

ETHNIC MINORITY REPRESENTATION ON JURIES – A MISSED OPPORTUNITY

By Fernne Brennan¹

ABSTRACT

People from ethnic minority groups (non-white) generally do not have confidence in the jury system. This is because they are not, or do not consider that they are, reasonably represented. Their lack of participation in this part of the criminal justice system means that such groups do not perceive that justice is done as far as they are concerned. This has implications for the belief that the right to a fair trial under article 6 of the European Convention on Human Rights is maintained in the courts. The question of lack of representation of ethnic minority groups in individual jury trials is one that has been raised in a number of common law jurisdictions the USA and in cases before the European Court of Human Rights. But there is also a persistent failure to address the question of institutional racism as a process by which people from ethnic minority groups are excluded from the jury system in general. This is of great importance in the current context of racial discrimination, its link with the Trans Atlantic slave trade and the issue of reparations. The refusal to deal with institutional racism as a process of exclusion indicates a lack of understanding of how discrimination permeates justice systems. This is compounded by the fact that - in aiming to attain justice in individual cases of racial bias in juries - English courts, the government and its commissions have paid scant attention to the inclusion of ethnic minority peoples as jurors as a matter of course. Rather, the focus on inclusion issues has often been construed as a matter of race. This lacuna indicates that there is little grasp of the extent to which institutional racism plays a role in the process of excluding ethnic minorities from participating in the jury per se. This matter arises not only in the UK but in other jurisdictions where the question of racial bias, representation and white juries is raised. It is argued that positive measures should be used to redress this problem that would also demonstrate a commitment to dealing with slave trade reparations claims. Three propositions will be discussed: a) the exercise of judicial discretion; b) a firm rule requiring a number of people from ethnic minority groups on jury panels where race is an issue and; c) the presence of people from ethnic minority groups on any jury panel. The latter would occur, regardless of the issue in the case, in areas where there is a substantial number in the population and where this would not create practical difficulties. This paper strongly supports proposition C. It is submitted that such a measure would help to instil confidence in the jury system as regards people from ethnic minority groups.

¹ Fernne Brennan is Senior Lecturer in Law at the University of Essex

INTRODUCTION

Lord Justice Auld posed the following question: “What then is to be done about the potential for racial prejudice in all-white juries in our system?” This question raises two issues. The first is the presence of racial bias from white juries in cases which involve people from ethnic minority groups as defendants or witnesses. The second is the perception on the part of people from ethnic minority groups that they are generally excluded from the jury system per se. Whilst insufficient attention has been paid to racial bias from white juries there is an issue at stake that is far more damaging. This concerns the notion of fairness and impartiality of tribunals that should be maintained consequent on the commitment to the right to a fair trial under article 6 of the European Convention on Human Rights. That is the lack of consideration given to the role institutional racism continues to play in the exclusionary processes experienced by people from ethnic minority groups as far as the jury system is concerned. It is argued that the latter has a far more profound affect on the question of how to secure the confidence of people from ethnic minority groups in the jury system.

Historically, ethnic minority people have borne the brunt of racially discriminatory institutional practices. The worst forms of racism inherent in colonialism entitles all black communities, (African, African-Caribbean, Asian and Chinese), to be treated with care. It is argued, however that the magnitude of the wrong of slavery is likely to have more deeply entrenched consequences in the context of institutional racism against this community as they were reduced to mere chattels, incapable of thought and without souls. That history is likely to give rise to deeper and longer-held prejudices. Therefore, extra care needs to be taken when dealing with issues of justice concerning this community. Dealing with the question of racial prejudice and racial discrimination requires an understanding that there are two problems to resolve – racial bias in individual cases and institutional racism that excludes ethnic minorities from the jury system. This paper gives consideration to three propositions. Proposition a) refers to the exercise of judicial discretion; proposition b) relies on the requirement of a number of people from ethnic minority groups on jury panels where race is an issue and; proposition c) argues for the presence of people from ethnic minority groups on any jury panel. This would occur regardless of the issue in the case in areas where there is a substantial number in the population and where this would not create practical difficulties. Whilst the first two ideas may meet the requirement that a fair trial must be seen to take place in individual cases, this is not sufficient to meet the need implied in the third idea – that is to secure the confidence of people from ethnic minorities that their concerns regarding the jury system are not only taken into account because a case involves an issue of race. It is submitted that the anxieties expressed by ethnic minority communities on the subject of exclusion from the jury system more generally requires serious consideration.

INSTITUTIONAL RACISM AND THE JURY SYSTEM

The concept of institutional racism has been developed within the English jurisdiction. It is defined as a failure to recognise the existence of racial discrimination in the cultural norms of public institutions. This malfunction has negative consequences for people from ethnic minority groups. Macpherson defined institutional racism as:

“The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority people” (Macpherson, 1999).

This paper maintains that institutional racism is inherent in the court system because that system retains practices that tend to discriminate against people from ethnic minority groups. One of those practices is the random selection of juries which aims to maintain the system of impartiality by which jurors deliberate on individual cases. The court is an organisation that functions through the retention of a number of professional services including the jury. The jury as a service provides work to satisfy a general need, a civic duty to decide the guilt or innocence of a person. As such it is probably one of the most important areas of public responsibility that may engage an eligible person. The jury system is maintained by the process of random selection that occurs through the use of a computer generated list from the electoral register and further selection from that group by a court official. It is argued that it is in the process by which jurors are selected that institutional racism may take place. As the Auld review pointed out the pool from which jurors are drawn is not representative of people from ethnic minority groups, nevertheless it is prioritised for selection purposes. Lord Justice Auld pointed out that:

“A fundamental problem is that ethnic minorities are among the highest categories of persons who, though entitled to serve on juries, do not qualify because they are not registered as electors. Recent Home Office research indicates that about 24% of black, 15% from the Indian sub-continent and 24% of other ethnic minorities are not registered.”

