

Multiculturalism, Representation and Integration: Citizenship Requirements for Jury Service

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Abstract

This article examines the practice of restricting jury service to citizens. While some jurisdictions, such as the United Kingdom and New Zealand, base jury eligibility on permanent residency status, others, such as Ireland and the United States limit it to citizens. This article examines sets out two principal arguments in favour of abolishing citizenship requirements. First, the need to ensure that juries are broadly representative of the community from which they are drawn. Secondly, the need to promote integration more generally, particularly as Western societies become increasingly multicultural. The article also considers specifically Irish constitutional and historical reasons why this citizenship requirement is difficult to justify.

Introduction: Multiculturalism and the Criminal Justice System.

Multiculturalism presents challenges to the democratic state, and in particular to the criminal justice system. As Kymlicka states, globalization 'has made the myth of a culturally homogenous state ... unrealistic'.¹ Many of the problems and challenges presented by diverse societies and multiculturalism have long been appreciated.² Critics of multicultural policies are concerned that increased fragmentation could lead to a disintegration of political society, though Kymlicka points out that 'the term "multicultural" covers many different forms of cultural pluralism'.³ He distinguishes between multination states and polyethnic states, and warns against generalizations when considering multicultural societies and how to deal with them. In multination states, such as Canada, New Zealand, Belgium and Switzerland, 'cultural diversity arises from the incorporation of previously self-governing, territorially concentrated cultures into a larger state'.⁴ Minorities in such states typically seek 'to maintain themselves as distinct societies, and demand various forms of autonomy or self-government'.⁵

By contrast, in polyethnic states, such as Germany or Ireland, diversity stems from immigration.⁶ Theories and policies dealing with immigrant incorporation have evolved over the past century. Early twentieth-century assimilation theory assumed that immigrant assimilation into the dominant society was inevitable. Chung points out that current theories tend to focus on two-way relationships between immigrants and host societies: '[a]lthough immigrants adapt to the receiving societies, they also

¹ Will Kymlicka, *Multicultural Citizenship* (Oxford, 2000), p. 9.

² Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women* (Cambridge, 2001), p. 1.

³ Kymlicka, *Multicultural Citizenship*, p. 10.

⁴ *Ibid.*, p. 6.

⁵ *Ibid.*, p. 10.

⁶ Some countries have both multination and polyethnic characteristics; for example, Canada, Australia and the United States.

have a significant impact through a type of give-and-take process that ultimately results in the remaking of the immigrants and the receiving societies.’⁷ Such immigrants

typically wish to integrate into the larger society, and to be accepted as full members of it. While they often seek greater recognition of their ethnic identity, their aim is not to become a separate and self-governing nation alongside the larger society, but to modify the institutions and laws of the mainstream society to make them more accommodating of cultural differences.⁸

Under integration policy, members of immigrant communities are encouraged to assimilate themselves with the cultural norms (such as the language) of the host country. Successful integration policy also requires an appreciation that immigrants can simultaneously maintain their own cultural heritage. The challenge for law-makers is to produce laws and policies which accommodate increasingly diverse societies. Both liberalists and critical theorists have considered whether the object of law should be solidarity, and ‘[d]espite variations in their accounts, they generally hold that modern constitutions can recognise and accommodate cultural diversity while preserving political unity.’⁹

Ireland presents an interesting case study when it comes to multiculturalism and integration. Between 2002 and 2006 the number of non-Irish nationals living in Ireland rose by 87%, representing a total of 10% of the population and by the end of this period.¹⁰ However, it would seem that on-Irish nationals are disproportionately represented in the criminal justice system, raising questions about the need to adapt the system to accommodate such demographic changes. Accurate statistics are unavailable, but Judge David Riordan estimated in 2007 that between fifteen and 20% of criminal defendants appearing before Irish courts were immigrants.¹¹ Similarly, in 2007 non-Irish nationals represented 30% of persons in custody.¹² Hitherto, Ireland’s approach to the challenges of diversity and multiculturalism has been the promotion of integration, with the Minister of State for Integration pointing out that this is

⁷ Erin Aeran Chung, *Immigration and Citizenship in Japan* (Cambridge: CUP, 2010), p. 10.

⁸ Kymlicka, *Multicultural Citizenship*, pp. 10-11.

⁹ Omid A. Payrow Shabani (ed), *Multiculturalism and Law: A Critical Debate* (Wiltshire, 2007), p.1.

¹⁰ Data from the Central Statistics Office, Available at:

<http://www.cso.ie/statistics/popnclssbyreligionandnationality2006.htm>. The year 2006 seems to represent a high point in the numbers of non-Irish nationals living in Ireland; the number of new PPS numbers going to non-Irish nationals reached a peak of 74% in 2006, though it dropped to 48% in 2009. In 2011, there were 144,589 new PPS numbers issued, of which 64, 521 were issued to non-Irish nationals. Department of Social Protection, *Personal Public Service Numbers-Allocation by Nationality-All Countries 2011*. Available at:

http://www.welfare.ie/EN/Topics/PPSN/Pages/ppsn_all_month11.aspx. It is expected that statistics emanating from the 2011 Census will indicate a drop in the percentage of non-Irish nationals residing in Ireland.

¹¹ D. Riordan, ‘Immigrants in the Criminal Courts’ (2007) 2 *Judicial Studies Institute Journal* 95, p. 100. Recent migration patterns probably mean that the percentage is currently less than this.

¹² In 2006 the total population of Ireland was 4,172,013, of which 419,733 were not Irish citizens. Central Statistics Office *Census of Population 2011 Preliminary Results* (June 2011), 1. Data from: <http://www.cso.ie/en/media/csoie/census/documents/Prelim%20complete.pdf> and <http://www.cso.ie/statistics/popnclssbyreligionandnationality2006.htm>. In the same year, there were 9,700 persons in custody, of which 2,701 were non-Irish: *Irish Prison Service Annual Report 2006*, p. 11. Available at: http://www.irishprisons.ie/documents/IPS_Annual_Report_2006.pdf.

essential for social cohesion.¹³ However, clear policies are needed to promote integration in a practical sense, and the criminal justice system is one place in which to start. Steps have already been taken to assist those whose language abilities would otherwise alienate them from court proceedings,¹⁴ and there is also a growing recognition of the need for sensitivity when it comes to swearing-in witnesses.¹⁵ Another way in which the criminal justice system ought to respond is through reform of the jury system. It is estimated that the jury pool represents at best roughly half of the total population of Ireland,¹⁶ and the question is whether jury composition ought to reflect, in so far as is practical, demographic realities. This is an area where change has been slow to take root, with jury composition having remained more or less stagnant since the 1970s.

In the UK, issues surrounding jury composition, ethnicity and diversity have been the subject of study for a number of years. In 2006 the Inspectorate of Court Administration recommended a diversity impact assessment of jury selection policy and procedures,¹⁷ and the Jury Diversity Project has examined, among other things, the impact of ethnicity on jury verdicts.¹⁸ Concern about the representation or under-representation of ethnic minorities on juries has often rested on a presumption that

¹³ Office of the Minister for Integration, *Migration Nation: Statement on Integration Strategy and Diversity Management* (2008), pp. 13-5. Available at: [http://www.integration.ie/website/omi/omiwebv6.nsf/page/AXBN-7SQDF91044205-en/\\$File/Migration%20Nation.pdf](http://www.integration.ie/website/omi/omiwebv6.nsf/page/AXBN-7SQDF91044205-en/$File/Migration%20Nation.pdf).

