

To what extent does random selection of jury members create bias and would jury selection provide a solution?

The theory behind the UK system of random selection is based on many assumptions. Firstly that randomness produces a representative sample of the population, which will provide verdicts, representative of the general public. It is assumed that if one juror has an apparent prejudice, then those in other jurors will counter it and so bias does not occur in this system<sup>1</sup>. Another assumption is that having “12 good men and true”<sup>2</sup> randomly selected into the jury “strengthens the legitimacy of the legal system.”<sup>3</sup> However, it is clear that randomness does not provide representativeness and not all jurors are good and true. By implication a random sample can be all white, all black, all Asian, all young, all Liberals or all members of the BNP<sup>4</sup> and so not representative of the population. Penny Darbyshire wrote an article in 1991<sup>5</sup> stating that instead of being representative, the jury was actually “an anti-democratic, irrational and haphazard legislator, whose erratic and secret decisions run counter to the rule of law”<sup>6</sup> and by overlooking the law in an attempt to gain justice, innocent people may end up being convicted. This is undoubtedly going to produce biases in the way jurors produce a verdict. *R v Ponting* (1985)<sup>7</sup> proved that when juries were convinced about what justice was meant to look like, they were unlikely to listen to what the judge has ruled and so rule as to what they believe is right. This essay will examine the biases created by random selection and decide whether jury selection would prove to be a better system.

One bias created by the random selection of the jury is that of inexperience and incapability, which leads to biased verdicts. Jurors are told that if they have any reasonable doubt as to whether a defendant is guilty then they are to find him not guilty. However in complicated cases it is argued that jurors are likely to unconsciously disguise their confusion as reasonable doubt and therefore more people are likely to be acquitted than if more experienced, specialised people were selected, as could be the case with jury selection.<sup>8</sup> Lord Denning argues, in *What Next In Law?*, that “Jurors are summoned who are not sufficiently intelligent or educated to perform their task”<sup>9</sup> and argues that the jury should be chosen like magistrates. A case, that illustrates random selection providing incapable jurors, is *R v Young* (1995) where the Court of Appeal ordered a retrial of a man convicted of double murder because 4 of the jurors had tried to contact the victims using a Ouija board in what was described as a “drunken experiment”.<sup>10</sup> Jury selection could provide a solution to this problem by selecting jury members with the knowledge and capacity to give verdicts, which don’t rely on unscientific experiments or on how confused the jurors

<sup>1</sup> White, R. C. A., *The English Legal System in Action – The Administration of Justice*, 3<sup>rd</sup> Edition, (Oxford: Oxford University Press, 1999).

<sup>2</sup> Slapper, G. and Kelly, D., *The English Legal System*, 7<sup>th</sup> Edition, (London: Cavendish, 2004).

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> Darbyshire, P., *Criminal Law Review* (1991, Crim LR 740) as cited by Slapper, G. and Kelly, D., *The English Legal System*, 7<sup>th</sup> Edition, (London: Cavendish, 2004).

<sup>6</sup> Id.

<sup>7</sup> Supra at note 2. The defendant was charged under the Official Secrets Act 1991 and although the judge ruled that there was no valid defence the jury refused to convict him.

<sup>8</sup> <http://www.hayesfield.co.uk/law/Revision/Juries.doc>

<sup>9</sup> Lord Denning, *What’s Next in Law?* As cited by <http://www.hayesfield.co.uk/law/Revision/Juries.doc>

<sup>10</sup> Supra at note 2.

are. This would suggest that jury selection could provide a solution where random selection creates a bias of ignorance, inexperience and confusion.

Another bias created by random selection is that ethnicities are underrepresented. Studies conducted on the electoral register have shown it to be unrepresentative of all ethnic minorities. The Home Office, in 1999, found that 8% of people eligible to be jurors were not on the elector register. 24% of black people were also not on the electoral register and 15% of those from an Indian sub-continent were also not on there. 24% of other ethnic minority groups were also not on the electoral register.<sup>11</sup> Therefore many juries are picked with either small amounts or no jurors from ethnic minorities in them, which may sometimes bring about a bias. Judges are also not allowed to manipulate juries by trying to move selection areas to gain a more ethnic mix and so in cases where ethnicity may be an issue the judge cannot interfere as apparently this would not be fair and would tamper with the basic ethics of random selection. In *R v Ford* (1989)<sup>12</sup>, the trial judge refused to grant a racially mixed jury and the Court of Appeal sustained this view on the grounds that "Fairness is achieved by the principle of random selection"<sup>13</sup> and that to ask for a racially mixed jury would infer that some jurors are unable to be unbiased. Jury selection could ensure that members of ethnic minorities are incorporated into juries and ensure that there are no issues of racism and prejudice. However there are exceptions to the rule. In the case of *Lakhbir Deol* (1994)<sup>14</sup> his lawyers asked to move the trial to Birmingham where there was approximately a 25% ethnic minority population but the trial judge refused. The case went ahead and Mr Deol was acquitted and so his doubts were proved to be unjustified. Here it would seem that jury selection could provide a solution to the problem of ethnic biases brought about by random selection when they occur, however, they do not always occur.

Random selection also brings about a bias as it relies on people to self-report their ineligibility. There is no systematic check on who is eligible<sup>15</sup> to be jurors and so it is up to the jurors themselves to state that they cannot take part. Because of this, those jurors who wish to bias the verdict can do so without much worry of being caught. The prosecution tend to have the right to challenge the eligibility of jurors and have them put on standby if they can produce a valid reason. However the only information given to the lawyers are the names and addresses of the potential jurors at the lawyer's request and so they are unlikely to use their powers to challenge<sup>16</sup> which means that biases can occur if self-reporting does not occur. Jury selection can provide a solution here by ensuring those who are chosen are also eligible which will reduce the bias created by the random selection of jury members.

It is clear that although in theory the random selection of jurors seems like the better option in gaining representative verdicts, in practice this is not so. Factors such as gender, race, experience, and capability are misrepresented which affect the verdicts given and in some cases juries do not pay attention to the law, as they should, and let

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<sup>11</sup> Ingam, T., *The English Legal Process*, 10<sup>th</sup> Edition (Oxford: Oxford University Press, 2004) p.224.

<sup>12</sup> Supra at note 2, p.1.

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Spencer, J. R., *Jackson's Machinery of Justice*, 8<sup>th</sup> Edition, (Cambridge: Cambridge University Press, 1989).

<sup>16</sup> Id.

their own views of what is right and wrong effect verdicts. The selection of jury members could rectify these faults by manipulating who should and shouldn't be in the jury according to their attributes, which may produce a more desirable outcome, but this would be at the cost of being truly representative of the whole population.