If people from ethnic minority groups are not on that list they stand no chance of being selected and thus serving as jurors. Additionally, even if people from ethnic minority groups are present as part of the sample from which a jury is then drawn, there are no guarantees that they will be selected to serve as jurors if they are not present in sufficient numbers. This is because the principle of random selection also operates in the jury room from which the jury panel is drawn. Since there is likely to be fewer people from ethnic minority groups present at this point it follows that they are less likely to be chosen.

The question is whether, and if so how, institutional racism operates to exclude people from ethnic minority groups from the registering in the first place? Viewed historically ethnic minority communities have been subject to many areas of institutional racism in the public sector such as discrimination in employment, education, housing and several

other public services. Solomos argues that interweaved with this is a racial discourse that has placed black people and black communities as the 'enemy within'. Modood states that in 1980's Britain, Pakistani and Bangladeshi communities suffered some of the worst forms of discrimination brought about by exclusionary practices in employment, education and housing. The institutionally discriminatory processes that impact on ethnic minority groups need to be understood historically, and thus it is important to take incursions into this history, to revisit the past in order to understand the reproduction of institutional racism that currently pervades justice systems.

A number of ethnic minority communities have been subject to the ravages brought on by imperialism and colonialism. Thus Indian people and those from the Caribbean were subject to economic exploitation in the Caribbean for example. The World Conference against Racism (2001) made it clear that descendants of countries where colonialism and the discrimination meted out by post colonial policies took place still suffer from racial discrimination and racial hatred. In the context of the Caribbean this includes African, Indian and Chinese people. For such factors to diminish what is required is the implementation of measures that address current racial discrimination. The question of racial discrimination is a particular issue in the context of the Trans Atlantic slave trade. Victims of that slave trade were perceived as soulless commodities. To be bought, sold and used at the behest of their white masters. The struggle to change this position took place through economic necessity and political struggle, but the relations of racial discrimination were not dismantled. Racial discrimination and the treatment of non-whites as racially inferior are embedded in the cultural practices inherent in public organisations. So cogent is the evidence that several years of race relations legislation has not resolved this problem. The political and legal system continues to strive for ever more imaginative ways to encourage public institutions to prohibit racial discrimination and promote good race relations.

The question of reparations for the Trans Atlantic slave trade has been raised on many occasions but remains unresolved. This is a particularly sensitive issue that requires some consideration in the light of issues of exclusion from positive participation in justice systems.

REPARATIONS

This paper contends that Afro-Caribbean's as descendants of former slave colonies cannot have confidence in a jury system that is premised on the right to be judged by your peers, if they continue to be excluded by the process, even if that exclusion is not a deliberative process, but one where the criteria for admission based on the principle of random selection, serves to exclude them anyway. It is argued that the system of random selection closely guarded by the Court of Appeal in its jurisprudence and the executive through the Jury Act 1974 is currently impervious to change because there is a lack of understanding about the influence of institutional racism on the processes that influence jury composition. The system of random selection of juries benefits white people at the expense of non-white people who already suffer from a history of racial discrimination and exclusion not of their making. Just as the system of random selection identified by

Lord Nicholls in the Privy Council case of *Rojas* served to discriminate against women and in favour of men. Until this situation is addressed, racial discrimination will remain and concerns such as the issue of reparations for victims of the Trans-Atlantic slave trade that was raised - at the Third World Conference against Racism (2001) - will not diminish. The essence of the reparative framework is that the wrongdoer is bound to repair the harm done to the injured party or compensate the injured party where repair is either not appropriate or possible. The '*Van Boven Principles*', describe reparations as a tool that aims to deal with violations of human rights. They are based on principles that are accepted by the international community that violators 'pay'. These principles require in relation to international law, that the violation of human rights including genocide, systemic discrimination and the forcible transfer or removal of populations should obligate states to make reparations and, where necessary to adopt 'special measures' to permit fully effective reparations. This package of measures may include the right to restitution, compensation, rehabilitation, re-establishment and the guarantee of non-repetition.

This paper takes the position that particular attention should be paid to the perception, on the part of Afro-Caribbean people that the jury system excludes them as a matter of course. This concern can usefully be placed in the context of reparations for the Trans Atlantic slave trade. Reparations claims raise issue such as survivorship rights and respondent obligations, the difficulty of basing current claims on ancient wrongs, the question of causation and the magnitude of financial damages. It is argued that these hurdles are not insurmountable if they are understood in ways that would do justice to the idea that people who have been racially excluded from society should be provided with the appropriate mechanism to ensure their full participation.

Survivorship arguments rely on ancestry claims; the ability to trace one's lineage to a slave. Unlike modern reparations claims, death and the lack of written evidence have served to break that chain. There are no victims for which a reparations claim can be satisfied. Furthermore, slave trading and slavery was abolished approximately 200 years ago. Some argue that current forms of racism and racial discrimination have nothing to do with that history. In addition there are no respondents.