¹⁴ In 2008, there were 10,000 requests for court interpretation services, covering 71 languages: *Courts Service Annual Report 2008*, p. 34. Available at: [http://www.courts.ie/Courts.ie/Library3.nsf/\(WebFiles\)/5BF8EA23BD1AE9D2802575E7003EDA7B/\\$FILE/Annual%20Report%202008.pdf](http://www.courts.ie/Courts.ie/Library3.nsf/(WebFiles)/5BF8EA23BD1AE9D2802575E7003EDA7B/$FILE/Annual%20Report%202008.pdf). Concern has been expressed in recent years over the lack of regulation for court interpreters: see *Irish Times*, 7 June 2010, Available at <http://www.irishtimes.com/newspaper/ireland/2010/0607/1224272004732.html?via=rel>.

¹⁵ See for example D. Riordan, 'Immigrants in the Criminal Courts', p. 106.

¹⁶ The current total population of Ireland is 4,581,269, with 3,202,442 registered electors (http://www.idea.int/vt/country_view.cfm?CountryCode=IE). When the estimated numbers of pharmacists, dentists, solicitors, barristers, HSE employees, civil servants, teachers, Gardai, full-time students, members of the defence forces, prison officers, local authority workers, persons who have served sentences of 3 months or more within the past ten years and persons aged over 65 are subtracted from this, the remaining jury pool is 2,367,606, which represents about 51.6% of the total population. These figures are estimates, and it is acknowledged that some of them may be over- or under-representative. Furthermore, there are categories of person listed under the Juries Act 1976 who are not dealt with here. Nevertheless, it is submitted that the 51.6% figure is broadly reflective of the state of the jury pool when the various disqualifications, exemptions and excusals as of right are taken into account. (Data taken from the Pharmaceutical Society of Ireland (<http://www.thepsi.ie/gns/about-psi/overview.aspx>), the Law Society (<http://www.lawsociety.ie/Pages/About-Us/>), the Bar Council (<http://www.lawlibrary.ie/viewdoc.asp?fn=/documents/aboutus/irishbar.asp&CatID=1&m=2>), the Irish Dentist Association (<http://www.dentist.ie/about/idarole.jsp>), the Public Appointments Service (<http://www.publicjobs.ie/publicjobs/en/civilservice/index.do>, <http://www.publicjobs.ie/publicjobs/en/healthservice/index.do> and <http://www.publicjobs.ie/publicjobs/en/localauth/index.do>), the Irish Prison Service (http://www.irishprisons.ie/documents/2010_Annual_Report.pdf and http://www.irishprisons.ie/documents/Irish_Prison_Service_2010_Annual_Report.pdf), the Department of Education and Skills (http://www.education.ie/servlet/blobServlet/stat_web_stats_10_11.pdf), the Higher Education Authority (<http://www.heai.ie/en/node/292>), An Garda Síochána (<http://www.garda.ie/Controller.aspx?Page=1710&Lang=1>) and the Central Statistics Office (<http://www.cso.ie/px/pxeirestat/Statire/SelectVarVal/Define.asp?maintable=PEA01>)).

¹⁷ Her Majesty's Inspectorate of Court Administration, *A Thematic Review of Quality of Service Provided by HMCS for Jurors in the Criminal Courts* (December 2006), p. 20. Available at: http://www.hmica.gov.uk/files/English_Jurors_text_for_web.pdf.

¹⁸ Cheryl Thomas, *Diversity and Fairness in the Jury System* (Ministry of Justice Research Series 02/07, June 2007), Available at <http://www.justice.gov.uk/publications/research130607.htm>.

ethnic composition impacts upon verdicts. Thomas has found that racially mixed juries are unlikely to discriminate against a defendant on the basis of his or her ethnicity. Her more recent report asks whether all-white juries are likely to discriminate against black and minority ethnic group defendants,¹⁹ and while the question is answered in the negative,²⁰ concerns about the appearance of fairness in such situations may still remain. Many of these issues will not arise in an Irish context, because the legislative regime in place means that minority ethnic groups are currently unlikely to be represented on Irish juries.

Jury Eligibility Criteria

Most common law countries have some sort of restriction on jury service – not everyone residing within the State will automatically qualify as a juror. The main restriction considered here is whether a juror must have long-term residency or citizenship status.

a. Long-Term Residency Requirements

The United Kingdom's jury system has received considerable attention over the past sixty years, and has been reformed and refined a number of times. As in many common law jurisdictions, the early 1970s saw an overhaul and modernisation of the rules relating to jurors' qualifications and eligibility. The Criminal Justice Act 1972 did away with the requirement that those who sat on juries be ratepayers, and replaced it with qualification based on entry on the electoral register.²¹ The same Act introduced a residential qualification of at least five years since the age of thirteen in the UK, the Channel Islands, or the Isle of Man.²² These requirements were confirmed in the Juries Act 1974. Thornton points out that these acts 'enhanced the impartiality of juries by strengthening their representative nature.'²³ However, a survey carried out in 1993 for the Royal Commission on Criminal Justice²⁴ indicated that for various reasons, women and members of minority ethnic groups continued to be under-represented. In addition, various groups were either ineligible or exempt from serving by reason of their occupation.

Following the publication of the Auld Report in 2001,²⁵ the Criminal Justice Act 2003 wrought significant changes to the composition of juries in England and Wales. It did away with various categories of exemptions from jury service, and as the law now stands, with the exception of the mentally ill and those disqualified because of certain criminal convictions,²⁶ anyone on the electoral register is eligible to serve as a juror if they have lived in the UK, the Isle of Man or the Channel Islands for a

¹⁹ Cheryl Thomas, *Are Juries Fair?* (Ministry of Justice Research Series 01/10, January 2010), Available at: <http://www.justice.gov.uk/publications/docs/are-juries-fair-research.pdf>.

²⁰ *Ibid.*, p. 16

²¹ Criminal Justice Act 1972, s. 25(a); see now the Juries Act 1974, s. 1(a).

²² Criminal Justice Act 1972, s. 25(b); see now the Juries Act 1974, s. 1(b).

²³ Peter Thornton, 'Trial by Jury: 50 Years of Change' (2004) *Criminal Law Review* 683, p. 685.

²⁴ Michael Zander and Paul Henderson, *The Royal Commission on Criminal Justice: Crown Court Survey* (Research Study No 19, HMSO, 1993). See also Penny Darbyshire, 'What Can We Learn from Published Jury Research? Findings for the Criminal Courts Review 2001' (2001) *Criminal Law Review* 970.

²⁵ Auld J., *Review of the Criminal Courts of England and Wales* (September 2001) (known as the Auld Report), Available at: <http://www.criminal-courts-review.org.uk/ccr-00.htm>.

²⁶ S. 321, sch. 33. This also includes those who are on bail in criminal proceedings.

period of five years since the age of thirteen.²⁷ In order to be on the electoral register, one may be a British citizen, an EU citizen or a Commonwealth citizen. There is no UK citizenship requirement for jurors; the 2003 Act echoes the 1970s legislation in this regard.

In New Zealand, section 6 of the Juries Amendment Act 2000 provides that registered electors are qualified to sit on juries. Under section 74 of the Electoral Act 1993, every person over the age of eighteen and who has lived continuously in New Zealand for one year may register as a voter. Thus resident non-citizens may sit on juries if they are registered to vote. The residency period is significantly shorter than that in the United Kingdom.²⁸

b. Citizenship Requirements

In 1975, the United States Supreme Court interpreted the Sixth Amendment to the US Constitution as guaranteeing that juries will be comprised of a 'cross-section' of the community.²⁹ Although the focus in the 1970s was initially on the exclusion of women from juries, King points out that 'the cross-section concept was immediately employed to combat racially discriminatory selection processes.'³⁰ In the United States, as in Ireland and the UK, jurors are randomly selected from the jury pool.³¹ There are few restrictions on jury eligibility in the US, and qualifications based on gender, wealth and race have now been done away with. At Federal level, the Jury Selection and Service Act 1968³² excludes persons with insufficient understanding of the English language, persons with certain criminal convictions, and persons with mental or physical infirmities which would prevent them from carrying out their functions. There are no automatic exemptions for whole classes of person, such as members of specified professions, or employees in particular sectors. The same Act also provides that one must be a citizen of the United States.³³ Most states have adopted similar legislation.

