

ARTICLES

SELECTION OF JURORS AND LAY ASSESSORS IN COMPARATIVE PERSPECTIVE: EURASIAN CONTEXT

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This article compares (1) the qualification of jurors or lay assessors; (2) methods of listing candidates for lay adjudication; and (3) selection and empanelling of jurors and lay assessors for a particular case, in various post-Soviet countries and Western countries. Two key issues are examined. The article examines whether the legislation of post-Soviet countries in relation to the qualification, listing and empanelling of jurors and lay assessors is consistent with the standards applied in developed democracies. Simultaneously, the article explores what standards and rules of selection of lay adjudicators should be incorporated into the legislation of post-Soviet states in order to insure impartiality and independence of lay adjudicators. The article reveals a significant number of defects and gaps that allow executives and court personnel to manipulate the selection process and hamper the formation of impartial, independent and representative lay courts. An examination of the legislation in post-Soviet countries and of the empirical data collected in Russia lead to the conclusion that the mechanisms of the voir dire, peremptory challenges and challenges to entire juries should be reviewed and improved in order to provide reliable safeguards for the selection of impartial and independent lay adjudicators and prevent parties from excluding prospective lay adjudicators for discriminatory reasons.

Key words: trial by jury; mixed courts; jurors; lay assessors; jury challenges; post-Soviet legal reforms; qualifications for jurors; jury service; voir dire; jury selection.

1. Introduction

Since ancient times, societies across the world have been searching for fairness in the adjudication of crimes. Many discovered it in people's participation in the

administration of justice or lay adjudication. As early as in ancient Greece and Rome, ordinary citizens judged their fellow citizens at people's assemblies. Trial by jury as a form of lay adjudication, which emerged in England in the 13th century, became an enduring and influential institution and a symbol of judicial democracy.¹ As other forms and models of lay adjudication evolved across the world, they had different historical roles and destinies.

Lay adjudication in criminal matters can be defined as the involvement of citizens, who may not have formal legal education and training, in deciding the guilt or innocence of the accused and the sentence if the accused is found guilty. This participation may only occur in a system where lay adjudicators share the power of decision-making with a judge or a panel of judges, or where citizens alone may serve as fact finders. The first method of lay adjudication comes in the form of the *mixed court*, in which the participating citizens are called 'lay assessors.' This is a hallmark of the Continental system of criminal adjudication. The second method refers to the *trial by jury*, the predominant model of criminal adjudication in common law countries.

Many contemporary lay adjudication systems descended from the English trial by jury. British colonists transported the English jury system to the 'new lands' of Africa, America, Asia, Australia and New Zealand.²

Other countries, like Russia and Spain, initially adopted this institution as a result of reforms carried out by liberal rulers in the second half of the 19th century.³

The institution of trial by jury did not develop evenly across the countries that implemented it in their justice systems in the 18th – 21st century. In the Netherlands, for example, the institution of the jury was transplanted onto a new, and 'alien' legal system, and was eventually abolished. In other jurisdictions, the jury system developed into or was replaced by a different model of lay adjudication, a mixed court of professional and lay judges, which sometimes preserved the name *jury*, for example in France, Greece, and Portugal. In some jurisdictions, including the United Kingdom and United States, the institution of the jury became an essential element of the criminal justice system and a part of the legal culture. In Russia, trial by jury was resurrected in criminal proceedings in the early 1990s after almost a century of rejection of everything associated with 'bourgeois' legal systems.

¹ John Hostettler, *The Criminal Jury Old and New: Jury Power from Early Times to the Present Day* 21–23 (Waterside Press 2004).

² Richard Vogler, *The International Development of the Jury: The Role of the British Empire*, 72 *Int. Rev. Pen. L.* 525 (2001); John M. Bennet, *The Establishment of Jury Trial in New South Wales*, 3 *Sydney L. Rev.* 463 (1959); Herbert V. Evatt, *The Jury System in Australia*, 10 *Austl. L.J.* 49 (1936); Christopher Granger, *The Criminal Jury Trial in Canada* (2nd ed., Carswell 1996).

³ Stephen C. Thaman, *The Resurrection of Trial by Jury in Russia*, 31 *Stanf. J. Int. L.* 61 (1995) [hereinafter Thaman, *The Resurrection of Trial*]; Samuel Kucherov, *Courts, Lawyers and Trials Under the Last Three Tsars* (Greenwood Press 1974); Stephen C. Thaman, *Spain Returns to Trial by Jury*, 21 *Hastings Int. & Comp. L. Rev.* 241 (1998); Carmen Gleadow, *Spain's Return to Trial by Jury: Theoretical Foundations and Practical Results, 2001–2002* *St. Louis-Warsaw Transatlantic L.J.* 56 (2002).

The future extent of lay adjudication in the world is not absolutely certain. Some countries with an established criminal justice system are presently reconsidering the role of lay adjudication. For example, in the United Kingdom, the scope of jury trials has been recently reduced.

By contrast, many countries with an authoritarian past and criminal justice systems in transition, in particular countries of the former Soviet Union, are implementing lay adjudication reforms. Russia became the first post-Soviet state to adopt the institution of the jury. In recent years, three other post-Soviet countries, Kazakhstan (2007), Georgia (2011) and Ukraine (2012), introduced or reformed courts with lay adjudicators, and the fourth country, Kyrgyzstan, expressed its intention to introduce trial by jury in January 2015.⁴ Although legislation in all four countries uses the term 'lay adjudication' – court with participation of jurors (*sud s uchastiem prisyzhnykh*) or trial by jury (*sud prisyzhnykh*) – not all of these countries introduced a classical jury model of lay participation similar to the one implemented in Russia. Only Georgia and Kyrgyzstan have introduced or are planning to introduce juries. Kazakhstan and Ukraine introduced mixed courts. The Kazakhstani court is based on the French model of *cour d'assises*⁵ and consists of one professional judge and ten lay assessors (before the reform of 2010 – two professional judges and nine lay assessors).⁶ Ukraine's mixed court system is based on the German model of *Schöffengericht* and consists of two professional judges and three lay assessors.⁷ Finally, several other post-Soviet states such as Belarus, Tajikistan, Turkmenistan and Uzbekistan retained the Soviet model of mixed courts, which is very similar to the German model.⁸

This article considers (1) the eligibility of jurors or lay assessors; (2) methods of compiling the list of candidates for lay adjudication; and (3) empanelment of jurors and lay assessors for a particular case. Two key issues are examined. This article examines whether the legislation of post-Soviet countries in relation to the selection of jurors and lay assessors is consistent with the standards of selection of lay adjudicators applied in developed democracies, and simultaneously asks

⁴ Закон Кыргызской Республики «О присяжных заседателях в судах Кыргызской Республики» [*Zakon Kyrgyzskoi Respubliki 'O prisyzhnykh zasedatelyakh v sudakh Kyrgyzskoi Respubliki'*] [Law of the Republic of Kyrgyzstan on Jurors in Courts of Kyrgyz Republic] (adopted on July 15, 2009 No. 215, with amendments as of Aug. 2, 2012) [hereinafter *Zakon Kyrg. o prisyzhnykh zasedatelyakh*], Art. 14 (Kyrg.).

⁵ See more on different models of lay adjudication in John D. Jackson & Nikolay P. Kovalev, *Lay Adjudication and Human Rights in Europe*, 13 Colum. L. Rev. 83 (2006).

⁶ Nikolai Kovalev & Gul'nara Suleymenova, *New Kazakhstani Quasi-Jury System: Challenges, Trends and Reforms*, 38 Int. J. L., Crim. & Just. 261 (2010).

⁷ Уголовно-процессуальный кодекс Украины [*Ugolovno-protsessualnyi kodeks Ukrainy*] [Criminal Procedure Code of Ukraine] (adopted on Apr. 13, 2012, No. 4651-VI) [hereinafter *UPK Ukr.*], Art. 31(3) (Ukr.).

⁸ Nikolay Kovalev, *Lay Adjudication of Crimes in the Commonwealth of Independent States: An Independent and Impartial Jury or a 'Court of Noddors?'*, 11 J. E. Eur. L. 123 (2004).

what standards and rules for qualifying and selecting lay adjudicators should be incorporated into the legislation of post-Soviet states in order to insure impartiality and independence of lay adjudicators.

In post-Soviet countries, the selection of lay adjudicators is usually regulated by laws on jurors or lay assessors, provisions on jurors and lay assessors in the law on judges and the judicial system, and the code of criminal procedure. In two post-Soviet countries, the governments adopted special laws on jurors or lay assessors. Russia introduced the Federal Law on Jurors in August 2004, which replaced sect. V of the Law on the Judicial System.⁹ The Kazakhstani Law on Lay Assessors was adopted in January 2006, and introduced in January 2007, along with the provisions of the Code of Criminal Procedure, which stipulates the mixed court model.¹⁰ The Kyrgyz Law on Jurors was adopted in 2009, and is expected to come into force in different Kyrgyz provinces starting in 2015.¹¹

In the majority of post-Soviet countries, procedures for qualifying and selecting lay adjudicators are stipulated in their laws on judges, the judicial system or courts.¹² In some countries, including Georgia, Kazakhstan, Russia and Ukraine, the selection of jurors and lay assessors in court is regulated by codes of criminal procedure.¹³ Only

⁹ Федеральный закон РФ «О присяжных заседателях» [*Federal'nyi Zakon RF 'O prisyazhnykh zasedatelyakh'*] [Federal Law of the Russian Federation on Jurors] (adopted on Aug. 20, 2004 No. 113-FZ, with amendments as of Feb. 1, 2014) (Russ.) [hereinafter *FZ RF o prisyazhnykh zasedatelyakh*].

