

Appeals against an unfavourable determination were formerly dealt with by the Government, but are now within the competence of the Aliens Appeal Board. It is an administrative agency, exercising judicial functions and is headed by a Director General with the powers of a court. It has nine permanent, seven temporary and thirty lay judges.

Our Swedish colleagues say that there is virtually no public debate on asylum seekers. For political reasons all government parties are united on this issue, although there has been some anti-immigrant sentiment expressed in pockets of the country. They were very firmly of the opinion that there should be sufficiently informed public debate regarding what immigration policies are in the public interest and for which the public must be prepared to pay.

VI. RACISM

It is important to note that according to the European Monitoring Centre on Racism and Xenophobia various reports in Europe on racism in 1999 reveal that no country in the European Union is immune from racism and that there are ethnic racial minorities, immigrants and refugees in all of the Member States vulnerable to racial crime and discrimination. Furthermore the attitudes in Ireland towards minorities are similar to the attitudes of other Europeans. We regarded the approach taken by the Prosecutor's office particularly thought-provoking.

In Sweden as in many European countries the Prosecutor's office enjoys a more proactive role in dealing with crime than is the case in Ireland. It concerns itself with all serious crimes from an early stage.

In 1999 a twelve step programme was introduced to provide guidance for the investigation of xenophobic or anti-Semitic crimes. The first complaint of any racist crime must be immediately notified to the Prosecutor's office. Such crimes range in seriousness from relatively minor offences for example unlawfully refusing to admit a person into a restaurant or club so as to amount to discrimination, to more momentous crimes such as murder or manslaughter. However it is government policy to treat all racist crimes seriously. There have been quite a number of prosecutions under their anti-incitement to hatred legislation usually for anti-Semitic crimes, the most common incidence being the Nazi salute.

The 12 step programme:

1. Any racist offence is to be taken with the utmost seriousness by the police and the Prosecutor.
2. Prosecutors are to become involved in the investigation at an early stage and be proactive in preventing racist crimes.
3. Police and Prosecutors are to regularly monitor the Internet in order to study and analyse racist developments.
4. The Authorities primarily the Prosecutors Office, the police and social workers should be co-ordinated and information and knowledge relating to the combating of such crimes should be communicated.
5. Racist crimes are to be dealt with as a priority and investigations are to be conducted with all due haste.
6. The motive should always be investigated and where xenophobic, the Prosecutor is to become involved.
7. Education and training programmes for specialist prosecutors will be provided.

8. All available legislation is to be utilised in full; for example in the case of discrimination in a restaurant or club, recourse should be had to licensing laws.

9. Where possible, a prison sentence is to be imposed.

10. If a particular sentence is considered to be too lenient, the possibility of an appeal by the Prosecutor is to be entertained.

11. The victim's needs are to be taken into account and fully catered for.

12. The Prosecutor should ensure that the victim is given all appropriate protection.

VII. RECOMMENDATIONS

A. Statistics

Currently there are no statistics tracking the level of crime or offending with a racial or xenophobic element. Consideration should be given to extending the recommendations in the Nally Report¹⁰ so that the D.P.P.'s office be a focal point for assembly and analysis of information in these areas.

Nor are there any statistics regarding the volume or types of crimes which might be committed by immigrants in general or groups from a particular country of origin, or the areas in which the resources of the courts are being stretched by the numbers of immigrants, particularly those who do not speak English, appearing before the courts. Care should be taken to balance the needs of such people with the overall requirements of the courts. There is a demand for comprehensive statistical data, not alone in this area but within the legal sphere in general. Substantial statistics are needed so as to identify any problems which arise and to attempt to deal with them in a meaningful manner.

B. Language

¹⁰ The Public Prosecution System Study Group, *Report* (1999).

Language barriers constitute some of the most significant difficulties confronting a court in dealing with ethnic minorities. It is the writer's experience that sometimes a monosyllabic translation of 'yes' or 'no' is proffered for what was clearly a several-sentence assertion. It is submitted that only appropriately trained and qualified legal interpreters and translators will suffice.

C. Battle against Racism

There will be a need to be proactive in this area. Although our prosecution system is not run on entirely similar lines to the Swedish system, consideration should be given to the above programme, some elements of which could easily be incorporated into our system. It seemed to be of particular value in the battle against racist crime.

D. Family Law

An examination of the additional burdens faced by family law and children's courts in dealing with immigrants and measures ought to be put in place to offset these obstacles. Resources required to function in the significantly changed circumstances in which they operate should be made available to the courts. Procedures must be re-evaluated in the light of our developing society. In particular concerns relating to passport applications, guardianship and care proceedings and the identification of non-nationals and their marital status must be addressed.

E. Expulsion

Following on the Swedish precedent, the option of expulsion of non-nationals for certain crimes is worthy of reflection.

F. Judicial Training

There is a need for education. It is essential to have some idea of the background and customs of people who appear before us, particularly if they are asylum seekers. In his introductory remarks at the Kapila Fellowship Lecture

1993, *The Administration of Justice in a Multi-Cultural Society*,¹¹ the former Lord Chief Justice of England, The Rt. Hon. The Lord Taylor of Gosforth admirably encapsulated the issue thus:

It has been suggested that if the right candidates are properly selected for appointment as judges, there should be no need to give them special training to do justice to all manner of persons as the judicial oath requires. Other have suggested that the resources to be devoted to this training could be better spent elsewhere. I believe that these criticisms are misconceived. However able, fair-minded and otherwise well equipped a judge may be, he is unlikely to be knowledgeable about the customs, observances, language and sensitivities of the wide range of ethnic and religious minorities now represented in our society. Such knowledge cannot be picked up merely by courtroom experience ... Patience and good manners are not sufficient to deal fairly with ethnic minorities.

G. Monitoring of Legislation

Over the past decade or so the dearth of legislation in this area has to some extent been filled by the Prohibition of Incitement to Hatred Act, 1989, Refugee Act, 1996, the Employment Equality Act, 1998, the Immigration Act, 1999, the Equal Status Act, 2000, the Illegal Immigrants (Trafficking) Act, 2000. It is imperative that this legislation and our various procedures are reviewed for adequacy and efficacy to ensure that all requisite reforms are made.

VIII. ACKNOWLEDGEMENTS

¹¹ 18 November 1993.

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APPENDIX I**Participating Irish District Court Judges**

Judge Peter Smithwick, President Of The District Court

Judge Mary Martin

Judge Michael Connellan

Judge Catherine Murphy

Judge Thomas E. O'Donnell

Judge Clare Leonard

APPENDIX II**Participating Judges, Uppsala District Court**

Chief Judge Erik Lempert, President Uppsala District Court

Judge Erik Goransson

Judge Erik Brattgart

Judge Anne-Christine Lindblom

Assistant Judge Magdalena Wikstrand

APPENDIX III**Participating Judges, General Administrative Court of Stockholm**

Judge Ake Lund, President

Senior Judge Eskill North

Judge Alan Johannson, Aliens Appeals Board

Senior Judge Johann Annell