There are other common law jurisdictions where jurors must be citizens. In Canada, aliens have always been disqualified from jury duty. Non-aliens have been defined successively as either British subjects or Canadian citizens,³⁴ and Canadian law still requires that jurors be citizens of the province or district in which a trial is to take place. In Australia, all states require that jurors be on the electoral register, which requires one to hold Australian citizenship. It has been pointed out that the Australian

²⁷ Lawyers, policemen and others who are exempt or disqualified from jury service in Ireland may now sit on UK juries, and excusals as of right under s. 9(1) of the 1974 Act have been abolished.

²⁸ In many Commonwealth jurisdictions, jurors need only be citizens of the Commonwealth. In Trinidad, the Jury Act 1922, as amended, provides in section 4 that a juror must either be a Commonwealth citizen, or a resident of Trinidad for at least two years, and must be aged eighteen or over. See also Ramesh Deosaran, 'The Jury System in a Post-Colonial Multi-Racial Society: Problems of Bias' (1981) 21(4) *British Journal of Criminology* 305, p. 312. This two-year requirement is in sharp contrast with the more long-term residency requirements in the United Kingdom. Similarly, in Jamaica, under section 1 of the Jury Act 1898, the requirement is one of both Commonwealth citizenship, and residency in Jamaica.

²⁹ *Taylor v Louisiana*, 419 U.S. 522 (1975).

³⁰ Nancy Jean King, 'The American Criminal Jury' (1999) 62(2) *Law and Contemporary Problems* 41, p. 55.

³¹ Efforts have been made to counteract the resulting under-representation of ethnic minorities by broadening the sources from which the pool is drawn.

³² 28 U.S.C. § 1865 (b).

³³ 28 U.S.C. § 1865 (b)(1).

³⁴ Graham Parker, 'Trial by Jury in Canada' (1987) 8(2) *The Journal of Legal History* 178, p. 181.

rule which requires that jurors be citizens ‘fails to achieve full representativeness in so far as migrants who do not have Australian citizenship cannot be on the electoral roll’.³⁵ Although the Australian Law Reform Commission has rejected proposals to extend jury eligibility to non-citizens who are long-term residents,³⁶ several other Australian law reform groups have more recently revisited this possibility.³⁷ Proposals in favour of abolishing the citizenship requirement in Australia generally rest on representativeness arguments.

The jurisdiction whose citizenship requirement is to be the subject of closer study in this article is Ireland. Article 38.5 of the Irish Constitution (*Bunreacht na hÉireann*) guarantees, subject to limitations, the right to trial by jury. It does not stipulate how such juries are to be composed, or how they ought to operate; such details are left to the legislature.³⁸ Jury composition in Ireland and elsewhere has changed dramatically over the past 200 years, as the very concept of the jury itself has evolved. There is nothing in Article 38.5 to suggest that a valid jury must be made up of twelve citizens; this requirement stems from section 6 of the Juries Act 1976.

When the 1976 Act was being drafted, it appears that there was no parliamentary debate over the citizenship issue, and parliamentarians seem to have proceeded on a presumption that jury service was in some sense tied to citizenship. At the time, the number of non-citizens residing in Ireland was lower than at present,³⁹ and perhaps idea of extending jury service to such groups simply did not occur to the legislature. Furthermore, this aspect of section 6 was most likely enacted merely in repetition of section 3 of the 1927 Act. In addition, it is worth pointing out that although it well-acknowledged that the 1976 Act was to a significant extent based on the UK’s 1970s legislation, it did not reflect the latter’s residency requirements.⁴⁰

Definitions of Citizenship.

Given the reliance in Ireland and in the United States on citizenship status as a prerequisite for jury service, it is worth examining the concept in more detail.

³⁵ Michael Chestermann, ‘Criminal Trial Juries in Australia’ in Neil Vidmar, (ed), *World Jury Systems* (Oxford: OUP, 2000), p. 136. However, British subjects who were on the electoral roll before 26 January 1984 are also allowed to vote, and this may confer a right to sit on juries.

³⁶ Australian Law Reform Commission, *Discussion Paper on Multiculturalism: Criminal Law* (48, May 1991), p. 63.

³⁷ Most recently, see the Law Reform Commission of Western Australia, *Discussion Paper on Selection, Eligibility and Exemption of Jurors* (September 2009, Project No. 99), Available at: <http://www.lrc.justice.wa.gov.au/099-DP.html>. For further discussion of proposals by Australian law reform bodies, see the Law Reform Commission, *Consultation Paper on Jury Service* (March 2010), pp. 41-44. Available at: <http://www.lawreform.ie/fileupload/consultation%20papers/LRC%20JuriesCP%20full.pdf>.

³⁸ As J.M. Kelly, *The Irish Constitution* (Dublin, 4th ed., 2003) points out, p. 1221, ‘jury’ is not defined in the Constitution. See O’Higgins CJ in *de Búrca and Anderson v Attorney General* [1976] IR 38, at 62.

³⁹ Although data on the citizenship of people living in Ireland is not readily available for the period, from the 1980s onwards the Census records the number of persons born outside the country. While this is not an accurate guide to the nationalities of the persons involved, it is nevertheless useful for contextualising developments at the time. In 1981, of a total population of around 3.4 million there were approximately 6.7% registered as having been born outside the country, and only 1.3% were born outside the United Kingdom. Because of migration patterns, many of those born outside the state were likely to have been Irish citizens. Figures obtained from the 1981 Census, Table 1A. Available at: http://www.cso.ie/census/census_1981_results/Volume9/C%201981%20V9%20P2%20T1a.pdf.

⁴⁰ The possible reasons for this are discussed below.

Although there is no fixed or generally accepted definition,⁴¹ definitions of citizenship can be used to address questions raised by the presence of minority groups within a country or state.⁴² While interpretations vary, T.H. Marshall classically identified three elements of modern citizenship: civil, political, and social.⁴³ Twine points out that Marshall's three elements must stand together: civil and political rights must be supported by social rights, 'otherwise the "three-legged stool of citizenship" will be unbalanced.'⁴⁴ Faulks reformulates these three categories into legal, philosophical and socio-political elements, acknowledging that there may be overlap between them.⁴⁵

Briefly, socio-political definitions emphasise citizenship as a status denoting membership of a society. Citizenship has to be understood in the context of the power relationships which exist in that society, and the political, economic and cultural factors which affect it.⁴⁶ Marshall's interpretation of the social element of citizenship encompassed a spectrum from the right to economic welfare to a right to share in the social heritage of the country. Philosophical definitions of citizenship are concerned with more normative questions, such as which model of citizenship can best deliver a just society; what the role of the state ought to be in providing for citizens' needs; what the state can expect from an individual citizen in terms of duties; and how the individual should relate to other members of the nation.⁴⁷

Finally, legal definitions of citizenship define the rights and duties of citizens in relation to the nation-state. The term citizenship in a legal sense is often used interchangeably with nationality.⁴⁸ However, citizenship generally embodies two relationships: a vertical relationship between citizen and state, 'connecting the group of humans who can exact the highest protection from the state and who owe it the most onerous duties. A horizontal relationship connects citizens themselves, developing a community of people who share loyalties, civic allegiance, and national character.'⁴⁹ These relationships correspond respectively to the 'state' and the 'nation'.⁵⁰ Citizenship of a particular nation-state carries with it certain duties towards the state and rights which can be claimed from the state.⁵¹

Jury Service and the Language of Citizenship

As noted, citizenship in a legal sense equates to nationality, and is often referred to in terms of rights and duties flowing between individuals and the nation-state. Many legal and political commentators refer to jury service as either a right or a duty of citizens, though in this context the term 'citizen' tends to be used loosely, as synonymous with 'person'. It is argued that in many instances, when jury service

⁴¹ Daniel Schugurensky, 'Citizenship Learning For and Through Participatory Democracy' in Elizabeth Pinnington and Daniel Schugurensky, *Learning Citizenship by Practicing Participatory Democracy: International Initiatives and Perspectives* (Cambridge Scholars Publishing: Newcastle upon Tyne, 2010), p. 1.