¹⁰ Закон Республики Казахстан «О присяжных заседателях» [*Zakon Respubliki Kazakhstan 'O prisyazhnykh zasedatelyakh'*] [Law of the Republic of Kazakhstan on Jurors] (adopted on January 16, 2006 No. 121-III ZRK, with amendments as of March 3, 2014) [hereinafter *Zakon RK o prisyazhnykh zasedatelyakh*].

¹¹ *Zakon Kyrg. o prisyazhnykh zasedatelyakh*.

¹² Кодекс Республики Беларусь о судостроительстве и статусе судей [*Kodeks Respubliki Belarus o sudoustroistve i statute sudei*] [Code of the Republic of Belarus on the Judicial System and Status of Judges] (adopted on June 29, 2006 No. 139-Z, with amendments as of July 21, 2012) [hereinafter *KoSISS Belr.*], Ch. 15; Закон Туркменистана «О суде» [*Zakon Turkmenistana 'O sude'*] [Law of Turkmenistan on Court] (adopted on Aug. 15, 2009) [hereinafter *Zakon Turkm. o sude*]; Закон Украины «О судостроительстве и статусе судей» [*Zakon Ukrainy 'O sudoustroistve i statute sudei'*] [Law of Ukraine on Judicial System and Status of Judges] (adopted on July 7, 2010 No. 2453-VI, with amendments as of Jan. 16, 2014) [hereinafter *Zakon Ukr. o sudoustroistve i statute sudei*]; Закон Республики Узбекистан «О судах» [*Zakon Respubliki Uzbekistan 'O sudakh'*] [Law of the Republic of Uzbekistan on Courts] (adopted on Sept. 2, 1993 No. 924-XII, with amendments as of Dec. 1, 2013) [hereinafter *Zakon Uzb. o sudakh*].

¹³ Уголовно-процессуальный кодекс Грузии [*Ugolovno-protsessualnyi kodeks Gruzii*] [Criminal Procedure Code of Georgia] (adopted on Oct. 9, 2009 No. 1772-Ilc) [hereinafter *UPK Gruzii*], Arts. 221–224; Уголовно-процессуальный кодекс Республики Казахстан [*Ugolovno-protsessualnyi Kodeks Respubliki Kazakhstan*] [Criminal Procedure Code of the Republic of Kazakhstan] (adopted on Dec. 13, 1997 No. 206-I) [hereinafter *UPK Kaz.*], Ch. 59 (Kaz.); Уголовно-процессуальный кодекс Российской Федерации [*Ugolovno-protsessualnyi Kodeks Rossiiskoi Federatsii*] [Criminal Procedure Code of the Russian Federation] (adopted on Dec. 18, 2001 No. 174-FZ) [hereinafter *UPK RF*], Arts. 328–332 (Russ.); *UPK Ukr.*, Arts. 385–388.

in Tajikistan is the selection process of lay assessors stipulated in the by-law passed by the Parliament.¹⁴

2. Eligibility for Lay Adjudication Service

As a rule, in order to be eligible for jury or lay assessor's service in post-Soviet countries, a person should satisfy some mandatory qualifications such as minimum age, citizenship and registration as a voter. Moreover, a person can be disqualified or excused from jury service by one of the reasons provided by law, such as mental or physical disability, service in the police or other law enforcement agencies, a criminal record or lack of knowledge of the official language.

2.1. Minimum Age

In contemporary English,¹⁵ Scottish,¹⁶ the vast majority of both Canadian¹⁷ and American jury systems, and in some European mixed court systems (including the Bulgarian, Croatian, Danish, Liechtenstein, Macedonian, Norwegian, Portuguese, Serbian, Swedish and Swiss systems) the minimum age for jurors and lay assessors is eighteen years.¹⁸

In post-Soviet legislation, however, the age requirements for potential jurors and lay assessors are more restrictive. In virtually all post-Soviet countries, lay adjudicators are qualified from among men and women not younger than twenty-five and even thirty.¹⁹ This is opposed to 'universal jury eligibility' obtained by citizens at the age of eighteen in the vast majority of common law jury systems and some mixed court systems.²⁰ Note, however, that the Georgian Criminal Procedure Code does not contain a minimum age for candidates for jury service. On the basis of the requirement of the Criminal Procedure Code of Georgia, candidates should be

¹⁴ Положение о народных заседателях (утв. Постановлением Маджлиси намоияндагон Маджлиси Оли Республики Таджикистан от 28 июня 2002 г. № 685) [*Polozhenie o narodnykh zasedatelyakh (utv. Postanovleniem Madzhlisi namoiandagon Madzhlisi Oli Respubliki Tajikistan ot 28 Iyunia 2002 g.* [Regulation on Law Assessors (approved by the Resolution of the Assembly of Representatives of the Supreme Assembly of the Republic of Tajikistan on June 28, 2002 No. 685)]] (Taj.) [hereinafter *Polozhenie Taj. o narodnykh zasedatelyakh*].

¹⁵ Juries Act, Ch. 23, § 1 (1974) (Eng.).

¹⁶ Peter Duff, *The Scottish Criminal Jury: A Very Peculiar Institution*, in *World Jury Systems* 255 (Neil Vidmar, ed.) (Oxford University Press 2000).

¹⁷ David M. Tanovich et al., *Jury Selection in Criminal Trials* (Irwin Law 1997).

¹⁸ Jackson & Kovalev, *supra* n. 5, at 101.

¹⁹ *Zakon Ukr. o sudoustroistve i statue sudei*, Art. 59.

²⁰ Neil Vidmar, *A Historical and Comparative Perspective on the Common Law Jury*, in *World Jury Systems*, *supra* n. 16, at 28.

registered as voters, thus inferring that the minimum age for a juror in Georgia is the minimum voting age: eighteen.²¹

One of the reasons for the high minimum age requirement for jurors and lay assessors in post-Soviet states is the legacy of Tsarist Russian and Soviet legislation. According to the Statute on Judicial Institutions of 1864, the age of twenty-five was the minimum for a juror in Tsarist Russia.²² Although, when Bolsheviks replaced jurors by lay assessors they removed any age qualifications apart from the eighteen-year-old voting minimum,²³ in 1948 the age qualification was increased to twenty-three,²⁴ and in 1958 the minimum age of twenty-five was reinstated.²⁵ The former Chairman of the Supreme Court of the RSFSR, G.Z. Anashkin, justified the decision of the Soviet legislator to increase the minimum age for lay assessors by stating that a person who adjudicates another person's fate should have sufficient life experience.²⁶

This rationale raises several concerns. The first issue is whether a young adult, or a person between the age of eighteen and twenty-five, is unable to deliver a just and true verdict based on the presented evidence. The second is, if the legislator decided that young adults were not able to reach reasonable decisions in adjudication, would it be also appropriate to exclude this category of citizens from voting? The standard age requirement for lay assessors and jurors in post-Soviet countries is higher than the minimum age requirement for a person who wishes to stand for local election,²⁷

²¹ *UPK Gruzii*, Art. 29.

²² Учреждение судебных установлений Российской империи // Полное собрание законов Российской империи. Собрание второе. № 41475. Ст. 81 [*Uchrezhdenie sudebnykh ustanovlenii Rossiiskoi imperii // Polnoe Sobranie Zakonov Rossiiskoi Imperii. Sbranie vtoroe*. No. 41475. St. 81 [*Law on Judicial Institutions of the Russian Empire*, in 39 Complete Collection of Laws of the Russian Empire. Second Collection, No. 41475, Art. 81]] (Типография II Otdeleniya Sobstvennoi E.I.V. Kantselyarii 1864).

²³ Положение о судоустройстве РСФСР 1922 г. (ст. 15) // *Голунский С.А. История законодательства СССР и РСФСР по уголовному процессу и организации суда [Polozhenie o sudoustroistve RSFSR 1922 g. (st. 15) // Golunskii S.A. Istoriya zakonodatel'stva SSSR i RSFSR po ugovnomu protsessu i organizatsii suda [Regulation on Judicial Organization RSFSR 1922, Art. 15, in Sergei A. Golunskii, History of Legislation of the USSR and RSFSR on Criminal Procedure and Organization of Courts]] 240 (Gosyurizdat 1955).*

²⁴ Положение о выборах народных судов 1948 г. (ст. 2) [*Polozhenie o vyborah narodnykh sudov RSFSR 1948 g. (st. 2) [Regulation on Election of Peoples Courts RSFSR 1948, Art. 2]*], in Golunskii, *supra* n. 23, at 592.

²⁵ Основы законодательства о судоустройстве Союза ССР, союзных и автономных республик 1958 г. // Ведомости Верховного Совета СССР. 1959. № 1(12). Ст. 29 [*Osnovy zakonodatel'stva o sudoustroistve Soyuzu SSR, soyuznykh i avtonomnykh respublik 1958 // Vedomosti Verkhovnogo Soveta SSSR*. 1959. No. 1(12). St. 29 [*Fundamentals of Legislation of the USSR and the Union and Autonomous Republics on the Judicial Organization*, 1959(1) Bulletin of the USSR Supreme Council, item 12, Art. 29]].

²⁶ *Анашкин Г.З. Народные заседатели в советском суде [Anashkin G.Z. Narodnye zasedateli v sovetskom sude [Grigorii Z. Anashkin, Peoples' Assessors in Soviet Court]] 7 (3rd ed., Gosyurizdat 1960).*

²⁷ The Ukrainian legislation allows a person who has attained the age of eighteen to stand for election as local mayors or members of local legislative assemblies. See, e.g., Закон Украины «О выборах депутатов Верховной Рады Автономной Республики Крым, местных советов и сельских,

or even for Parliamentary election.²⁸ This inconsistency between qualifications for lay assessors and jurors vis-a-vis MPs and local mayors, in post-Soviet countries also raises the question as to whether it might be considered a form of age discrimination.