It is argued that what institutional racism offers is an understanding of how one is to approach what is arguably a unique set of circumstances in order to do justice to the principle in international law of the right to a fair trial. That is to understand the parties, not as a set of individuals tied by linear descent but communities tied by a history of racial discrimination, which continues to manifest itself, in this instance, in the way the jury system works to exclude a particular group. It is quite clear that the 'lives' of black communities were stolen, their ties lost, their language and culture destroyed for the sole purpose of furthering the interests of white communities of the West. It is no longer tenable to retain the upper hand by relying on a mechanism – random selection as a way of retaining impartial juries if there is not the effort made to ensure that black communities are effectively part of that system.

The ancient wrongs argument is also held up as a shield against reparations claims for the Trans Atlantic slave trade. It is argued that what happened in the past should remain in the past and in any event slavery was not a crime. With the limited exception of piracy

there is no ancient wrong to which a modern reparation claim could be attached. It is argued that the contemporary claim for reparations is based on the history of racial abuse and racial discrimination that may have changed its shape but not its impact. Black people still suffer from torts brought about by racial discrimination. Their status may have change from that of slave to that of citizen but their experience vis-à-vis racial discrimination and racial disadvantage still raises a number of concerns. It is contended that acquiescence in the exclusion of black people from the jury process, without proper consideration of the process of random selection, compounds the position of inferiority in society of which they are all too familiar.

What is the causal link between modern forms of racism and the Transatlantic Slave Trade? It is argued that there is none so here endeth the lesson. Such an argument surely puts a reparations claim in jeopardy unless one understands that the slave trade wrought injustices and injuries on black communities that continue in the form of institutional racism today experienced by those same communities in the West. The Caribbean and ex slave colonies of Africa worked to the demands of the West through a system of economic exploitation that tied its black inhabitants to the service of the land and the master. During Colonial times the service of black labour was still called upon to serve the interests of Western economies devastated by war and the desire for economic reconstruction. During this time the relationship of inferiority and superiority of the slave trade and colonial times did not simply disappear. Adverts refusing “wogs and dogs” were clearly displayed on the boards of boarding houses. Black people were underpaid for the work their white peers refused to do. The persistence of amended race relations provisions attest to such problems. Thus there is no problem of causation. Rather a refusal on the part of some to accept the cause.

This paper maintains the position that the argument for reparations does not rely just on past wrongs. Rather a reparative framework allows us to consider how racism has become institutionalised in a way that does not allow itself to be easily subject to legal scrutiny. This is because racism if only understood outside of its institutionalised form, appears as the bad behaviour of individuals and thus loses its link with its Trans Atlantic past. If it is understood as a racism defined as the ‘...predication of decisions and policies on considerations of race for [which have the affect of] subordinating a racial group and maintaining control over that group,’ then one can see the relationship between the past, current forms of racism and its manifestation in aspects of the criminal justice system such as the jury system. Under international law, exclusions on the basis of race or colour or descent that nullify the enjoyment of any field of public life is discriminatory.

In Justice for All, the government stated that, “The Stephen Lawrence Inquiry brought home to many in Britain for the first time what it can be like to be on the receiving end of prejudice or poor service by being black” yet there is a misunderstanding of how what one is “cultured to see or not to see” plays a role in the maintenance of a colour-blind justice, which it is argued, first needs to be colour conscious. The concept of institutional racism provides us with a looking glass through which to view juries and the role of institutional racism as it impacts on outcomes. The argument for reparations to deal with

this provides us with an opportunity to right a continuing wrong. However, the concern with the individual racism that might be expressed by all-white jurors tends to dominate discussion on the inclusion of ethnic minority groups on juries at the expense of general concerns regarding exclusion.

Individual racial bias

In *Sander v United Kingdom* the court held that, “it is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused.” The pursuit of this ideal can be seen in the English legal tradition of impartiality of jury systems. This may be attained, in part, through two processes, the monitoring of racial bias that might be expressed by an all-white jury and the adherence to the principle of random selection.

Overt Forms

Some courts tend to focus on potential racism as the, “overt acts of discrimination or hostility by individuals who are acting out their personal prejudices.” And respond by warning the jury of its overriding responsibility to behave in an impartial way Ford, Smith or they may exercise their discretion to dismiss a juror for cause. Whilst the courts expect jurors to put aside their biases once they are in the court room, there is no guarantee that the courts will always ensure, as far as possible, that such is the case. This is demonstrated in *Remli v France* where a potential juror who admitted to being racist was not prevented from sitting on the jury panel of a defendant who was a French national of Algerian origin. The trial judge said that since the comments were made prior to the hearing and not in front of the judge a formal note of the comment would not be included. Disagreeing with the way this issue was handled, the majority of the European Court of Human Rights (ECHR) held that “the court had failed to examine the statement on the merits”, thus to demonstrate that the hearing was pursued in an impartial manner for the purposes of article 6. It is important that judges control the appearance of bias particularly where there is a history of discrimination against ethnic minority groups such as Algerians. It might be argued that in a case like this where the juror manifested overt racism they should not be allowed to serve. To do otherwise would be an injustice to the principle that impartiality requires the absence of bias. This case shows that whilst jurors may retain their prejudices, responsibility is placed on national courts to provide as far as possible some way of dealing with it in a way that satisfies public confidence.