⁴² Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law* (New York, 2006), p. 1312.

⁴³ T.H. Marshall, 'Citizenship and Social Class', in T.H. Marshall, *Class, Citizenship and Social Development* (Chicago, 1977), p. 8.

⁴⁴ F. Twine, *Citizenship and Social Rights: The Interdependence of Self and Society* (London, 1994), p. 104.

⁴⁵ K. Faulks, *Citizenship in Modern Britain* (Edinburgh, 1998), p. 2.

⁴⁶ *Ibid*, pp. 4-5.

⁴⁷ *Ibid*.

⁴⁸ *Ibid*.

⁴⁹ Anon., 'The Functionality of Citizenship' (1997) 110(8) *Harvard Law Review* 1814, p. 1815.

⁵⁰ *Ibid*.

⁵¹ Faulks, p. 3.

is described as a duty or a right of citizens, commentators are referring to citizenship in a socio-political, rather than a legal sense; they could just as easily refer to 'residents', 'inhabitants' or even 'persons'. It is submitted that such use of citizenship terminology obscures any debate over whether or not jurors actually ought to be legal citizens of the state.

For example, Lord Justice Auld pointed out that '[t]he jury does not represent or reflect the *community* as a whole, save in the broad sense of enabling some *citizens* to participate in the trial process'.⁵² He also referred to jury duty as 'an important incident of citizenship',⁵³ while at the same time emphasising that juries ought to better represent the communities from which they are drawn. We can assume that in both instances Lord Justice Auld meant citizenship in a socio-political sense; at the time of his writing, jury service in the UK was not in fact limited to citizens, but as discussed above, extended to long-term residents who were registered to vote.⁵⁴

The seminal Irish case on the need for juries to be representative of the community is *de Búrca and Anderson v Attorney General*.⁵⁵ The issue here was the constitutional validity of the 1927 Juries Act's requirement that jurors be ratepayers. The Supreme Court sought to emphasise that all persons, regardless of gender or status, should be allowed to sit on juries. The various judges made free use of the term 'citizen' in this context, without any examination of whether jury service should in fact be limited to Irish citizens, or indeed how such a limitation might be justified.⁵⁶ Such use of the socio-political definition of 'citizen' appears to be a common feature of discussions of jury composition by both lawyers and political scientists.⁵⁷

There is therefore scant Irish scholarship on the issue of whether one ought to be a legal citizen in order to sit on a jury.⁵⁸ Aside from brief mentions by academic commentators,⁵⁹ the only examination of the issue in recent times is contained in the Law Reform Commission's *Consultation Paper on Jury Service*.⁶⁰ The Commission here appears to be concerned in the main with the use of electoral registers as source lists for jury selection, such lists often being outdated, inaccurate, and not reflective of the community at large. The Commission considers the link between electoral registration and jury eligibility as being possibly inappropriate,⁶¹ in part because of Ireland's recent demographic changes. Aside from these concerns, the Commission's engagement with the issue of the citizenship requirement is somewhat limited, though it does conclude that '[e]xtending jury selection to non-citizens would significantly broaden the pool of potential jurors and would enhance representativeness'.⁶²

⁵² *Review of the Criminal Courts* (September 2001), p. 139 (emphasis added).

⁵³ *Ibid.*, p. 140.

⁵⁴ Juries Act 1974.

⁵⁵ [1976] IR 38.

⁵⁶ An exception to this is Walsh J, at 67, who at one stage refers to 'citizens or inhabitants of the State' (emphasis added).

⁵⁷ Another example of the apparent use of a more socio-political definition of citizenship is found in Gary J. Jacobsohn, 'Citizen Participation in Policy-Making: The Role of the Jury' (1977) 39(1) *The Journal of Politics* 73.

⁵⁸ The same made be said of other jurisdictions; the issue is obscured somewhat by the use of the term 'citizenship' in a socio-political rather than a legal context.

⁵⁹ See O'Malley and Jeffers.

⁶⁰ *Consultation Paper on Jury Service* (March 2010), pp. 38-52.

⁶¹ *Ibid.*, p. 39.

⁶² *Ibid.*, p. 48.

Overall, it appears that little thought has been given to the validity of the exclusion of non-citizens from Irish juries; it is this with in mind that a rationale is sought to justify their continued exclusion.

Arguments for Excluding Non-Citizens from Jury Service

Advocates of the restriction of jury eligibility to citizens may cite a number of justifications. For example, the issue of language clearly presents a significant barrier for many ethnic minorities. If we open up jury service to non-citizens, how can we be sure that they will adequately comprehend court proceedings? One answer to this lies in the Law Reform Commission's *Consultation Paper*. It proposes that a basic level of proficiency in one of the languages of the state should be a requirement for all jurors, as is the case in other jurisdictions.⁶³ Under current legislation, there is no requirement that jurors should be able to speak and understand English, but they must be able to read.⁶⁴ It is advised that any abolition of the citizenship requirement should go hand-in-hand with the introduction of a language requirement. In both the United States and the United Kingdom, there are requirements that all jurors have a sufficient grasp of the English language.

Another argument against allowing non-citizens onto juries is that persons who are recent immigrants may conform to different social norms and practices than the majority of citizens of the host state, or may be used to different legal regimes. Religious beliefs and attitudes towards women in particular may arguably leave room for tolerance of practices and attitudes which generally attract censure in the host country, and vice versa. This may be so, but there is no reason to presume that jurors with different cultural backgrounds would be any less competent or willing to carry out their functions fairly and conscientiously. The modern idea of the jury is that it represents a cross-section of society, lending an air of legitimacy to its decisions. If there is a significant group within society which holds certain beliefs or endorses certain practices, then perhaps this ought to be represented on the jury.

Furthermore, in criminal cases, the primary role of the jury is to decide whether the prosecution has proven all the elements of the offence beyond a reasonable doubt. A clear and unambiguous direction from the judge as to their role in the criminal process should help jurors to understand their role.⁶⁵ This ought to be combined with adequate written information provided to prospective jurors in advance of coming to court, so that the nature of the criminal trial and the role of the jury within it are easily understood by those coming from different legal traditions and cultures.⁶⁶

The rationale for the citizenship requirement in the United States appears to have historical roots. Jury service in the US has historically been tied to voting,⁶⁷ and as Ritter points out that traditionally, after voting, jury service was 'the most significant right or duty that citizens commonly filled. Jury service was democracy in

⁶³ Ibid, p. 49.

⁶⁴ Juries Act 1976, Sch. 1, Pt. 1, as amended by the Civil Law (Miscellaneous Provisions) Act 2008, s. 64.

⁶⁵ See generally Genevieve Coonan and Brian Foley, *The Judge's Charge in Criminal Cases* (Dublin, 2008).

⁶⁶ In the context of serious fraud trials, steps have already been taken to assist jurors to understand their role and the evidence: Criminal Justice (Theft and Fraud Offences) Act 2001 (Commencement) Order 2011 (S.I. 394 of 2011).