Contrarily, some proponents of age restrictions in the post-Soviet countries argue that the involvement of young adults in lay adjudication will be unfair towards professional judges because the minimum age requirement for a professional judge is significantly higher than the universal suffrage age. Thus, former President of the Supreme Court of Ukraine, V.T. Malyarenko, believes that the age of jurors should not be less than the minimum age requirement for the presiding judge in different courts, for instance twenty-five years for jurors in county courts, thirty years in provincial courts and thirty-five years in the Supreme Court.²⁹ Lower age requirements for jurors, according to Malyarenko, would discriminate against the presiding judge. This reasoning is similar to other claims of opponents to lay adjudication, who deny that adjudicators without any formal knowledge of the law should be allowed to function alongside professional judges, who are required to undertake a professional education and special judicial training.

It could be argued that the government has less trust in younger citizens because a significant number of young adults, in particular young males, are more often confronted with the arbitrariness of law enforcement agencies.³⁰ In other words, governments in post-Soviet countries may presume that young adults would be more reluctant to vote for conviction because they do not trust law enforcement agencies.

The exclusion of young adults from jury or lay assessors' lists partly deprives a significant group of socially active citizens of the right to participate in public affairs. Since lay adjudication is considered a form of civic education it would be preferable for a society to include more young people in lay adjudication in order to develop a sense of responsibility for their decisions and respect for such constitutional values as human life, rights and freedoms.³¹ Some post-Soviet governments, for example

поселковых, городских голов» [*Zakon Ukrainy o vyborakh deputatov Verkhovnoi Rady Avtonomnoi Respubliky Krym, mestnykh sovetov i sel'skikh, poselkovykh, gorodskikh golov*] [Law of Ukraine on the Election of Deputies of the Supreme Council of the Autonomous Republic of Crimea, Local Councils and Village, Town and City Mayors]] (adopted on July 10, 2010 No. 2487-VI), Art. 9.

²⁸ According to Art. 76 of the Ukrainian Constitution 'a citizen of Ukraine who has attained the age of twenty-one on the day of elections . . . may be a National Deputy of Ukraine.'

²⁹ Малеярєнко В.Т. Позитиви і негативи суду присяжних // Право України. 2000. № 3. С. 3, 9 [Malyarenko V.T. *Pozitivi i negativi sudu prisyazhnykh* // *Pravo Ukrainy*. 2000. No. 3. S. 3, 9 [Vasiliy T. Malyarenko, *Advantages and Disadvantages of Trial by Jury*, 2000(3) Law of Ukraine 3, 9].

³⁰ Степанков И. Милицейский произвол в зеркале социологов [Stepankov I. *Militseiskyi proizvol v zerkale sotsiologov*] [Igor Stepankov, *Police Arbitrariness in the Mirror of Sociologists*], *Rosiiskaya gazeta* (Oct. 15, 2003), <<http://www.rg.ru/2003/10/15/proizvol.html>> (accessed June 18, 2014).

³¹ Alexis de Tocqueville, *Democracy in America* 262 (University of Chicago Press 2000); Neil Vidmar & Valerie P. Hans, *Judging the Jury* (Plenum Press 1986); Sanja Kutnjak Ivković, *Lay Participation in Criminal Trials: The Case of Croatia* 46–49 (Austin & Winfield 1999).

Russia, assign significant importance to military education of young people and aim to enlist as many young conscripts as possible for mandatory military training. The opportunity for young people to participate in the administration of justice is no less important than their knowledge of warfare and their constitutional duty to defend their country. Traditionally, in post-Soviet countries, politicians and ordinary people call the army a 'school of life, patriotism and courage.' By analogy, it would be fair to say that participation of younger citizens in lay adjudication can be a 'school of civic consciousness.'

2.2. Criminal Record as a Ground for Disqualification

Post-Soviet countries have different approaches towards disqualification of prospective jurors or lay assessors based on previous criminal records. Four post-Soviet countries, Kazakhstan, Kyrgyzstan, Russia and Ukraine, disqualify only those ex-convicts whose records of conviction were not expunged (*'pogashennaya sudimost'*). According to Soviet and post-Soviet criminal law, a record of criminal conviction (*'sudimost'*) can be expunged if, within the established period of time after serving the punishment, this person does not commit any other offences. For instance, according to Russian criminal law, if a person is convicted of non-aggravated murder and serves his full sentence, the record of his conviction will be expunged eight years after he is released from prison. In the case of ordinary theft, the record of conviction is expunged three years after the punishment has been served.³²

In Belarus, the legislature applies a different approach to excluding persons with previous criminal convictions. The absence of a proviso that a record of previous convictions means only a 'non-expunged' record allows the state bodies to interpret the wording of the statute to exclude anyone with any criminal conviction from becoming a potential juror or lay assessor. This approach could be said to violate the right of potential lay adjudicators to participate in the administration of justice. Firstly, according to the criminal legislation of Belarus, a person convicted of any crime is considered 'convicted' until his or her record of conviction is expunged.³³ Secondly, after the ex-USSR countries became independent states, a number of offences were decriminalised, including buggery (*muzhelozhstvo*),³⁴ parasitism (*tuneyadstvo*) or evasion from work, anti-Soviet agitation and propaganda. Therefore, people convicted for such criminal acts can be erroneously excluded from lay assessor service in Belarus.

³² Уголовный кодекс Российской Федерации [*Ugolovnyi kodeks Rossiiskoi Federatsii* [Criminal Code of the Russian Federation]], [hereinafter *UPK RF*] Art. 86.

³³ Уголовный кодекс Республики Беларусь [*Ugolovnyi kodeks Respubliki Belarus* [Criminal Code of the Republic Belarus]], Arts. 45, 97 and 98.

³⁴ Note that two post-Soviet countries, Turkmenistan and Uzbekistan, still prosecute sodomy between consenting adults. See Уголовный кодекс Туркменистана [*Ugolovnyi kodeks Turkmenistana* [Criminal Code of Turkmenistan]], Art. 135, and Уголовный кодекс Республики Узбекистан [*Ugolovnyi kodeks Respubliki Uzbekistan* [Criminal Code of the Republic Uzbekistan]], Art. 120.

2.3. Knowledge of the Official Language

Some post-Soviet countries, including Kazakhstan,³⁵ Ukraine,³⁶ and Uzbekistan,³⁷ allow courts to use the language of the majority of the population living in a particular area, Russian or any other language besides the official language of the titular nation. At the same time, according to the current legislation of some countries, lay assessors or jurors who do not have a command of the official language are excused or disqualified, and excluded from jury or lay assessors' lists at pre-trial stage.

According to Kazakhstani legislation, citizens may apply for exclusion from lay assessors' lists before being summoned to try a criminal case on the ground that they do not know the language of the proceedings.³⁸ This provision could encourage people who do not have a command of the official (Kazakh) language to apply for excusal from lay assessor service and hence reduce the pool of lay assessors from the Russian-speaking population, which constitutes significant part of the population in some areas.³⁹

Ukrainian legislation regulating pre-trial qualification of lay assessors and jurors contains an even more biased provision, according to which citizens may serve as lay assessors or jurors only if they have knowledge of the Ukrainian language.⁴⁰ Thus, the Ukrainian Government and legislature disregard the fact that many Ukrainian citizens in the eastern and southern provinces of the country do not speak Ukrainian⁴¹ and hence are automatically excluded from jury and lay assessors' lists. This language policy could cause a number of problems in eastern, southern and some central provinces of the country. Firstly, courts could face a problem of finding a sufficient number of potential jurors and lay assessors who speak Ukrainian, which could lead to delays and additional expenditures for appropriate checks and evaluation. Secondly, and most importantly, in regions with a predominantly Russian speaking population, jury trials conducted in the Ukrainian language with participation of

³⁵ *UPK Kaz.*, Art. 30.

³⁶ *Zakon Ukr. o sudoustroistve i statute sudei*, Art. 12(4). Note, however, that the new Criminal Procedure Code of Ukraine explicitly states that the language of the criminal proceedings is the state or Ukrainian language (*UPK Ukr.*, Art. 29(1)).

³⁷ *UPK Uzb.*, Art. 20.

³⁸ *Zakon Kaz. o prisiazhnykh zasedatelyakh*, Art. 10(3)(1).

³⁹ База данных ФОМ. Казахстан. Поле мнений [*Baza dannykh FOM. Kazakhstan. Pole mnenii* [*FOM Database. Kazakhstan. The Field of Opinions*]] (2002), <http://bd.fom.ru/map/kazakhstan/506_12746> (accessed June 16, 2014).

⁴⁰ *Zakon Ukr. o sudoustroistve i statute sudei*, Art. 59(2)(6).

⁴¹ Вахтин Н. и др. Новые языки новых государств: явление на стыке близкодержавных языков на постсоветском пространстве [Vakhtin N. i dr. *Novye yazyki novykh gosudarstv: yavlenie na styke blizkoderzhavnykh yazykov na postsovetskom prostranstve* [Nikolai Vakhtin et al., *New Languages of New States: Phenomenon at the Junction of neighboring States' Languages in the Post-Soviet Countries*]] (2003), <<http://old.eu.spb.ru/ethno/projects/project3/list.htm>> (accessed June 16, 2014).

only Ukrainian speaking lay adjudicators may lead to dissatisfaction of the parties involved in the trial and arouse disapproval across local communities.

2.4. Disqualification and Exclusion of Judges, Prosecutors and Other Officials Involved in the Administration of Criminal Justice

All post-Soviet countries, except Russia, automatically disqualify officials associated with the criminal justice system, such as judges, prosecutors and law enforcement agents, from jury or people's (lay) assessor service. In Russia, these professionals can be excluded from jury lists only if they apply for excusal. The Russian approach seems less preferable for ensuring independence and impartiality of trial by jury.