Covert Forms

The view of Lord Scarman was that racism was caused by individuals ‘rotten apples’ who could be weeded out or sanctioned. But as the Macpherson Report demonstrated, “history shows that “covert” insidious racism is more difficult to detect.” This makes the job of controlling the influence of racial bias in juries a particular problem for the courts. Having considered a substantial amount of evidence from the USA and other jurisdictions, Darbyshire argues that the racial composition of juries influences outcomes

for ethnic minority defendants and the determination of guilt. Several high profile cases such as the Tottenham 3 (UK) and Rodney King (USA) indicate that all-white juries can influence the outcomes of trial in a way that raises questions as to whether such trials are fair. The “Tottenham 3” case involved black defendants Winston Silcott, Mark Braithwaite and Engin Raghip convicted of the murder of a police officer following disturbances in North London between police and the black community. All three convictions were quashed following the report of Robert Radley, a government scientist, who testified that the evidence had been tampered with. In 1992 Rodney King (who had been stopped after a high speed car chase) accused four white police officers of brutality and there was footage of the assault which was made public knowledge by a passer-by who made a video of the assault. The four officers “beat, kicked and clubbed King for 81 seconds while the others looked on”. This incident was televised to millions. Subsequently, an all white jury acquitted the officers and riots broke out in Los Angeles primarily perpetrated by black people angered at the result. There was an independent commission that investigated the Los Angeles Police Department and found systematic use of excessive force and institutional racism.

It is possible to operate in a racist way without recognising such is the case. It is argued that the presence of people from ethnic minority groups as jurors during jury trials may serve to counter such prejudices and build more confidence in the system but that random selection currently rarely lends itself to such possibility. Lord Lane argued against the principle of racially balanced juries on the basis that this relied on “an underlying premise that jurors of a particular racial origin... are incapable of giving an impartial verdict in accordance with the evidence”. However, Darbyshire argues that “when the evidence is not strong enough for a conviction a white juror gives the benefit of doubt to a white defendant but not a black defendant.” The point being made is that all-white juries are indeed biased in cases involving black people as defendant or as witnesses. This argument destroys the value of the process of random selection to ensure impartiality in cases involving black defendants. It can be argued that a panel of mainly ethnic minority jurors may also be sympathetic to an ethnic minority defendant and may in acquitting such a defendant show prejudice rather than impartiality. In the O. J. Simpson case an Afro-American was acquitted of the charge of murder of his white wife. It appears that the prosecution wanted white jurors and the defence wanted black jurors. The majority of jurors were Afro-American. Clearly jury bias can have an impact on the credibility of defendants and results. Darbyshire, and Ellis and Diamond rely on evidence which shows that unconscious racial prejudice can influence the outcome of jury trials. Darbyshire contends that “all the evidence done by her teams’ world wide research into juries supports the public suspicion that the racial structure of the jury affects the verdict. Race is the one identifiable characteristic linked with the verdict.” Ellis and Diamond surmise that the evidence does not support the assumption that a juror comes to the courthouse devoid of a variety of beliefs. Rather, jurors have real biases even though they may not be aware of them. The problem with these biases is that they may have a disproportionate impact in cases involving defendants or witnesses of ethnic minority groups different from that of the jury. If the jury happens to be all-white and share certain preconceptions of particular ethnic minorities – such as black defendants are less credible than white prosecution witnesses, what is there in the system to stop this

influencing how the evidence is construed? This has to be considered in the light of the fact that a jury composed of ethnic minority groups will not necessarily be any less susceptible to racial bias. The focus has been on finding mechanisms that minimise this through the idea of fair representation and the process of racial structuring. Against this backdrop must be placed the fact that it is people from ethnic minority groups who tend to be the victims of racial discrimination caused by institutions dominated by white people and racial hatred perpetrated against people from ethnic minority communities. The racial bias of all-white juries is likely to exacerbate this problem. Ethnic minority communities expect to see justice done in individual cases through some form of representation but there is a presumption that this will be satisfied without a consideration of how people from ethnic minorities are excluded from the process of decision making more generally. Here *Justice is not seen to be done*.

There are two problems to consider regarding people from ethnic minority groups and the jury system 1) there is evidence that white juries are biased so inclusion of racial balance will be more likely to achieve justice in the particular case 2) that not balancing juries leads to loss of confidence as black jurors feel excluded from the process - leading to a perception of bias. To what extent these two issues have been addressed is the matter of further discussion below.

THREE PROPOSITIONS

There is clearly a concern, even if it is based on public perception, that the jury system does not provide a forum where the right to a fair trial is observed for people from ethnic minority groups. High profile cases such as the “Tottenham 3”, Rodney King serve to compound such fears. The jury system consists of human beings who can make mistakes thus it is not perfection that is sought. However, it is both the lack of participation on the one hand, and the underlying idea about how that participation may be engineered that concerns this part of the paper.

Three propositions are considered that seek to engage ethnic minority groups in the jury system. The first is the incorporation of people from ethnic minority groups through the exercise of judicial discretion. The second is the establishment of a firm rule along the lines proposed by the Auld and Runciman Commissions that would rely on a fixed number of people from ethnic minority groups in particular kind of trials. The third proposition is one that seeks to engage people from ethnic minority groups in any trial regardless of the issue in the case.