⁶⁷ Gretchen Ritter, 'Jury Service and Women's Citizenship before and after the Nineteenth Amendment' (2002) 20(3) *Law and History Review* 479, p. 481.

action – it was direct governance by the citizens.⁶⁸ Writing in the nineteenth century, de Tocqueville considered the jury to be both a judicial and a political entity;⁶⁹ in fact, he considered it to be ‘pre-eminently a political institution,’⁷⁰ writing that ‘[t]he system of the jury, as it is understood in America, appears to me to be as direct and as extreme a consequence of the sovereignty of the people, as universal suffrage.’⁷¹ Jury service in the United States continues to be considered to be an element of political participation, rather like the Aristotelian conception of citizenship.⁷²

However, jury service in Ireland is not regarded as a political right or duty, and there has not been the same historical nexus between voting rights and jury service. For example, while Irish women secured the right to vote in 1922, it was not until 1927 that they were allowed to sit on juries – and in reality, there were very few women jurors until after 1976. Whilst citizenship is generally a prerequisite to voting in the United States,⁷³ it is less so in Ireland, where non-citizens can vote in local, parliamentary and European elections.

Arguments for Including Non-Citizens.

There are a number of possible arguments in favour of removing the citizenship requirement for jury service. In most countries, resident non-citizens enjoy a range of rights, including the right to vote and the right to work. They are also obliged to fulfil certain obligations, such as the payment taxes and compliance with civil and criminal laws. As is evident from nineteenth-century rhetoric and the repeated efforts by reformers to widen the jury franchise, jury service in the past was regarded in Ireland as a right, even a privilege, jealously guarded and enjoyed by the few. This can no longer be said to be the case. Walsh J in *de Búrca and Anderson* appears to have been of the view that jury service is a duty, rather than a right,⁷⁴ something with which many, including the Law Reform Commission, would agree.⁷⁵ As will be discussed below, a residency requirement such as that existing in the United Kingdom might suffice as a qualification. A long-term resident in a country, who works, studies, pays taxes and contributes to society may be said to be a stakeholder in the society of that country, in a way that, for instance, a casual visitor or tourist is not.

Argument 1: Juries need to be representative

The twentieth century saw increasing recognition of the need for jurors to be representative of society as a whole. This shift has been identifiable in all common-

⁶⁸ Ibid.

⁶⁹ Alexis de Tocqueville, *On Democracy in America* (translated by Henry Reeve) (New York: Dearborn, 1838), p. 261.

⁷⁰ Ibid, p. 265.

⁷¹ Ibid, p. 264.

⁷² In Athens in the 4th and 5th centuries BC, one of the obligations of citizenship for those aged thirty or older was jury service, as well as participation in the Assembly. Bellamy, p. 32.

⁷³ Voting in elections for the US House, Senate or Presidency is limited to citizens over the age of 18 who meet state residency requirements. However, a number of states and cities have moved in recent years towards allowing limited municipal voting rights to non-citizens. See generally Virginia Harper-Ho, ‘Noncitizen Voting Rights: the History, the Law and Current Prospects for Change’ (2000) 21 *Immigration and Nationality Law Review* 477. See also Ronald Hayduck, ‘Democracy for All: Restoring Immigrant Voting Rights in the US’ (2004) 26(4) *New Political Science* 499.

⁷⁴ [1976] IR 38, at 66.

⁷⁵ *Consultation Paper on Jury Service* (March 2010), pp. 7-8.

law countries where juries still form an integral part of the criminal justice system, and legislation from the 1970s onwards reflects this. The idea of representativeness gets to the heart of what the modern jury is for. It allows lay persons to participate in a meaningful way in the criminal justice process. By ensuring that all sections of the community are in theory represented, the jury's legitimacy in the eyes of the public is enhanced.

In Ireland, section 6 of the Juries Act 1976 states:

Subject to the provisions of this Act, every citizen aged eighteen years or upwards and under the age of seventy years who is entered in a register of Dáil electors in a jury district shall be qualified and liable to serve as a juror for the trial of all or any issues which are for the time being triable with a jury drawn from that jury district, unless he is for the time being ineligible or disqualified for jury service.

Persons not eligible to serve as jurors include those connected with the administration of justice and the holders of various public posts.⁷⁶ In addition, there are a number of categories of people who are excusable as of right, including clergy, students, various categories of civil servant and a range of practicing professionals.⁷⁷ A third group who do not serve on juries are those who are disqualified by virtue of having a criminal conviction.⁷⁸ Finally, county registrars may excuse any persons summoned.⁷⁹ Because there is no remuneration or compensation for losses incurred as a result of jury service in Ireland,⁸⁰ those who are self-employed are often granted excusals by the county registrar. The result of these provisions in practice is to restrict jury service in the main to the unemployed, the retired, and those who are unable to demonstrate that their job cannot be performed by someone else. The desirability of extending jury duty to these excluded groups has been discussed elsewhere.⁸¹

Such a wide range of exemptions is not unique in the history of the jury, which has never been a fully representative body in Ireland. For hundreds of years, only a minority were entitled to sit on juries.⁸² The policy was one of homogeneity: jurors were male members of the property-owning classes, and tended not to be representative of either the social class or the politico-religious background of the majority. Over the centuries, the amount of property necessary to qualify as a juror

⁷⁶ Juries Act 1976, s. 7.

⁷⁷ Juries Act 1976, Pt 2, Sch. 1.

⁷⁸ Juries Act 1976, s. 8.

⁷⁹ Juries Act 1976, s. 9. Several reasons for such excusal are listed in the Act, including if the person summoned 'shows to the registrar's satisfaction that there is good reason why he should be so excused.'

⁸⁰ Section 29 provides that employees and apprentices are to be treated as employed or apprenticed respectively whilst serving upon juries, meaning that the financial burden of jury service currently falls on employers. This issue is currently being examined by the Law Reform Commission.

⁸¹ The former Director of Public Prosecutions observed in May 2009 that 'far too many categories of people are excluded from jury service as a result of which juries are not as representative of modern Irish society as they might be.' James Hamilton, 'Opening Address', *Tenth Annual National Prosecutors Conference 2009*, (Dublin Castle, 23 May 2009), p. 2, Available at: http://www.dppireland.ie/filestore/documents/10th_ANPC_-_Director's_Opening_Address.pdf. See also Jeffers. In a UK context, see *Review of the Criminal Courts* (September 2001).

⁸² The range of exempt and excluded categories was always narrower in England.

varied, and the nineteenth century saw it being repeatedly adjusted⁸³ in attempts to achieve the perfect balance between guaranteeing sufficient numbers of jurors and ensuring that they were competent to fulfil their duties.

The twentieth century saw the abolition of the property requirement, and women sat on juries for the first time. In the landmark case of *de Búrca and Anderson v Attorney General*,⁸⁴ two women protested against the discrimination against women embodied in the Juries Act 1927's requirement that jurors be ratepayers.⁸⁵ It was held by O'Higgins CJ and Walsh J in the Supreme Court that the exclusion of persons who were not ratepayers was an invidious discrimination, contrary to Article 40.1 of *Bunreacht na hÉireann*, which states: 'All citizens shall, as human persons, be held equal before the law.' Walsh J was of the view that the exclusion of persons on grounds of gender was an additional breach of Article 40.1.⁸⁶ In addition, Henchy and Griffin JJ held that the legislation failed to satisfy the requirement in Article 38.5 that juries be representative.⁸⁷ The 1976 Act was passed as a response to the Supreme Court's judgment in that case.