A recent reform in England allowing the judiciary, barristers, solicitors, police officers, prison officers, and court staff to serve as jurors⁴²) is not without controversy. Interestingly, in England defendants argue that participation of police officers and prosecuting solicitors in adjudication as jurors undermines the independence and impartiality of the jury because 'the tribunal conducting the trial must be free from actual or apparent bias.'⁴³ The English Court of Appeal and the House of Lords dismissed the appeal of Nurlon Abdroikov, convicted by a jury that included among its members a serving police officer. The House of Lords held that the applicable test is whether, on the particular facts of each case, a fair-minded and informed observer would conclude that there was a real possibility that the jury was biased.⁴⁴ In other words, the mere fact that the police officer was a member of the jury is not enough to find a violation of fair trial rights of the accused.

It can be argued, however, that the involvement of criminal justice system professionals in lay adjudication could have adverse effects in transitional legal systems. The House of Lords' approach in relation to the English jury system is not applicable to criminal justice systems across the post-Soviet states because many contemporary post-Soviet judges, prosecutors, police officers and secret service agents, have a strong accusatorial bias against defendants.⁴⁵ Thus, participation of

⁴² Criminal Justice Act, c. 44, § 321 and sch. 33 (2003) (Eng.).

⁴³ *R v. Abdroikov et al.* [2007] UKHL 37; [2008] 1 All ER 315.

⁴⁴ *Id.*

⁴⁵ Accusatorial bias (in Russian *obvinitel'nyi uklon*), which sometimes is also called 'prosecutorial bias,' or bias against defendants, can be defined as a tendency of the judge to presume that the defendants are usually guilty. Judges with accusatorial bias tend to underestimate arguments and evidence of the defence, and, on the contrary, overestimate the significance of the position of the prosecution for justice and mostly rely on indictment. Алексеева Л.Б., Радутная Н.В. Предупреждение судебных ошибок, обусловленных обвинительным уклоном в деятельности судов первой и кассационной инстанции: Пособие для судей [Alekseeva L.B., Radutnaya N.V. *Preduprezhdenie sudebnykh oshibok, obuslovlennykh obvinitel'nyim uklonom v deyatel'nosti sudov pervoi i kassatsionnoi instantsii* [Lidiya B. Alekseeva & Nona V. Radutnaya, Prevention of Judicial Errors Caused by Accusatory Bias in Trial and Appellate Courts: Manual for Judges]] 4–5 (VYuZl 1989). See also Панасюк А.Ю. Презумпция виновности в системе профессиональных установок судей // Государство и право. 1994. № 3. С. 70 [Panasyuk A.Yu. *Prezumpsiya vinovnosti v sisteme professional'nykh ustanovok sudei* // Gosudarstvo

professionals involved in the administration of criminal justice may damage the impartiality of the jury. A police officer or a prosecutor serving as a juror, despite the instructions of the presiding judge, could inform his or her fellow jurors about inadmissible evidence that this juror might obtain from his or her colleagues at the place of work, for instance facts of previous convictions of the defendant. Moreover, jurors selected from among law enforcement agents may be influenced by their superiors or colleagues, who have a direct interest in the outcome of the case. This means that the participation of law enforcement officers and officials from the prosecutor's office may also diminish the independence of a particular juror.

Although theoretically the defence may use peremptory challenges or challenges for cause in order to exclude such jurors during *voir dire* or other empanelment processes in court, this is often difficult in practice for a number of reasons. Firstly, sometimes the defence may not be aware that a prospective juror is a law enforcement agent. Secondly, even if the defence knows that a prospective juror is a police officer or a representative of any other law enforcement agency, successful challenges for cause cannot be based on mere allegations of accusatorial bias on the part of this prospective juror, but should be grounded in particular facts of which the attorney might not be aware. Thirdly, although the defence has the right to peremptory challenges of prospective jurors, the number of challenges is limited to two for each party, or occasionally more if the number of prospective jurors in the jury pool allows so. Some specific issues of challenging jurors, which emerged after ten years of jury trials in Russia, will be discussed later in this paper.

2.5. Educational, Income and Other Qualifications

Although the current legislation of post-Soviet countries contains neither educational nor income (property) qualifications, the Russian judiciary, prosecutors and some conservative legal scholars propose that the government should introduce these and other qualifications for jurors. For example, a survey of Russian practices, conducted by the author, sought views of Russian judges, prosecutors and advocates on the issue of changing the jury law.⁴⁶ When asked about desirable changes, several judges and prosecutors stated that educational qualifications should be introduced for potential jurors. However, Russian respondents did not clarify what standards should be used for educational qualification.

Some European countries apply educational qualifications for their lay assessors. For instance, in Greece and Italy, lay assessors must have at least a secondary school

i pravo. 1994. No. 3. S. 70 [Alexander Yu. Panasyuk, *Presumption of Guilt in the System of Professional Biases of Judges*, 1994(3) State and Law 70]; Thaman, *The Resurrection of Trial*, *supra* n. 3, at 67; Мельник В.В. Искусство защиты в суде присяжных [Mel'nik V.V. *Iskusstvo zashchity v sude prisyzhnikh* [Valerii V. Mel'nik, Art of Defense in Trial by Jury]] 32 (Delo 2003).

⁴⁶ Nikolai Kovalev, *Criminal Justice Reform in Russia, Ukraine, and the Former Republics of the Soviet Union* 539–560 (Edwin Mellen Press 2010).

certificate. In Russia, 90% of citizens have at least a secondary education; therefore it is unclear whether the proponents of educational qualifications meant even a higher requirement, for example, a university degree. If only university graduates were qualified for jury service, prospective jurors would be selected from 28% of the Russian population.⁴⁷ Such educational qualifications would, therefore, fail to ensure a fair cross-section of various communities in lay adjudication.

In addition to educational qualifications, several prosecutors from Rostov province who participated in the author's survey, suggested that income or property qualifications (*imushchestvennyi tsenz*)⁴⁸ should be applied to prospective jurors. However, the respondents did not specify any standards to be used for such qualification. Some Russian scholars, for instance, Professor Demichev, of the Nizhni Novgorod Academy of the Interior Ministry, suggests that an income qualification should be based on the 'subsistence minimum' (*prozhitochnyi minimum*).⁴⁹ Professor Demichev claims that some Russian citizens who respond to jury summons are more interested in receiving a juror's allowance than in their role in the administration of justice. According to Demichev, income qualifications would exclude 'lumpen' citizens, who deteriorate the quality of trial by jury.⁵⁰

These arguments in favour of income qualification are not convincing. The fact that, for some citizens, jury compensation is one of the motivations to respond to a jury summons does not mean that such jurors cannot be fair and able to deliver a true and just verdict. Using the 'subsistence minimum' as a standard for income qualification would disqualify a significant number of Russian citizens from jury service. According to official statistics, about 12% of the total Russian population in 2013 had an income below the subsistence minimum.⁵¹ Moreover, income qualifications can be in conflict with educational qualifications since many people with university degrees (*Russian intelligentsia*) live below middle class standards, and some *nouveau riche* (*novye russkie*) became affluent without any higher education. Moreover, the proposal to introduce income qualifications sounds particularly

⁴⁷ Об итогах всероссийской переписи населения 2010 г. [*Ob itogakh vserossiiskoi perepisi naseleniya* [About the Results of the Russian National Census in 2010]], *Rosiiskaya gazeta* (Dec. 22, 2011), <<http://www.rg.ru/2011/12/16/stat.html>> (accessed June 16, 2014).

⁴⁸ The Russian term *imushchestvennyi tsenz* from Russian *imushchestvo* – property can be translated into English either as property or income qualification.

⁴⁹ The term *subsistence minimum* is a minimum maintenance rate established by the Government per capita per month.

⁵⁰ Демичев А.А. Теневое право и суд присяжных // Государство и право. 2004. № 7. С. 104, 105 [Demichev A.A. *Tenevye pravo i sud prisyazhnykh* // *Gosudarstvo i pravo*. 2004. No. 7. S. 104, 105 [Alexei A. Demichev, *Shadow Law and Trial by Jury*, 2004(7) State and Law 104, 105]].

⁵¹ Доходы 12 процентов россиян ниже прожиточного минимума [*Dokhody 12 protsentov rossiiyan nizhe prozhitochnogo minimuma* [Income of 12 Percent of Russians is Below Subsistence Minimum]], *Pravda* (Nov. 25, 2013), <<http://www.pravda.ru/news/economics/25-11-2013/1183272-money-0/>> (accessed June 16, 2014).

provocative and discriminatory in Russia, a country that declared democracy and equality of all citizens regardless of their social or property status.⁵²

Property or income qualifications were abolished in developed democracies in the second half of the 20th century: in Australia in 1947–1957;⁵³ in England in 1972;⁵⁴ in the Republic of Ireland in 1976.⁵⁵ For instance, in *de Búrca & Anderson v. Attorney General*, the Irish Supreme Court unanimously held that property qualification was inconsistent with either the equality clause or the criminal jury clause of the national Constitution.⁵⁶ Russia and other post-Soviet nations in the process of democratisation and reforming criminal justice systems should follow the example of developed Western democracies that abolished property qualifications, rather than the approach of developing countries mentioned above.

Another qualification proposed by Professor Demichev is the qualification of ‘reliability’ or ‘trustworthiness’ (*tsenz blagonadezhnosti*).⁵⁷ By referring to the 19th century Russian jury system, Demichev argues that jurors in modern Russia should be selected on the basis of good moral characteristics. According to Demichev, a reliability qualification can serve as an instrument for the exclusion of ‘undesirable persons such as the unemployed, “alcohol abusers,” and the homeless.’