PROPOSITION A – EXERCISE OF JUDICIAL DISCRETION

Judicial discretion may be understood “as the existence of room for choice between alternative courses of action and as an act that can result in the creation of new norms.” In cases involving ethnic minority defendants, some judges have said that there exists discretion in the courts to construct a jury to include ethnic minority defendants where there would otherwise be an all-white jury, and the defendant has raised concerns about impartiality. In *R v Simon Thomas*, Otton J acknowledged the existence of such a discretion stating that this should only be used “sparingly and in very exceptional circumstances”, where there was a racial element to the proceedings. Judges have exercised their discretion to make juries more representative of the communities they serve due to concern that random selection has not produced a cross section of a population that includes people from ethnic minority communities and where race has been an issue in the case before the court. In the cases of *Thomas, Binns, Frazer* and *Bansal*, the judges have considered the use residual discretion to achieve racially mixed juries. In *Thomas*, where the presiding judge, Otton J said that he did have a discretion regarding the composition of the jury in order to “secure at least an infusion of black representation” upon the jury. In *Binns* the idea was canvassed that a jury should include representatives of the black community on the basis that, “they could be expected to have a better understanding of black youth and their relationships with a predominantly white police force.” In *Bansal* Woolf J ordered that the panel of jurors be selected from an area with a large Asian population to recognise the request of Asian defendants that they should be tried before a multi-racial jury. This was a case that involved an alleged assault on a police officer during an anti-fascist demonstration.

The power to exercise such discretion has recently been denied by the Court of Appeal. Lord Lane CJ in *Ford* and Lord Justice Pill in *Smith* were quite clear that this power was one derived from statute which placed such power in the hands of the executive not the

courts. The current position of the English Court of Appeal in *Ford* followed by *Smith*, should be contrasted with Privy Council case of *Rojas v Berllaque (A-G for Gibraltar Intervening)* in 2003. An all-male jury was selected in accordance with a Gibraltar ordinance, according to which jury service was compulsory for males but not compulsory for females. This was held not to have met with the constitutional requirements of a fair trial by an independent and impartial court due to the discrimination as between males and females. Lord Nicholls giving the majority opinion in the Privy Council, said that the offending provision of the ordinance should be struck down for being “blatantly, indefensibly discriminatory method of jury selection”. He argued that a “fair cross section” was an inherent characteristic of any trial and a non-discriminatory method was needed in order to ensure that women were not excluded without “cogent and objective justification” which would amount to an unacceptable and discriminatory relic from the past. Reliance on this jurisprudence however is likely to be problematic since it involved an issue of direct sex discrimination which involved less favourable treatment of women compared with men on the basis of gender. The process of random selection of juries, where people from ethnic minorities are concerned, does not raise a question of direct discrimination. However, the lack of ethnic minority representation on juries might indicate that indirect racially discriminatory processes are at play. That is, the practice of random selection fails to produce a proportionate number of potential jurors from ethnic minority groups and this may be to the detriment of ethnic minority defendants and witnesses since the evidence suggests that all-white juries tend to exhibit racial bias.

In a number of cases the courts have exercised their discretion in a less active way by focusing on warnings. This has been pursued as a way of inspiring confidence in the existence of an impartial jury system by focusing on the individual behaviour of jurors and to remind jurors of their role in dealing with the evidence. Thus the trial judge in *Sanders*, when told that two jurors had made racist remarks and racist jokes in a case involving a defendant of Asian appearance, reminded the jurors to put aside any prejudices. The judge was subsequently satisfied when one of the jurors admitted that he may have made racist jokes but was not a racist and the others rejected the allegations by one of their number that they were racist. Similarly, *Gregory* was a case that involved a black defendant. After the jury retired to consider the evidence a note was passed from the jury to the trial judge alleging that the “jury [was] showing racial overtones” and request was made to remove one juror. The trial judge reminded the jury to decide the case on the evidence alone and that any “prejudice....must be put out of [their]....minds.” In both cases the defendants were convicted and raised breach of their right to a fair trial under article 6 ECHR before the European Court of Human Rights. The majority in *Sanders* held that there should exist sufficient guarantees to exclude any legitimate doubts in the perception both of the public and the accused that the jury was none other than impartial. On the facts, the majority continued that the redirection by the trial judge fell short of operating as a safeguard against a perception of bias. With *Gregory* the majority decision was that the direction to the jury on the issue of impartiality was sufficient to safeguard the principle of the right to a fair trial. However, the dissenting opinion of Judge Foighel concluded that the trial judge’s direction was not a sufficient guarantee. In Judge Foighel’s opinion “simply to dispel racial prejudice within a jury by way of a redirection cannot be a sufficient guarantee of impartiality:

remedies must be in place to ensure that the decision of the jury is not tainted with any objective suspicion of bias.” It is submitted here, that in such cases judicial warnings are not likely to provide the protection required to ensure that a defendant from an ethnic minority community is judged on the facts rather than on the basis of race or presumed race. Thus, other positive measures should be pursued to ensure impartiality.

Other jurisdictions have raised the issue of representation by reliance on the “fair cross section” or “representative” principle. Kawaley explains this principle as one where qualification for jury service provides for a representative sample of jurors from a fair-cross section of the community. Additionally, it is the process by which jurors are selected, but it is not managed in a way that systematically excludes an identifiable social group from the opportunity to serve on a jury. In *B v HM Advocate*, which was a case before the Scottish High Court, the defendant was on trial for lewd, indecent and libidinous practices that referred to offences committed against a girl over a period of time when she was between the ages of 4 and 9 years. He asked for the jury panel to be representative since it comprised 7 men and 15 women – his concern being that a disproportionate number of women would not provide for a fair trial as required by Article 6. Allowing the appeal, the court held that the jury panel “lacked the appearance of fairness.” The issue of fair representation of jury panels with respect to people from ethnic minority groups has been raised in several parts of the common law world, states Israel. He points to the concern that procedures tend to exclude Afro-Caribbean and Asian communities in the UK and the USA and argues that this has a negative impact on indigenous people.