Having now reached the position where discriminations based on wealth and gender have been done away with, Ireland still finds itself facing unrepresentative juries. O'Malley observed in 2003 that the demographic changes which occurred in Ireland since the 1970s resulted in many non-citizens becoming long-term residents in Ireland.⁸⁸ He questioned 'whether the insistence on jurors being citizens is any longer justified.'⁸⁹ Almost a decade on, nothing has been done to correct this, and the problem is now even more pronounced. As has been observed more recently, the restriction of jury eligibility to citizens who are registered as parliamentary or Dáil electors means that in Ireland, 'virtually all juries are likely to be racially and ethnically homogenous'.⁹⁰

Obviously it would be extremely difficult to reflect accurately the make-up of society in the jury pool, but the requirement is only that juries be broadly representative of society. It is argued that a jury system which represents only half of the population cannot be considered representative. The first step towards improving

⁸³ Legislation prescribing Irish jurors' qualifications was passed in 1833, 1871, 1873, 1874, and 1876; see Niamh Howlin, 'Controlling Jury Composition in Nineteenth-Century Ireland' (2009) 30(3) *The Journal of Legal History* 227 for a more detailed analysis of these Acts.

⁸⁴ [1976] IR 38.

⁸⁵ Section 3 of the Juries Act 1927 provided that '...every citizen of the age of twenty-one years or upwards and under the age of sixty-five years who ... is rated for the relief of the poor in respect of land in a jury district shall, if the total rateable value of all the land in respect of which he is so rated in such jury district equals or exceeds the minimum rating qualification for such jury district, be qualified and liable to serve as a juror...' A male citizen could also, by virtue of section 3(2), be liable to serve as a jury on the basis of his wife being rated for the relief of the poor to a specified value. The effect of section 3 was effectively to exclude the majority women from sitting on juries, because at the time few women were ratepayers.

⁸⁶ [1976] IR 38, at 71.

⁸⁷ [1976] IR 38, at 77 and 84 respectively.

⁸⁸ Tom O'Malley, 'A Representative and Impartial Jury' (2003) 8(6) *Bar Review* 232, p. 232.

⁸⁹ *Ibid.*

⁹⁰ James M. Jeffers, 'The Representative and Impartial Jury in the Criminal Trial: An Achievable Reality in Ireland Today?' (2008) 18(2) *Irish Criminal Law Journal* 34, p. 35. There is a clear need for empirical research in this area, to establish with greater precision the representativeness (or otherwise) of Irish juries. Academic commentators and practitioners rely largely on anecdotal evidence and personal experience, and the consensus appears to be that Irish juries are indeed devoid of ethnic or social diversity. Even in the absence of hard data, it is clear from the statutory exemptions, discussed below, that Irish juries simply cannot be broadly representative.

the representativeness of the jury is to broaden the legislative qualifications and abolish or severely curtail exemptions and disqualifications.

Argument 2: Promoting Integration

It has already been pointed out that in increasingly multicultural polyethnic states, there is a need to accommodate ethnic minorities through integration, and this is Ireland's stated policy when it comes to multiculturalism. Chung notes that recent waves of immigration to industrialised societies have pushed the question of immigrant incorporation to the fore.⁹¹ She points out that particular attention has been focused on the issues of political incorporation and political participation, 'because of what many have identified as a troubling wave among the current wave of immigrants. That is, foreign communities are growing in size; at the same time, many immigrants and their descendants remain politically unincorporated.'⁹² It is important to guard against this, and a country such as Ireland, which has quite a recent experience of immigration, ought to learn from the experiences and mistakes of other countries.

At European level, the Tampere Agenda of the European Council declared that a 'more vigorous integration policy' should aim to give third-country nationals 'rights and obligations comparable to those of EU citizens.'⁹³ Building on this, the Commission floated the idea in 2000 of 'civic citizenship' as an alternative status for third-country nationals living in Member States, 'based on the EC Treaty and inspired by the Charter of Fundamental Rights, consisting of a set of rights and duties offered to third country nationals.'⁹⁴ Initially the Parliament did not explicitly back the Commission's suggestion, though more recently it has supported the civic citizenship concept, emphasizing its importance for fostering a sense of belonging to a community.⁹⁵ In 2004 the Council set out a number of common basic principles for integration, intended to assist Member States in the development of integration policies. One of the principles is that '[e]fforts in education are critical to preparing immigrants, and particularly their descendants, to be more successful and more active participants in society.'⁹⁶ The jury system represents one way of encouraging such participation. Such participation requires familiarity with both the legal system and the legal and social norms of the host state, and also necessitates interaction (in the form of deliberation) with other members of society, whether recent immigrants or otherwise. The Irish Minister for Integration points out that '[i]ntegration lives and breathes, and indeed dies, at the level of community,'⁹⁷ and Lord Justice Auld referred in 2001 to the jury's aura of 'involvement of the community in the administration of

⁹¹ Chung, p. 7.

⁹² Ibid.

⁹³ Tampere European Council 15 and 16 October 1999: Presidency Conclusions. Available at: http://www.europarl.europa.eu/summits/tam_en.htm.

⁹⁴ European Commission, *Communication from the Commission to the Council and the European Parliament on a Community Immigration Policy* COM (2000) 757, 22. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0757:FIN:EN:PDF>

⁹⁵ European Parliament, *Resolution on the Communication from the Commission on Immigration, Integration and Employment* [2004] OJ C92E/390. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:092E:0390:EN:PDF>.

⁹⁶ *A Common Agenda for Integration: Framework for the Integration of Third-Country Nationals in the European Union. Communication from the Commission to the Council, the European Parliament, the European Economic and Social committee and the Committee of the Regions*, COM (2005) 389. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0389:FIN:EN:PDF>.

⁹⁷ *Migration Nation* (2008), p. 22.

justice'.⁹⁸ Jury service may be considered one of the ultimate expressions of community involvement.

Kymlicka and Norman point out that many writers on citizenship avoid taking a clear stand on the public policy implications of their scholarship, and fail to address the question of how practically to promote the desirable qualities of citizens which their theories enumerate.⁹⁹ Commitment to social order is often seen as one of the essential elements of citizenship,¹⁰⁰ and can include things like adhering to laws and regulations, reporting crimes, serving in the military when necessary, and serving on a jury if called to do so.¹⁰¹ A former Irish Minister for Integration has stated that '[i]ntegration policy in Ireland will be a two-way street involving rights and duties for those migrants who reside, work and in particular those who aspire to be Irish citizens.'¹⁰² Research indicates that participating in jury duty can help to promote integration and foster civic-mindedness. The 2004 study by Matthews *et al* on jurors' perceptions in the UK found that the jury has a role 'in promoting social bonding, solidarity and cohesion.'¹⁰³ A number of respondents in their study commented that serving as a juror enhanced 'a sense of "national identity"' and 'forged a sense of "citizenship"'.¹⁰⁴ Similarly, Gastill and Weiser consider jury service to have a significant role to play in civic engagement.¹⁰⁵

Dees and Gastill point that de Tocqueville's idea that jury service can change the individual juror had seeped into consciousness, and contributing to the shaping of law and policy, without having been tested or established in fact.¹⁰⁶ In a study designed to test De Toqueville's assertion that there is a relationship between jury service and civic engagement, they linked official jury records with voting records, and they found that people who sat on criminal juries where a verdict was reached were more likely to vote in subsequent elections.¹⁰⁷ These jurors were more likely to have sought judicial assistance, and generally deliberated for longer than their counterparts.¹⁰⁸ This effect was even more pronounced among those who had sat upon hung juries, which Deess and Gastill describe as an 'intense deliberative experience.'¹⁰⁹ The relevance of the intensity of the deliberative experience was also reflected in the fact that the likelihood of future voting correlated to the number of

⁹⁸ *Review of the Criminal Courts* (September 2001), p. 139.

⁹⁹ Will Kymlicka and Wayne Norman, 'Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts' in Will Kymlicka and Wayne Norman, eds, *Citizenship in Diverse Societies* (Oxford: OUP, 2000), p. 7.