The introduction of a reliability qualification, however, is presumptively unjustifiable since it could give the government the opportunity to exclude citizens from jury service on subjective grounds. The criteria proposed by Demichev cannot ensure the objective exclusion of ‘unreliable’ persons. Taking unemployed citizens as an example, one can argue that local authorities may unfairly exclude temporarily unemployed people or those who are officially unemployed but are in fact self-employed. Alcohol abuse has been already recognised as a ground for disqualification in Russian legislation. According to Russian law, however, the government may exclude only those persons who are registered in addiction clinics as alcoholics or drug addicts.⁵⁸ Hence, Russian law provides an objective standard for exclusion of alcohol and drug abusers as opposed to the vague definition suggested by Demichev.

⁵² Конституция Российской Федерации [*Konstitutsiya Rossiiskoi Federatsii* [Constitution of the Russian Federation]] [hereinafter *Konst. RF*], Art. 19(2) (Russ.).

⁵³ Sonia Walker, *Battle-Axes and Sticky-Beaks: Women and Jury Service in Western Australia 1898–1957*, 11(4) *Murdoch U. Electronic J.L.* (2004), available at <http://www.murdoch.edu.au/elaw/issues/v11n4/walker114_text.html> (accessed July 16, 2014).

⁵⁴ Sally Lloyd-Bostock & Cheryl Thomas, *The Continuing Decline of the English Jury*, in *World Jury Systems*, *supra* n. 16, at 68–69.

⁵⁵ John Jackson et al., *The Jury System in Contemporary Ireland: In the Shadow of a Troubled Past*, in *World Jury Systems*, *supra* n. 16, 290–91.

⁵⁶ *Id.*

⁵⁷ Demichev, *supra* n. 50, at 104–05.

⁵⁸ *Zakon RF o prisyazhnykh zasedatelyakh*, Art. 3(2)(4) (Russ.).

This proposal would give qualification committees too much discretion in the evaluation of candidates for jury service. Instead of objective criteria, qualification committees could rely on interviews with district police officers and hearsay information about the general reputation of prospective jurors.

As regards Demichev's argument against the involvement of homeless people, it is impossible to expect this group of people to serve as jurors since in order to call a person for jury duty he or she should have a fixed abode. At the same time, it is interesting to note that the negative attitude of Demichev, who then was an assistant professor in the Nizhnii-Novgorod Police Academy, towards Russian jurors is similar to the criticism of the democratisation of qualifications for jury service in the UK expressed by some English legal practitioners. According to Blake, since 1972 'there have been a variety of complaints from judges, policemen, and some lawyers, that jurors are too stupid, or too irresponsible, too easily bribed or intimidated.'⁵⁹

Some post-Soviet jurisdictions, for example Tajikistan, require that candidates for mixed courts have specific personal and moral qualities, which can be very vague criteria opening the possibility for discrimination. The Tajik regulation on lay assessors states that a citizen can become a lay assessor if he is respected, has good character at work and has not committed any disreputable acts.⁶⁰ This is because qualifications for lay judges in the classical mixed court are more restrictive than for jurors and are also less democratic.⁶¹ The configuration and organisation of this variant of the collaborative court is based on the idea that the right to participate in adjudication is not the right of every citizen but, rather, of the most 'merited citizens.'⁶² Here, however, the question remains open as to whether the determination of a candidate's aptness and merit can be objective and non-discriminatory.

2.6. Repeated Participation in Lay Adjudication

There is no single approach in the legislation of post-Soviet states regarding the issue of repeated participation of citizens in lay adjudication. In countries with a classical mixed court model, lay adjudicators usually serve a definite number of days per annum during a specific term, which may be up to several years. In Belarus,

⁵⁹ Nicholas Blake, *The Case for the Jury*, in *The Jury Under Attack* 140 (Mark Findlay & Peter Duff, eds.) (Butterworths 1988).

⁶⁰ *Polozhenie Taj. o narodnykh zasedatelyakh*, ¶ 8.

⁶¹ For example, in Bulgaria candidates should have a good name and authority with the public; in Slovakia – have full integrity and his/her moral qualities must provide a guarantee that he/she will correctly perform the duties of a lay judge; in Slovenia – be suitable in terms of personal qualities to participate in exercising judicial authority, etc. See Jackson & Kovalev, *supra* n. 5, at 101.

⁶² In fact, the German legislation and literature uses the term *ehrenamtlicher Richter* or *honorary judge* for German lay adjudicators. See, e.g., Eberhard Siegismund, *The Function of Honorary Judges in Criminal Proceedings in Germany*, Presentation to the 120th UNAFEI International Senior Seminar (Japan, Jan. 7 – Febr. 17, 2002), <<http://www.unafei.or.jp/english/pdf/PDFpublict/siegismund.pdf>> (accessed June 16, 2014).

lay assessors may not serve more than twenty-one days per year over a period of five years.⁶³ According to Uzbekistani law, lay assessors cannot serve more than two weeks per year for two and half years.⁶⁴ Similar provisions can be found in Tajikistani and Turkmenistani legislation: no more than two weeks per year for five years.⁶⁵ In other words, according to the legislation of these post-Soviet countries, lay assessors should be disqualified if they have completed the established number of days of lay assessors' service. However, practice in some post-Soviet countries demonstrates that judicial authorities violate the statutory requirement that lay assessors may serve only for a certain number of days or weeks; they deliberately extend the period of service for their 'favourite' and trustworthy lay assessors.

The European Court of Human Rights [hereinafter Eur. Ct. H.R.] had examined the issue of 'a flagrant breach of the internal rules for the appointment' of lay assessors in relation to Russian mixed courts shortly before the Russian Government abolished this form of lay adjudication.⁶⁶ In *Posokhov v. Russia*,⁶⁷ the applicant argued that two lay assessors

had, contrary to section 9 of the Act [*Federal'nyi zakon 'O narodnykh zasedateliakh federal'nykh sudov obshchei iurisdiktsii v Rossiiskoi Federatsii'*], been acting as lay judges before the applicant's trial for at least *eighty-eight* days, instead of the maximum *fourteen* days per year. Moreover, their names had not been drawn by lot, in breach of section 5 of the Act.

The European Court of Human Rights doubted that the court that heard Posokhov's case could be regarded as a 'tribunal established by law' and held that there had been a violation of Art. 6(1) of the Convention.⁶⁸

A similar practice of alleged illegal use of 'repeaters' in lay adjudication became an issue in constitutional litigation in Uzbekistan. One Uzbek lawyer addressed the Constitutional Court of Uzbekistan with a request to provide an official interpretation of Art. 62 of the Law on Courts (*Zakon Uzb. 'O sudakh'*), since lawyers and judges interpret this provision in various ways. The applicant argued that if a lay assessor had

⁶³ *KoSISS Belr.*, Arts. 134, 136.

⁶⁴ *Zakon Uzb. o sudakh*, Art. 62.

⁶⁵ *Zakon Turkm. o sude*, Art. 62(9) and (10), and *Polozhenie Taj. o narodnykh zasedatelyakh*, ¶¶ 3 and 17.

⁶⁶ A system of mixed courts of one professional judge and two lay assessors existed in Russia until January 2004 when it was abolished in favour of two other modes of trial: a bench trial of three judges or jury trial. See Federal Law of the Russian Federation of 29 May 2002 No. 59-FZ.

⁶⁷ *Posokhov v. Russia*, no. 63486/00 (Eur. Ct. H.R., March 4, 2003).

⁶⁸ Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms states: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

completed his or her two weeks' service he or she could not participate in other trials in the same year and should be challenged. However, the Constitutional Court held that the two week term is not a limitation for repeated participation of lay assessors in the same year and thus could not be grounds for a challenge or a disqualification.⁶⁹ The decision of the Constitutional Court of Uzbekistan means that the provision of the Law on Courts is declarative and the court authorities are allowed to summon specific lay assessors for unlimited terms within two and a half years.

Jurors in Russia,⁷⁰ Georgia,⁷¹ Kyrgyzstan⁷² and lay assessors in Kazakhstan⁷³ and Ukraine⁷⁴ are to be summoned for each trial. Moreover, the Georgian,⁷⁵ Kazakhstani,⁷⁶ Kyrgyzstani,⁷⁷ and Russian laws⁷⁸ disqualify or excuse lay assessors or jurors from further service only in the same year. As to the Ukrainian law, it does not disqualify lay assessors from further service even in the same year. Consequently, there is a danger that court authorities could deliberately summon favoured jurors or lay assessors, who delivered guilty verdicts in the past, every year in Georgia, Kazakhstan, Kyrgyzstan and Russia, and even more frequently in Ukraine.⁷⁹ In recent years, several cases have been reported where the defence appealed against guilty verdicts on the ground that the jury was composed of members who served as jurors in the past.⁸⁰ In one case, 9 of 12 jurors had previously served as jurors in other cases.⁸¹

⁶⁹ Resolution of the Constitutional Court of Uzbekistan of 10 April 2002 (Uzb).

⁷⁰ *FZ RF o prisyazhnykh zasedatelyakh*, Art. 10(1).

⁷¹ *UPK Gruzii*, Art. 221.

⁷² *Zakon Kyr. o prisyazhnykh zasedatelyakh*, Art. 10(1).

⁷³ *Zakon Kaz. o prisyazhnykh zasedatelyakh*, Art. 15(2).

⁷⁴ *UPK Ukr.*, Art. 385(1).

⁷⁵ *UPK Gruzii*, Art. 31.

⁷⁶ *UPK Kaz.*, Art. 550(3).

⁷⁷ *UPK Kyr.*, Art. 331–6(6).

⁷⁸ *UPK RF*, Art. 326(3).