If we are to re-consider the exercise of judicial discretion in cases where there is a race issue a number of questions arise. The question of what constitutes a race issue has been stated in various ways – where there is a history of racial tension between black people and a white police force - where a case was heavily influenced by racial considerations (and the defendants were Asian). And where there is a racial element to the proceedings.

What do the terms ‘racial considerations’ and ‘racial element’ mean? Would they carry the same meaning in all cases or would this differ? How would clarification be achieved from the point of view of a framework through which trial courts would understand in what circumstance to exercise the discretion? Guidelines could be established, possibly provided by the Commission for Racial Equality or the Commission for Equality and Human Rights, but the language contained in such guidelines are often unclear, obviously not mandatory and parameters vague. Moreover, judicial discretion may address the question of potential bias in individual cases. It cannot deal with the general perception of exclusion of ethnic minority people from the jury system as a whole.

PROPOSITION B – A FIXED NUMBER IN RACE ISSUE TRIALS

Lord Justice Auld recommended that a scheme should be devised “for cases in which the court considers that race is likely to be relevant to an issue of importance in the case, for the selection of a jury consisting of, say up to three people from any ethnic minority

group.” This echoed to a large extent the recommendation contained in the Runciman commissions report to Parliament in 1993. This recommendation would constitute a firm rule in that it would require, in an appropriate case, a fixed number of jurors from an ethnic minority group.

The Right Honourable Lord Justice Auld was appointed on the 14th December 1999 to review the Criminal Courts of England and Wales. In chapter 5 of that review he stated that although the jury system is seen as the “jewel in the Crown” it retains serious defects. These flaws show that the juries “do not reflect the broad range of skills and experience of the ethnic diversity of the communities from which they are drawn.” Lord Justice Auld identified the source of the problem and its solution in the composition of the jury pool from which potential jurors are selected. The source of this pool is the Electoral Registers list. The Electoral Registers list comprises the names of people who are entitled to vote. The responsibility for collating registers resides with local authorities. Entry qualification for the list is based on age (minimum of 18 years of age and not more than 70 years of age) and residence (ordinarily resident in this country for a minimum of five years from the age of 13). Jurors are selected from the Electoral Roll in order to take part in a jury. The jury consists of 12 women and men who are chosen from a computer generated list at random. Jurors then attend court where they are selected at random by a court official. A number above 12 is selected for this purpose to go into the court room so that the process of random selection can take place. However, the Electoral Registers list does not include a pool of people who are sufficiently representative of the various ethnic minority groups. Thus it is argued that those randomly selected in the jury room lack that quality of representation that should produce a “cross-section of our society.” The lack of sufficient numbers of ethnic minority people on the Electoral Register has been caused by such factors as a failure to register or moving home. Incidence of non-registration in the 1991 Electoral Register returns was highest amongst black people at 24%, whilst for whites the registration rate was highest.

Lord Justice Auld argued that the gap caused by insufficient numbers of ethnic minorities on the Electoral Register has a detrimental impact on the quality of the available pool from which to pick jurors and the consequent quality of decision-making in the jury room. This problem Lord Justice Auld suggested would have an impact on public confidence in the criminal justice system. To remedy this difficulty Lord Justice Auld suggested a number of improvements. To increase the proportion of people from ethnic minorities in the pool those responsible for the pool could widen the source by looking to other lists. For example, the Driver and Vehicle Licensing Authority, the Department of Works and Pensions, the Inland Revenue and telephone directories. This strategy could lead to an increase in the number of ethnic minority people available for jury service. An additional measure was called for in the form of a guarantee or “ethnic quota” - “a scheme should be devised for cases in which the court considers that race is likely to be relevant to an issue of importance in the case, for the selection of a jury consisting of, say up to three people from any ethnic minority group.” Lord Justice Auld argued that the practice of random selection was not an end in itself. Rather it presented a valuable but nonetheless “rough and ready way of empanelling a jury”.

Historically there have been adjustments to the pool from which to select jurors to reflect, for example, one of the “many claims of the women’s movement” regarding their emancipation and right to participate in public life. Thus the section 1 of the Sex Disqualification (Removal) Act 1919 removed sex or marriage as a barrier to the exercise of public functions, enabling judges to manage the gender composition of juries. Age and property qualifications have also been relaxed to widen the availability of jury pools. Darbyshire queried how it was that representation of ethnic minority groups through the common law practice of *Jury de mediate linguae* – where “a minority defendant had the right to be tried by a jury comprised half of foreigners” existed for a time in England. Yet there is a struggle to attain a similar result in the current climate of racial discrimination. However, it is difficult to rely on such ancient customs by way of analogy. Ramirez states that this right came by way of a Charter that “gave Jews, when suing Christians, the right to a half-Jewish jury.” Subsequently, Italian and German financial merchants were able to rely on this practice in disputes involving themselves as foreign merchants. Nevertheless, it would appear that the Crown - concerned to protect its resources - sought to instil confidence in foreign merchants that they would be dealt with fairly under English law. Therefore, the practice of mixed juries remained until 1870. Constable argues that, “the early jury and its precursors constituted a practice that allowed a person to be judged by the laws and customs of that person’s community.” This practice was abolished in 1870 by the Naturalisation Act by virtue of s 5 “an alien shall not be entitled to be tried by a jury de mediate linguae, but shall be triable in the same manner as if he were a natural-born subject.”