¹⁰⁰ Others include public participation in politics, autonomy and solidarity. See Russell J Dalton, 'Citizenship Norms and the Expansion of Political Participation' (2008) 56 *Political Studies* 76, pp. 78-9.

¹⁰¹ Russell J Dalton, 'Citizenship Norms and the Expansion of Political Participation' (2008) 56 *Political Studies* 76, p. 80.

¹⁰² *Migration Nation* (2008), p. 10.

¹⁰³ Roger Matthews, Lynn Hancock and Daniel Brigs, *Jurors' Perceptions, Understanding, Confidence and Satisfaction in the Jury System: A Study in Six Courts* (Home Office Online Report 05/04), p. 66; Available at: <http://www.homeoffice.gov.uk/rds/pdfs2/rdsolr0504.pdf>.

¹⁰⁴ *Ibid.*

¹⁰⁵ John Gastill and Phillip H. Weiser, 'Jury Service as an Invitation to Citizenship: Assessing the Civic Value of Institutionalized Deliberation' 2007 34(4) *Policy Studies Journal* 605.

¹⁰⁶ Perry Deess and John Gastill, 'How Jury Service Makes us into Better Citizens' (2009) 21(3) *Jury Expert* 51, p. 51.

¹⁰⁷ *Ibid.*, p. 56.

¹⁰⁸ *Ibid.*, p. 57.

¹⁰⁹ *Ibid.*, p. 56.

criminal charges against the defendant.¹¹⁰ They conclude that ‘the transformative experience of jury service ... further underscores the importance of engaging citizens.’¹¹¹ This ‘transformative experience’, it is argued, ought to be extended not only to citizens but to long-term residents who may be expected to participate in other aspects of democratic society.

Specifically Irish Reasons for Abolishing the Citizenship Requirement

In addition to the two arguments surrounding representativeness and integration, which can be applied to any common law jury system, there are further justifications for abolishing the citizenship requirement which arise in an Irish context. First, existing Irish jury laws may be open to constitutional challenge. This could be on the basis of a breach of the equality requirement of Article 40.1, though on the face of it, this provision only prohibits invidious discrimination¹¹² between Irish citizens.¹¹³ The 1976 Act is more likely to be challenged on the basis of Article 38. Henchy J in *de Búrca* said that when a system of jury recruitment is criticised for being exclusionary to the point of unconstitutionality,

the test is whether, by intent or operation, there is an exclusion of any class or group of citizens (other than those excluded for reasons based on capacity or social function) who, if included, might be expected to carry out their duties according to beliefs, standards, or attitudes not represented by those included. If such a group is excluded it cannot be said that a resulting jury will be representative of the community. The exclusion will leave untapped a reservoir of potential jurors without whom the jurors’ lists will lack constitutional completeness.¹¹⁴

Although Henchy J refers here to the exclusion of ‘any class or group of citizens’, he then goes on to mention the need for juries to be ‘representative of the community’. These two groups – community members and citizens – are not the same, and it has already been noted that the judges in this case seem to have used the term ‘citizen’ quite loosely, in a non-legal sense. Not all members of the community will necessarily be citizens, and the preference ought to be for the broader representation of the community in a general sense, if a jury is to be constitutionally valid. Traditionally, jury eligibility in this part of the world was not associated with citizenship; in both the UK and Ireland, the institution of the jury precedes the idea of citizenship by several hundred years. Jurors were traditionally landowners from the community where an alleged crime took place or where an alleged cause of action arose. The emphasis was on community – those who came from the same neighbourhood as the accused or the parties were deemed to be best placed to determine the facts. Granted, the earliest juries played a combined role of witness and

¹¹⁰ Ibid. Interestingly, the effect of jury duty on people who had previously good records of voting was negligible: *ibid*, p. 57.

¹¹¹ Ibid, p. 58.

¹¹² *O’Brien v Keogh* [1972] IR 144.

¹¹³ The Constitution Review Group recommended that Article 40.1 be extended to cover all individuals, regardless of citizenship. *Report of the Constitution Review Group* (July 1996, Dublin, Stationary Office), p. 224.

¹¹⁴ [1976] IR 38, at 76.

fact-finder, but nevertheless, even when the role of the jury evolved, the emphasis on neighbourhood persisted.

If the words ‘residents’ or ‘persons’ were to be substituted for ‘citizens’ in Henchy J’s analysis above, then the current jury lists indeed lack ‘constitutional completeness’. A class of persons – non-citizen residents – is currently excluded from jury service, with the result that the beliefs, standards and attitudes of this group may not be represented in the jury pool. The resulting juries are not therefore representative of the community. Generally speaking, there is an argument that juries which exclude a large section of Irish society are inconsistent with the general spirit of Article 38, and the general principles of fairness which must lie at the heart of the criminal justice system.

Finally, there is a historical argument as to why the citizenship requirement ought to be abolished. The exclusion of foreigners or aliens from Irish juries appears to be based on a historical anomaly. Until 1870, ‘aliens’ in both England and Ireland were entitled to sit on what were known as juries *de medietate linguae*. These were mixed juries, or juries ‘of the half-tongue’, available by the nineteenth century to aliens indicted or impeached on felonies or misdemeanours.¹¹⁵ They were composed of half locals and half aliens, and, where possible, the aliens were to be of the same nationality as the accused.¹¹⁶ The issue of mixed juries came to the fore after several high-profile incidents in the 1860s when Irish nationalists who had become naturalised Americans sought to be tried by mixed juries after the abortive Fenian uprising.¹¹⁷ Two Fenians who were naturalised US citizens were denied the jury *de medietate linguae*,¹¹⁸ and the cases generated considerable discussion of whether or not one could ever lose one’s status as a British subject.¹¹⁹ These questions were subsumed into the broader over-arching debate on aliens and naturalisation. In 1868 a Royal Commission examined the British laws of citizenship, naturalisation and allegiance, and commented upon the ‘unsatisfactory results of the operation of the law enabling aliens to claim a jury *de medietate linguae*’.¹²⁰ It was particularly critical of the lack of any requirement that the aliens be of the same nationality of the accused. It was largely this, coupled with the absence of any language requirement, which led the Commission to recommend the abolition of mixed juries.

As a result, the Naturalisation Act 1870 provided that an alien was no longer entitled to such a tribunal, but was ‘triable in the same manner as if he were a natural-born subject’.¹²¹ This applied to both England and Ireland. In the same year, the English Juries Act 1870¹²² allowed aliens to serve on regular trial juries for the first time.¹²³ This Act did not extend to Ireland, and there was no corresponding Irish

¹¹⁵ See Niamh Howlin, ‘Fenians, Foreigners and Jury Trials in Ireland 1865-69’ (2010) 45 *Irish Jurist* 51.

¹¹⁶ The Juries Act (Ireland) 1833 (3 & 4 Wm. IV, c. 91), s. 38 and the English County Jury Act 1825 (6 Geo. IV c. 50), s. 47.

¹¹⁷ See generally T.W. Moody, *The Fenian Movement* (Dublin, 1978), and Howlin, ‘Fenians, Foreigners and Jury Trials’.

¹¹⁸ *The Freeman’s Journal*, 31 October, 2 November 1867. See Sullivan, p. 74.

¹¹⁹ M. Brown, ‘Expatriation of Infants: Being a Study in the Conflict of Laws between Canada and the United States’ (1939) 3(1) *University of Toronto Law Review* 97, p. 98.

¹²⁰ *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance* 1868-69 H.C. [4109] xxv. 607, at xi.

¹²¹ 33 & 34 Vic., c. 14, s. 5.

¹²² 33 & 34 Vic., c. 77.