⁷⁹ According to the Chairman of the Cassational Chamber of the Russian Supreme Court, Alexei Shurygin, the Supreme Court quashed at least one jury verdict on the grounds that the trial court summoned a juror one month after he had served in a previous trial in the same calendar year, in violation of random selection. See Научно-практический комментарий к Уголовно-процессуальному кодексу Российской Федерации [*Nauchno-prakticheskii kommentarii k Ugolovno-protsessual'nomu kodeksu Rossiiskoi Federatsii*] [Commentary on Criminal Procedure Code of the Russian Federation] 563 (Viacheslav M. Lebedev, ed.) (Yurait 2003) [hereinafter *Nauchno-prakticheskii kommentarii*].

⁸⁰ Appellate Decision of the Supreme Court of the Russian Federation No. 67-007-53 SP of 18 October 2007 (Re *Filatov*); Appellate Decision of the Supreme Court of the Russian Federation No. 53-011-61 SP of 24 November 2011 (Re *Ivanov*).

⁸¹ Appellate Decision of the Supreme Court of the Russian Federation No. 67-012-78 SP of 27 November 2012 (Re *Balashov*).

In another case, the jury foreman previously participated in another trial with the same prosecutor.⁸² However, in all these cases the Supreme Court of the Russian Federation dismissed the appeal on the ground that the trial judge did not err by including jurors in the jury, because the required period of one year had passed since their previous jury service. In order to prevent this unfair practice, the legislation of post-Soviet countries should explicitly disqualify those citizens who have served as jurors or lay assessors during several preceding years.

In many common law jurisdictions, citizens are excused from further jury service for longer periods: for two years in the U.S. federal courts,⁸³ New Zealand,⁸⁴ the Canadian provinces of Manitoba⁸⁵ and Nunavut;⁸⁶ for three years in the Republic of Ireland;⁸⁷ and for five years in Québec.⁸⁸

Taking into account that the number of jury trials in Russia and other post-Soviet states is fewer than in the United States and other common law jurisdictions due to the limited number of cases eligible for lay adjudication, the period of excusal for citizens who have already served as jurors or lay assessors in post-Soviet countries could be even longer than in common law jurisdictions, for instance, extending to five or seven years.

Several arguments can be made in favour of extended excusal for previous jurors and lay assessors from lay adjudication service. Firstly, the rotation method would allow other citizens to fulfil their right to participate in the adjudication process. Moreover, since lay adjudication is recognised as a civic duty in Kazakhstan⁸⁹ and Russia,⁹⁰ it would be unfair, on the one hand, to place the burden of serving as a juror or lay assessor on the same citizens each year or even more often, and, on the other hand, to excuse others from the service. Finally, summoning new 'recruits' for each trial would prevent case-hardening and accusatorial bias on the part of lay adjudicators, which is one of the most serious threats to impartiality of tribunals in post-Soviet states.

⁸² Appellate Decision of the Supreme Court of the Russian Federation No. 4-007-91 SP of 25 October 2007 (*Re Zlotnikov*).

⁸³ 28 U.S.C. § 1866(e).

⁸⁴ Juries Act § 15 (2)(b) (1981) (N.Z.).

⁸⁵ The Jury Act C.C.S.M., c. J30, § 25(3) (Can.).

⁸⁶ Jury Act R.S.N.W.T., c. J-2, § 7 (1988) (Can.).

⁸⁷ Juries Act, Act No. 4/1976, § 9 (1976) (Ir.).

⁸⁸ Province of Quebec Jurors Act, c. J-2, § 5(e) (Can.).

⁸⁹ *Zakon Kaz. o prisvyaznykh zasedatelyakh*, Art. 11(5).

⁹⁰ *FZ RF o prisvyaznykh zasedatelyakh*, Art. 2(2).

3. Pre-trial Composing Lists of Candidates for Lay Adjudication Service

3.1. Methods of Composing Lists of Jury and Lay Assessor Candidates

Legislation in post-Soviet countries stipulates various methods of composing lists of prospective lay adjudicators, which do not always adhere to the methods used in developed democracies. While the Kyrgyzstani⁹¹ and Russian⁹² legislation stipulates random collection of prospective jurors' names from electoral registers. Kazakhstani legislation, following the contemporary French model of the collaborative court, also provides for randomly collecting the names of prospective lay assessors from electoral registers.⁹³

On the other hand, the Ukrainian law does not require that the listing of prospective lay assessors should be random.⁹⁴ In Ukraine, local councils compose and approve lists of prospective lay assessors.⁹⁵ Neither does Belarussian law call for random selection. Lay assessors in Belarus are chosen by local executive authorities and approved by local councils and, in case of lay assessors, appointed for the Supreme Court of Belarus – by the President of Belarus.⁹⁶

A final category of selection methods used by some post-Soviet nations is an election model. Uzbekistani legislation, for example, retains a method of listing lay assessors peculiar to the Soviet legal system, election by an open ballot at citizens' meetings at the place of work or residence.⁹⁷ A similar method of electing lay assessors is used for district and provincial courts in Tajikistan⁹⁸ and for lower district courts (*etrapskie*) in Turkmenistan. At the same time, for higher courts such as provincial (*velaiatskie*) and the Supreme Court of Turkmenistan, potential lay assessors are only nominated by citizens' meetings, and then are appointed by the local governors (in the case of provincial courts) and by the President of the Republic (in the case of the Supreme Court).⁹⁹

Presumably, the method of random selection is the most objective method of composing a list of potential jury or lay assessor candidates, as it ensures a fair cross-section of the community. The alternative method of nomination by the executive

⁹¹ *Zakon Kyr. o prisyazhnykh zasedatelyakh*, Art. 8(3).

⁹² *Zakon RF o prisyazhnykh zasedatelyakh*, Art. 5(3).

⁹³ *Zakon Kaz. o prisyazhnykh zasedatelyakh*, Art. 6(1)(3).

⁹⁴ *Zakon Ukr. o sudoustroistve i statuse sudei*, Art. 58-1.

⁹⁵ *Zakon Ukr. o sudoustroistve i statuse sudei*, Art. 65(3).

⁹⁶ *KoSISS Bel.*, Art. 134.

⁹⁷ *Zakon Uzb. o sudakh*, Art. 62(1).

⁹⁸ *Polozhenie Taj. o narodnykh zasedatelyakh*, ¶ 7.

⁹⁹ *Zakon Turkm. o sude*, Art. 62.

bodies grants considerable power to local authorities to include loyal or favourable lay adjudicators. The deliberate choice of potential lay assessors by courts could result in obedient lay assessors, who would willingly cooperate with professional judges. The 'democratic' method of electing lay assessors by people in Turkmenistan and Uzbekistan, similarly does not appear to ensure fair representation of citizens in the administration of justice. Firstly, the laws do not stipulate how the special judicial selection commissions or local councils that organise elections in these countries, nominate candidates for inclusion in the list for people's assessor service. This gap leaves a lot of room for manipulation in the pre-selection process, potentially with a view to nominating people favourable to the government. Secondly, if one is to consider this an election, the open ballot voting procedure violates the general requirement of the Universal Declaration of Human Rights for 'genuine elections.'¹⁰⁰

In the contemporary, political context of the post-Soviet countries, the executive authorities are able to intervene in the process of compiling lists of prospective lay adjudicators no matter what method is used. However, the degree of government intrusion depends on such factors as publicity of the procedure, and accountability of the committee choosing the potential candidates.

3.2. Publicity of the Listing Procedure

None of the post-Soviet countries makes public the random selection of candidates for jury or lay assessor service. Although some countries formally provide public access to preliminary or final jury or lay assessors lists, this alone cannot prevent the authorities from manipulating the lists and thus causing possible selection fraud.

In Kazakhstan, the law stipulates that, first, the individuals on the election registers who are not qualified for lay assessor service are excluded. Then, before 'random' selection of the candidates, the district (*raionnyi*) or city executive body should permit any citizen to examine the preliminary lists of candidates for the lay assessor service over a period of seven days.¹⁰¹ Examination is done on the premises of the executive body. On the one hand, this rule gives the public an opportunity to observe the selection process. On the other hand, however, this provision is formalistic and does not ensure genuine publicity of the collection process. Firstly, the Kazakhstani law does not require the executive bodies to notify the public of when they can examine the preliminary lists of candidates. Secondly, the period of seven days is not a reasonable time for all citizens who are interested in studying

¹⁰⁰ Article 21(3) of Universal Declaration of Human Rights proclaims: 'The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.'

¹⁰¹ *Zakon Kaz. o prisyazhnykh zasedatelyakh*, Art. 6(1)(2).

preliminary lists to visit the executive body and do so. Thirdly, the examination of preliminary lists by the public does not disclose the actual process of the 'random' listing of candidates, and hence is not an effective safeguard of true randomness. Moreover, the law does not require publication of the final lists; making it impossible for the public to examine the composition of lists on the basis of which a court will actually summon lay assessors for a particular case.

Neither the Russian, nor Georgian, nor Kyrgyzstani laws provide for public random compiling of lists of candidates for jury service from the electoral registers. Sergei Pashin, a former judge and one of the founders of the Russian jury trial system, and Lev Levinson, of the Moscow Human Rights Institute, criticise the Russian legislation for a lack of public control over the compilation of jury lists:

Closed from the public the procedure [of selection of prospective jurors] allows the consideration of a celebrated 'method of random selection' as unsupported by anything, a pure declaration or fiction . . . The law says nothing about notifying citizens concerning the date of random selection, the open nature of the procedure, the right of representatives of mass media, bar association and prosecution during the process of the compilation of jury lists.¹⁰²

Public random compilation of lists potential jurors and lay assessors is clearly set out in the legislation of some developed democracies. For example, according to French law:

In each municipality the mayor publicly draws by lot from the electoral list a number of names three times that fixed by the *préfet's* decision, in order to draw up the preliminary list for the annual list. Persons, who will not reach the age of twenty-three in the coming civil year are not retained for the composition of this preliminary list.¹⁰³

In addition to this public procedure of random drawing up of the lists, French legislation also requires the mayor to draft a preliminary list in two original copies, of which one is deposited at the town hall and the other is sent to the court office of the court where the assize sits. Then a notification is sent to the persons drawn by lot.¹⁰⁴

¹⁰² Пашин С., Левинсон Л. Суд присяжных: проблемы и тенденции [Pashin S., Levinson L. *Sud prisyazhnykh: problemy i tendentsii* [Sergei Pashin & Lev Levinson, Trial by Jury: Issues and Trends]] 52–53 (International Helsinki Federation for Human Rights 2004).