Lord Justice Auld pointed out that despite the various reforms to the jury system its modern version is not representative of the community it serves. This unease echoes similar concerns raised by Viscount Runciman in the commission he chaired in 1991. In the commission’s report to Parliament it recommended that “in exceptional cases with “a racial dimension” involving an ethnic minority defendant or victim, the judge could, if persuaded that one or other reasonably believed there would not be a fair trial from an all-white jury, direct the selection of a jury consisting of up to three people from ethnic minority groups.” The recommendation was not accepted by the Government because it was concerned that such a change would jeopardise the principle of random selection.

Resistance to Lord Justice Auld’s recommendations

Resistance to the restructuring of juries along ethnic minority group lines have appeared from several quarters - the judiciary, the executive and the academic. The common and underlying concern appears to be that of giving an advantage on the basis of the ethnicity of minority members of society where none appears to be warranted. In *R v Ford* a black defendant unsuccessfully appealed against his conviction grounding his claim in the failure of the judge to allow a multiracial jury. Lord Lane CJ said that the principle of random selection meant that trial judges had no discretion to interfere with the ethnic composition of a jury. Furthermore, although judges in the past had exercised their residual discretion to achieve racially mixed juries in *Thomas, Binns, and Frazer* and in *Bansal*, Lord Lane CJ argued that the jury composition was an executive function residing in the powers of the Lord Chancellor by virtue of the Juries Act 1974. In the

post-Auld Review case of *Smith* the Court of Appeal refused counsel for the defendants' argument that an all-white jury in a case which involved a black defendant raised fair trial rights under article 6 ECHR. Lord Justice Pill's position was that it did not follow that an all-white jury would not be able to provide an impartial view based on the facts. Additionally, given that the question of the jury composition resides with the executive, the court was not an appropriate forum for dealing with flaws detected in the pool from which the jury was selected. The Government's response to the Auld report can be found in *Justice for All*. Recognising that "many members of minority ethnic communities do not have confidence that the Criminal Justice System (CJS) treats all people equally", the emphasis is on "ensuring that juries better reflect all sections of society." Additionally, it is intended to "continue to implement the findings of the Stephen Lawrence Inquiry, in order to reduce racism in the CJS, increase diversity and build the confidence of all sections of the community." Nevertheless, the Government concluded that it would be wrong to allow judges to interfere with the composition of juries where race was a significant issue. The primary reason against Lord Justice Auld's recommendation was the fear that it would amount to a quota and thus create more problems than it would solve. What problems this would resolve and the further problems that would be caused were not elaborated upon. Scholars have also been critical of Lord Justice Auld's position on the racial composition of juries. Zander, for example, argued that there might be practical problems in widening the pool from which jurors were drawn in order to achieve the objectives in the Auld report. In any event there was an ethnic minority balance in the jury broadly representative of black and Indian populations according to a Crown Court study.

It is submitted here however that the positions taken against the recommendations in the Auld report are problematic in that they fail to address the issue that concerns people from ethnic minority groups. That is the perception that the jury system is taken to reflect an important aspect of the criminal justice system in which they could participate but are generally denied the opportunity. Historically the English legal system developed the *Jury de Mediete Linguae* as a way of getting mixed juries. By the mid-19th century this process of jury selection was seen as an "unnecessary relic with formidable practical difficulties," as "stigmatizing ourselves as a nation very unjustly to assume that the prejudice against foreigners is such that an alien on his trial will not have a fair trial." The danger is that we will come full circle to this position if we do not find some way of satisfying both demands to ensure fair trials: the need to retain the principle of impartial juries, and the necessity that flows from the prohibition of practices that might indirectly discriminate against people from ethnic minority groups.

The Canadian system has similar aims to that of the UK in terms of jury selection. That is, "to produce panels that are – or appear to be – impartial, competent, and to some extent representative." However, there have been a number of obstacles to obtaining representative panels that reflect the multi-ethnic composition of Canadian communities. Such obstacles include exclusionary practices that arise because of the primacy given to administrative convenience based on concern with resource allocation. Similar concerns about the impracticality of enlarging the jury panel were expressed by some commentators regarding Auld's recommendations. And although it has been argued that

proportionate to the general population some ethnic minorities are possibly over-represented, this should be viewed in the context of the fact that there are a disproportionate number of people from ethnic minority groups who enter the criminal justice system due to factors such as the use of stop and search and thus are less likely to face a panel that is fairly representative. It is argued that since “institutional racism exists at many stages of the criminal justice process it is vital that there is ethnic minority representation on juries to maximise impartiality and independence at the trial stage.”