¹²³ Section 8 allowed aliens who had been domiciled in England or Wales for ten years to serve on juries, provided they complied with the other legal qualifications as to property. These were contained in the County Juries Act 1825 (6 Geo. IV, c. 50). S. 1 of this Act provided that s.1 provided that jurors

statute passed that year. Surprisingly, the Juries Act (Ireland) 1871 did not follow the English legislation in allowing aliens to sit on regular juries. It provided that no alien 'is or shall be qualified to serve on juries, inquests, or inquiries in any court, or on any occasion whatsoever.'¹²⁴ The reasons for the exclusion of aliens in Ireland are unclear, and contemporary parliamentary debates shed no light. Given the precarious political situation in 1870s Ireland, there may have been residual concern over the possibility of naturalised citizens of America or elsewhere seeking to sit on juries in politicised cases. Loyalty to the crown was difficult enough to secure on Irish juries as it was; the possible addition of long-term resident aliens might have further destabilised the already unpredictable and unreliable system of jury trial.

If the exclusion of aliens from all juries in Ireland was a mere drafting oversight, the years following presented numerous opportunities for correction, as the 1871 Act was amended several times.¹²⁵ However, their exclusion continued. The Juries (Ireland) Act 1873 exempted persons who could not read and write the English language.¹²⁶ Although this was primarily aimed at those whose primary language was Irish, it nevertheless would have applied to aliens with poor levels of English literacy. The Jurors Qualification (Ireland) Act 1876¹²⁷ also exempted such persons. The Juries Procedure (Ireland) Act 1876¹²⁸ made no specific mention of aliens, but it stated in section 21 that persons convicted of perjury were disqualified, '[i]n addition to the persons not qualified under the Juries (Ireland) Acts to serve on juries'. This suggests that that section 7 of the 1871 Act continued in force. In addition, the Jurors Qualification Act 1876¹²⁹ stated that every juror was to be a 'subject of the Queen.'¹³⁰ Again, the parliamentary debates contain no discussion of the issue of aliens, and their exclusion from Irish juries continued in stark contrast to the position in England.¹³¹ It is argued that the exclusion of aliens from juries, which was inherited by the 1927 and 1976 Acts, rests on an unprincipled foundation, and is not historically justifiable.

Conclusions

Although historically the jury was not a group representative of the wider community, over the past century or so it has evolved into such a body. The idea of trial by one's peers has come to be taken more literally than was originally intended, with the result that jury systems across the common law world have been radically reformed and refined in order to achieve a more balanced representation of society. Qualifications based on wealth, education, power or prestige are now virtually unheard of, and in most common law jurisdictions the primary restrictions on jury

should hold ten pounds *per annum* in lands or tenements, or a long lease. It also provided for the qualification of persons rated or assessed for the poor rate or the inhabited house duty. A juror could also be a householder with a house of not less than fifteen windows.

¹²⁴ 34 & 35 Vict., c.65, s. 7. Section 5 referred to 'Every man, being a subject of the Queen...'

¹²⁵ Irish Jury Act 1873 (36 Vic., c. 27), s.1, Jurors Qualification (Ireland) Act, 1876 (39 & 40 Vic., c. 21), s. 2.

¹²⁶ 36 & 37 Vic., c. 27, s. 1. Although it only exempted such persons, the effect was the same as disqualification.

¹²⁷ 39 & 40 Vic., c. 21

¹²⁸ 39 & 40 Vic., c. 78.

¹²⁹ 39 & 40 Vic., c. 21.

¹³⁰ Section 2.

¹³¹ Although it is worth noting that in the aftermath of World War I, in England, the Aliens Restriction (Amendment) Act 1919, s. 8 stated: 'No alien shall sit upon a jury in any judicial or other proceedings if challenged by any party to such proceedings'. For debate on this see *House of Commons Debates*, 5th series, vol. 120, col. [130-133], House of Commons, 22 October 1919.

service relate to age, mental capacity, criminal background, and whether one is registered to vote.

Chung argues out that ‘for putatively democratic states, the long-term exclusion of a significant fraction of the population from the rights and duties of full citizenship is untenable.’¹³² Some would disagree, and hold that some rights and duties ought to be limited to citizens, so that the attainment of full citizenship means something in a practical sense. It is far from clear that jury service is something which ought to be regarded as either a right bestowed exclusively on citizens, or a duty which forms an essential part of citizenship. Under current Irish legislation, it is not possible to empanel juries which are fully representative of the population, and it is proposed that the Irish citizenship requirement ought to be abolished.¹³³ In the absence of any compelling reasons to restrict jury eligibility to citizens, the requirement ought to be limited to one of residency.¹³⁴

According to O’Flaherty J, trial by a ‘reasonable cross-section of people’ is integral to the concept of trial by jury in Ireland. He said in *O’Callaghan v The Attorney General*¹³⁵ that ‘[t]he purpose of trial by jury is to provide that a person shall get a fair trial, in due course of law, and be tried by a reasonable cross-section of people acting under the guidance of the judge, bound by his directions on law, but free to make their findings as to the facts.’¹³⁶ Henchy J in *de Búrca* went so far as to say that *Bunreacht na hÉireann*, by providing a right to trial by jury under Article 38.5, required that the jury represent the community. He stated that ‘the jury must be drawn from a pool broadly representative of the community so that its verdict will be stamped with the fairness and acceptability of a genuinely diffused community decision.’¹³⁷ Doing away with the citizenship requirement would be a significant step towards achieving this.

Miller points out that ‘[i]mmigration on a significant scale, is now and will continue to be a significant feature of political life in Western liberal democracies.’ The normative implications of this are unclear: ‘[h]ow far is it reasonable to expect immigrants to adapt to existing conditions in the host society, and how far must citizens in the host society bend to accommodate ‘the strangers in our midst’?’¹³⁸ In the interests of promoting successful integration, greater recognition must be given to the contribution that immigrant communities can make to society and to the criminal justice system. The value of accommodating diversity should also be recognised. It

¹³² Ibid, p. 10.

¹³³ The citizenship requirement is but one element of this. The extensive categories of disqualified persons, exempt persons and persons excusable as of right leaves the 1976 Act open to criticism. Any legislation which follows the Law Reform Commission’s ultimate recommendations ought to narrow the categories of exemption and excusals from jury service.

¹³⁴ In the UK, the length of residency required for jury eligibility is five years. The Law Reform Commission recommends a similar five-year residency, but aside from the fact that this is also the length of residency required to gain Irish citizenship by naturalisation (see s. 15 of the Irish Nationality and Citizenship Act 1956 (inserted by s. 4 of the Irish Nationality and Citizenship Act 1986)), the Commission provides no clear reasons why five years would be considered optimal: *Consultation Paper on Jury Service* (March 2010), p. 49. There is arguably no reason why a shorter residency period of one or two years, similar to that existing in New Zealand and certain Caribbean islands may suffice. A year or two as a resident in Ireland will generally entail civic involvement and participation on a number of levels, including voting.

¹³⁵ [1993] 2 IR 17.

¹³⁶ [1993] 2 IR 17, p. 25.

¹³⁷ *De Búrca and Anderson v Attorney General* [1976] IR 38, p. 75.

¹³⁸ David Miller, ‘Immigrants, Nations and Citizenship’ (2008) 16(4) *Journal of Political Philosophy* 371, p. 371.

has been pointed out that the interplay between multiculturalism and jury trial has been the subject of numerous studies in the UK. It is suggested that similar concerns about ethnic diversity on juries may arise in Ireland, particularly with increased social diversification in the coming years. However, without rigorous empirical research such as that carried out by Thomas in the UK, it is difficult to assess with any precision whether the ethnic composition of juries in Ireland has an impact upon verdicts, and what the nature and extent of any such impact might be. Beyond the possible impact on verdicts, it must negatively affect perceptions of justice and engagement with ethnic minority communities.