¹⁰³ Code de procédure pénale, Art. 261 (Fr.).

¹⁰⁴ *Id.* Art. 261-1.

3.3. Accountability of the Selection Body

Besides the publicity of the selection procedure, the legislation in post-Soviet states should also contain guarantees of accountability of the bodies that prepare the lists of candidates for jury or lay assessor service. Two mechanisms could help to ensure the accountability of these bodies: appropriate composition of committees, and liability of officials for violations of procedure.

The composition of state bodies that are in charge of random collection of candidate jurors or lay assessors is not sufficiently regulated in the legislation of any post-Soviet countries. In common law countries, legislation explicitly stipulates that preparation of jury lists is the responsibility of nominated officials, such as a *sheriff* in Canada,¹⁰⁵ a *county registrar* in the Republic of Ireland,¹⁰⁶ and a *Chief Electoral Officer* in Northern Ireland.¹⁰⁷

Contrarily, the laws of post-Soviet states, are unclear about which official or state body should compose jury or lay assessors lists. For example, the Kazakhstani and Kyrgyzstani legislation says that local executive authorities prepare preliminary and general lay assessors lists. According to the Russian law on jurors, in each Subject of the Federation, the highest executive authority determines the procedure and schedule for the compilation of jury lists. Russian law also stipulates that municipal executive bodies compose a random list of candidates for jury service in each municipal district of the subject of the Russian Federation. At the same time, it is unclear which officials conduct the random selection from the list, and whether it is a collective body or a single officer.¹⁰⁸

In order to prevent corruption and manipulation of jury or lay assessors lists in post-Soviet countries, selection bodies should consist of local officials from executive, legislative and judicial branches of power, as well as representatives of the bar and civil society.

Some European countries use this approach. For example, according to the French law, the annual list of potential lay assessors is drafted at the seat of each assize court by a commission that consists of the court's president or his delegate, three judges appointed each year by the general assembly of the court where the assize court sits; the district prosecutor or his delegate; the president of the bar association attached to the court where the assize court sits or his representative; and five district councillors appointed each year by the district council.¹⁰⁹

¹⁰⁵ See Granger, *supra* n. 2.

¹⁰⁶ Juries Act, Act No. 4/1976, § 9–10 (1976) (Ir.).

¹⁰⁷ The Juries Order, Act No. 1141, § 4 (1996) (Northern Ireland).

¹⁰⁸ Pashin & Levinson, *supra* n. 102, at 53.

¹⁰⁹ Code de procédure pénale, Art. 262 (Fr.).

Were such a system to be adopted in post-Soviet states, since the representatives of courts, local legislatures and bar associations are not accountable to executive authorities, the selection committee could presumably 'check and balance' the power of executive authorities by preventing deliberate screening of candidates instead of genuine random collection. In multi-ethnic, multi-religious and multi-language communities, the committee could include, at least as observers, representatives of ethnic minority cultural centres and major religious organizations. This would reduce the risk of ethnic, religious and racial discrimination, as well as prevent arbitrary exclusion of candidates from jury or lay assessors lists. Otherwise, there is a risk that compilation of jury and lay assessors lists in post-Soviet states would be similar to the practice that existed in 19th century Ireland where sheriffs from the protestant community intentionally included only their co-religionists into jury lists and stuck Catholics and other citizens unfavourable to the government off the lists.¹¹⁰

Another issue of accountability of the bodies responsible for compilation of jury and lay assessors' lists, is the liability for violations of the compilation procedure. Note that none of the post-Soviet countries recognises manipulation of the jury or lay assessors lists either as a criminal offence (*prestuplenie*) or as an administrative delinquency (*administrativnoe pravonarushenie*), which, according to some scholars and human rights activists in Russia, allows authorities to fabricate jury lists with impunity.¹¹¹

The laws of some post-Soviet countries, for example Kazakhstan, Kyrgyzstan and Russia, allow citizens to complain to executive authorities against the unjustified inclusion or exclusion of names from jury or lay assessors lists. Moreover, Russian and Kazakhstani laws stipulate that if the executive authorities do not answer or reject the complaint, the complainant may appeal to the court according to rules of civil procedure. At the same time, laws in these post-Soviet states do not empower courts to punish executive authorities: for example, to award punitive damages to the plaintiff. According to the current laws in post-Soviet states, courts may only order executive authorities to review jury or lay assessors lists and include or exclude specific citizens' names. Moreover, considering that the procedure of random selection in these countries is not transparent, it is even impossible to establish the facts of unjustified inclusion or exclusion of specific names. Without the ability to obtain proof of irregularities, citizens' rights to appeal to the court against violations in the pre-trial selection procedure are declaratory and formalistic.

In order to prevent officials from manipulating the jury and lay assessors lists, post-Soviet countries need to introduce criminal liability for violating random

¹¹⁰ Миттермайер К. Европейские и американские суды присяжных [Mittermeier C. *Evropeiskie i amerikanskie sudy prisyzhnykh*] [Carl Mittermeier, *European and American Jury Systems*] 83–84 (V. Molchanov, ed.) (Tipografiya A.I. Mamontova i K^o 1869).

¹¹¹ Pashin & Levinson, *supra* n. 102, at 70.

selection and for deliberate inclusion or exclusion of names from jury or lay assessors lists on grounds of race, ethnicity, political views, social status, and other illegitimate grounds. Such a new criminal provision would allow prosecution of those officials who illegally exclude names from jury and lay assessors lists, as well as prosecution of those officials who order such exclusion. Such crimes should be included in the class of serious felonies, since jurors and lay assessors in the post-Soviet states may participate in adjudication of serious crimes where the defendants' lives and liberties are at stake.

4. Selection of Jurors and Lay Assessors in Court

While pre-trial selection of veniremen or candidates for lay assessor service is an initial step for selection of the jury or mixed courts for a particular trial, the legislation in post-Soviet states should also guarantee that empanelment of jurors and lay assessors is fair and provides defendants with an impartial and independent tribunal in each individual case.

The procedure for empanelling jurors and selecting lay assessors for a particular case varies in different post-Soviet countries. In countries with classical collaborative courts, like Belarus, Turkmenistan and Uzbekistan, the court assigns two lay assessors for each case in the order they appear on the list of lay assessor candidates.¹¹² Parties in a criminal trial in Belarus, Turkmenistan and Uzbekistan cannot participate in the selection of lay assessors, except by challenging them for cause on the same grounds as they can challenge the presiding judge. By contrast, legislation in Georgia, Kazakhstan, Kyrgyzstan, Russia and Ukraine, stipulate for the summoning of veniremen or lay assessors on a random basis from jury and lay assessors lists. Moreover, parties in these countries are entitled to participate in jury or lay assessors' selection by means of *voir dire*, challenges for cause and, with the exception of Ukraine, peremptory challenges.

4.1. Summoning for Veniremen and Lay Assessors Service

According to the legislation of Georgia,¹¹³ Kazakhstan,¹¹⁴ Kyrgyzstan,¹¹⁵ Russia¹¹⁶ and Ukraine,¹¹⁷ candidates for jury or lay assessor service are summoned for each case. Moreover, laws in these countries require the summoning of a minimum number of

¹¹² *KoSISS Belr.*, Art. 136; *Zakon Turkm. o sude*, Art. 62(10); *Zakon Uzb. o sudakh*, Art. 62.

¹¹³ *UPK Gruzii*, Art. 221(1).

¹¹⁴ *UPK Kaz.*, Art. 549(2).

¹¹⁵ *UPK Kyr.*, Art. 331-5.

¹¹⁶ *UPK RF*, Art. 325.

¹¹⁷ *UPK Ukr.*, Art. 385.

candidates: 100 in Georgia, 20 in Russia, 25 in Kazakhstan, 50 in Kyrgyzstan, and only seven in Ukraine. Although Russian legislation requires court personnel to summon veniremen from jury lists using the method of random selection,¹¹⁸ some Russian scholars, advocates and human rights activists claim that courts sometimes violate this method and select only the candidates most favourable to the government.

In the survey of Russian advocates, judges and prosecutors conducted by the author in 2004, in nine Russian provinces, several advocates and one judge expressed concerns about current practices of selection of veniremen. One of the advocates said:

Prospective jurors are selected 'in private' without participation of the parties and there is a high risk of selection of a number of 'loyal' jurors, who have numbers from one to fourteen. Even two peremptory challenges cannot correct the situation and prosecution loyalists will get into the jury.

One judge, who was apparently mistaken on the law, pointed out that it was necessary to return to the former method of 'lottery selection,' which would allow selecting jurors at random as opposed to the current practice of selection from the list. This implies that in his court the court personnel in fact deviated from the legally mandated practice of random selection.

A number of reported appellate cases alleged that the court violated random selection procedures, but in most of these cases the appellants failed to prove these allegations.¹¹⁹

More evidence of violations in the selection of veniremen in Russia can be found in two high-profile cases where the court personnel deliberately included improper candidates in the jury pool¹²⁰ and violated the provision of the Russian Code of Criminal Procedure, which requires that the jury venire should be selected at random from the existing jury lists compiled for a particular court.