There may be objections on the basis that this would amount to a “quota” rather than a target. This is likely to be contrary to race discrimination law because it could amount to reverse discrimination on the grounds of race. But the real problem is how such a firm rule is to be interpreted. Judges might construe the notion “if the court considers race to be relevant to an issue of importance” in a narrow way to avoid potential racial discrimination. Another problem is how one tells that a person belongs to an ethnic minority group? Appearance is generally not a reliable guide to a person’s ethnic group and does not meet with the legal definition supplied by *Mandla v Dowell Lee*. The Commission for Racial Equality uses the term ‘ethnic minority’ in a broad sense to refer to “anyone who would tick any box other than ‘White British’ in response to an ethnicity question on a census form.” There are likely to be practical problems that lie in the way of using the census for the purpose of determining a person’s ethnic minority status. Since the electoral register contains information regarding a person’s name, residence and age it could be amended to include details of a person’s ethnic group. Unless there were a requirement on the form to disclose one’s ethnic group this is unlikely to yield useful data. One might place reliance on a potential juror to volunteer this information. What happens if they choose not to? What happens if a Jewish person ticks the “White” box? Assuming there were the appropriate number of people from ethnic minority groups serving as jurors on a particular case should they come from the same ethnic minority group as the defendant or witness or from another? There may be cases where it is appropriate for there to be representation from people from an ethnic minority group which is the same as that of the defendant or witness. But this assumes that an elderly Jamaican resident of Brixton will be more sympathetic to a Jamaican defendant in a case involving black youth and white police officers, than say a white resident living in Sudbury in Suffolk. The elderly Jamaican is, arguably, more likely to have had more negative experiences associated with this group than her Sudbury Suffolk counterpart and may consequently be less willing to give the defendant the benefit of the doubt. Clearly some kind of racial balance may need to be achieved in such cases and it may be opportune to allow for a rule but one that does not amount to a quota but rather a target.

Both the cases and the commission reviews focus on mechanisms for the inclusion of ethnic minority groups in cases where the issue of race may be at stake. This may be appropriate in individual cases. Here it is suggested that pre-emptory challenge is brought back into to use for defence counsel in such cases. Pre-emptory challenge is the right of the prosecution or defence counsel to have a juror excused without giving reason. This right was abolished with the Criminal Justice Act 1988. It is argued that this right should be brought back in order to allow defence counsel to object without giving reasons. Unless a juror were to wear a Swastika on her sleeve or some other overt manifestation of

prejudice, it would not be likely that racial prejudice would be detected. Thus the use of challenge for cause that resides with the defence is virtually redundant. Challenge without cause could be pursued in consultation with the client to ensure that individuals of ethnic minority groups have a right of participation in the system. This, it is argued, might be a way forward in individual cases where there is concern that racial bias might interfere with jury impartiality.

PROPOSITION C – FULL PARTICIPATION IN ANY JURY TRIAL

Dealing with the issue of racial composition of juries in individual cases does not, however, address a more pressing problem – the presence of people from ethnic minority groups on juries regardless of the nature of the case at hand. This paper maintains that a mechanism needs to be put in place to ensure not only the impartiality of the jury system in cases involving all-white juries but that the focus must also seek to enhance confidence that people from ethnic minority groups will not be excluded more generally.

It is argued therefore that a mechanism must be found that ensures as far as possible that people from ethnic minority groups are included in the jury system, not as a matter of *race* but as a matter of *course*. This could be achieved by focusing resources on the value afforded those who register on the electoral roll. It is a device that gives all those entitled the chance to play an active part in society generally. “Conscious-raising” activities could be considered by use of a registration drive. Areas frequented by people from ethnic minorities could be targeted. The point is that people from ethnic minority groups should be encouraged to participate fully in jury trials and not simply on the basis that there is an issue of race at stake in the trial.

CONCLUSION

This paper argues that there are lasting social consequences of racial discrimination that are evidenced in the way in which institutions in society discriminate against ethnic minority people. They do so by locking such groups out of the decision-making process. And this is maintained when decision-making unwittingly maintains in place barriers to participation in public office, and further compounds this by refusing to acknowledge the necessity for change recommended by commissions such as Runciman and Auld. The operation of random selection as it stands is a process that excludes ethnic minority people from participation in the jury system. Johnson argues that such process should give way to positive action in the composition of juries and that the individualised approach that predominates cannot work in the context of racism as understood today. We have seen how, increasingly racial discrimination has moved from overt to covert forms and how attempts to capture and deal with it falter in the face of more pressing concerns to retain impartiality. Moreover, the more subtle forms of institutional exclusion operate in institutionally discriminatory way that Macpherson alluded to in his report. This prevents the operation of a professional service that is devoid of racial discrimination. The jury system is no less susceptible to the influence of institutional racism; yet awareness of this is curtailed by focus on its operation in individual cases involving all-white juries and racial bias towards ethnic minority people as defendants or witnesses. Following the amendment to the Race Relations Act as a consequence of the Macpherson Report, there is a statutory requirement that institutions should not simply refrain from discriminatory practices but embrace the principle of promoting equal opportunities. This means seeking ways in which to include people from ethnic minority groups in public institutions as active participants and players in the decision-making process such as that occasioned by serving on juries. The argument here is that we need to be careful to ensure we harness the good will of ethnic minority communities by providing opportunities for them to perform civic duties.

The Declaration and Programme of Action of the World Conference acknowledged that the Trans Atlantic Slave Trade, was not only a major source of racism and devastation contributing to the underdevelopment of Africa, but that the effects of it are manifest in lasting social and economic inequalities for ethnic minority communities today. The adoption of a reparative framework in the case of those communities affected by the Trans Atlantic slave trade for instance would better provide a particularly important opportunity for minority ethnic jury members to perform valuable civic duties.

Effective sanctions to suppress the influence of racial bias is an important but not a sufficient means of addressing the role institutional racism has come to play in the exclusion of many ethnic minority people from the jury system in general. This paper argues that the principle of random selection that purports to maintain an impartial jury can only be sustained if more consideration is given to the criticism that people from ethnic minority groups believe they are excluded from the process, albeit indirectly and cognizance is taken of the solutions suggested.

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