In one case a prospective juror, allegedly a former KGB officer, was intentionally included in the jury pool for the trial of the Russian scientist Igor Sutyagin, who was charged with high treason.

¹¹⁸ *UPK RF*, Art. 326(1).

¹¹⁹ Appellate Decision of the Supreme Court of the Russian Federation No. 35-006-3SP of 13 March 2006 (Re *Sheichenkov*); Appellate Decision of the Supreme Court of the Russian Federation No. 74-008-18 of 4 June 2008 (Re *Gorin et al.*); Appellate Decision of the Supreme Court of the Russian Federation No. 73-009-8SP of 4 June 2009 (Re *Shenoev*); Appellate Decision of the Supreme Court of the Russian Federation No. 5-009-261 SP of 16 November 2009 (Re *Frenkel*); Appellate Decision of the Supreme Court of the Russian Federation No. 67-012-78 SP of 27 November 2012 (Re *Balashov*).

¹²⁰ Anatoly Medetsky, *Juror in Sutyagin's Trial Was a Former Intelligence Officer*, *The Moscow Times* (Oct. 26, 2004), <<http://www.themoscowtimes.com/news/article/juror-in-sutyagins-trial-was-a-former-intelligence-officer/227444.html>> (accessed June 16, 2014); *Крузер И.* Суд как разведмероприятие [Kriger I. *Sud kak razvedmeropriyatie* [Igor Kriger, *Trial as Intelligence Measure*]], *Novaya Gazeta* (Nov. 4, 2004), <<http://2004.novayagazeta.ru/numer/2004/82n/n82n-s10.shtml>> (accessed June 16, 2014).

In another case, according to one of the advocates who participated in the trial, the presiding judge discharged the jury because several jurors and all alternates dropped out of the jury after three months of the trial. Four members from the discharged jury, however, were illegally included in the new jury to try the same case.¹²¹

Note that the Russian Supreme Court, in its appellate decision, pointed out that the grounds for quashing the acquittal in this case was the fact that all 4 repeaters were not on the jury lists for the new term of service.¹²² However, in the Sutyagin trial, in which there was a guilty verdict, the same fact was simply ignored.

In order to increase public confidence in the selection procedure and prevent manipulation of the selection of veniremen or lay assessors, some scholars suggest that parties should be present in court during the random selection of candidates.¹²³ In Kazakhstan, the authors of the alternative draft law on the Anglo-American type jury system included such a provision:

Parties have the right to be present during random selection procedure . . .
The list of prospective jurors is signed by a court clerk and parties if they participated during random selection procedure.¹²⁴

A similar approach is used in France, where the chairman of the court draws the names of forty lay assessors, who will form the list for the session, by lot from the annual list in open court.¹²⁵

¹²¹ Appellate Decision of the Supreme Court of the Russian Federation No. 1-011/03 of 26 August 2004 (Re *Ulman et al.*).

¹²² *Id.*

¹²³ Пашин С.А. Концепция судебной реформы в России [Pashin S.A. *Kontseptsiya sudebnoi reformy v Rossii* [Sergei A. Pashin, *Concept of the Judicial Reform in Russia*] (2004), <http://sutyajnik.ru/rus/cases/etc/koncepcia_sud_reformi.htm> (accessed June 16, 2014).

¹²⁴ Проект Закона Республики Казахстан «О внесении изменений и дополнений в некоторые законодательные акты...» (ст. 550) // Судопроизводство с участием присяжных заседателей и перспективы его введения в Республике Казахстан [*Proekt Zakona Respubliki Kazakhstan 'O vnesenii izmenenii i dopolnenii v nekotorye zakonodatel'nye акты...' (st. 550) // Sudoproizvodstvo s uchastiem prisnyazhnykh zasedatelei i perspektivy ego vvedeniya v Respublike Kazakhstan*] (Draft Law of the Republic Kazakhstan on Amendments to Some Laws . . . (Art. 550), in *Trial by Jury and Prospects of Its Introduction in the Republic of Kazakhstan*] 256 (Dmitry Nurumov, ed.) (Poligrafservis 2005) [hereinafter *Sudoproizvodstvo s uchastiem prisnyazhnykh zasedatelei*]. This draft law was written by the National Commission on Democracy and Civil Society (*Natsional'naya komissiya po voprosam demokratii i grazhdanskogo obshchestva*). It has never been officially introduced to the Kazakhstani Parliament despite numerous appeals and requests by NGOs, legal scholars and bar associations to the Government, Members of Parliament and the President. See, e.g., Открытое обращение неправительственных организаций Республики Казахстан к Правительству, Парламенту и Президенту Республики Казахстан [Открытое обращение неправительственных организаций Республики Казахстан к Правительству, Парламенту и Президенту Республики Казахстан [An Open Letter from NGOs to the Kazakhstani Government, Parliament and President]], *Zona.kz* (Nov. 11, 2005), <<http://zonakz.net/articles/?artid=10127>> (accessed June 16, 2014).

¹²⁵ Code de procédure pénale, Art. 266 (Fr.).

In addition to the selection of prospective jurors or lay assessors by ballot in open court for each particular case or session, the minimum number of summoned jurors or lay assessors should be increased up to thirty-five or forty in order to provide the parties with an opportunity to use their right for peremptory challenges and challenges for cause more extensively and effectively.

4.2. Excusals from Jury or Lay Assessor's Service

In some post-Soviet countries, legislation allows prospective jurors or lay assessors to apply for excusal or to 'challenge themselves' (*zayavit' samootvod*) in court.¹²⁶ At the same time, there is not always an exhaustive list in this legislation setting forth the grounds on which the presiding judge can excuse such prospective lay adjudicators. There is a range of grounds for excusal from lay adjudication service stipulated in the laws of some post-Soviet states, such as a jury candidate being sixty-five or older (Kazakhstan and Russia) or seventy (Georgia). In Kazakhstan, as another example, the law allows excusing women with children younger than three years old, candidates with religious views that prohibit participation in the administration of justice,¹²⁷ and professionals whose absence from their duties may cause damage to public or state interests (doctors, teachers, pilots, etc.). Moreover, according to the laws of Russia¹²⁸ and Kazakhstan,¹²⁹ the presiding judge can excuse a prospective juror or lay assessor for any other 'good' reason. These grounds easily allow those who wish to avoid jury or lay assessor service to be excused.

In 2004, the author studied the transcripts of fifteen criminal jury cases in the Moscow City Court. In all these cases the presiding judge excused all prospective jurors who applied for exemption. For instance, besides medical reasons, some prospective jurors were excused for one of the following reasons: pressure of work (twenty-two), vacation (two), commemoration of a father's death (one), care of grandchildren (four), relatives in the hospital (two), care for elderly parents (three), reluctance to serve (two), sick leave (two), family conditions (two), religious beliefs or moral reasons (two). The vast majority of refusals to serve as a juror were based on the claim that potential jurors had a permanent job and could not take leave from work. Note, however, that according to the court transcripts none of the prospective jurors was required to provide any evidence to support his or her claim. At the same time, from the point of view of the current law, such claims would not seem to be

¹²⁶ *UPK Gruzii*, Art. 31; *UPK RF*, Art. 328(4); *UPK Kaz.*, Arts. 552–553.

¹²⁷ Russian legislation between 1993 and 2004 used to allow the presiding judge to excuse prospective jurors on these grounds. Закон РСФСР «О судоустройстве РСФСР» [*Zakon RSFSR 'O sudoustroistve RSFSR'*] [Law of the RSFSR on Judicial Organization in RSFSR]] of 8 July 1981, Art. 80(6)(3) (provision repealed by the Federal Law of Aug. 20, 2004 No. 113-FZ) (Russ.), however the new law on jurors does not contain such provision.

¹²⁸ *UPK RF*, Art. 328(4).

¹²⁹ *UPK Kaz.*, Art. 552(3)(5).

justified, since employers in Russia are prohibited from discharging or transferring an employee to another position during the term of their jury service and from obstructing employees from fulfilling their jury duties.¹³⁰

Theoretically, if a person is fired during jury service, this person can dispute the employer's decision in court. For instance, a woman, who served as a juror in the Moscow Regional Court for seven months, was fired from her place of work shortly before she finished her jury service. She filed a civil action against her employer requesting that she be restored to her position, paid compensatory damages for economic losses during the period of unemployment, and paid non-economic losses for her moral suffering. The court ruled in favour of the ex-juror, and awarded her 2.66 million rubles in damages.¹³¹

At the same time, the law does not protect those who are employed in the shadow economy. Such employees are not registered, and hence cannot complain if the employer discharges them while they serve as jurors. Even registered employees, who work in the private sector, do not feel secure if they need to leave their job for several weeks or even months. For example, in one of the cases reviewed in the Moscow City Court, a prospective juror, a female merchandiser, was excused because she claimed her employer was not interested in her duties as a juror and she was not able to be in court full-time. The inability to take leave from work in private sector employment in general, and in the 'shadow' sector in particular, should not be recognised as a legitimate ground for exemption from jury service. Otherwise the state would shift the burden of jury or lay assessor duties to citizens who are unemployed or employed in the public sector. Moreover, by excusing those who work in the shadow sector of the economy, courts would indirectly support further tax evasion in companies with unregistered employees.

In some post-Soviet countries, for instance Belarus, Kyrgyzstan and Ukraine, lay assessor service is based on the principle of *voluntarism* (*dobrovol'nost'*), meaning that the government may include citizens in lay assessors list only with their consent. The Criminal Procedure Law of Kyrgyzstan does not allow jurors to excuse themselves, except in the cases of conflict of interest or bias in a particular case, which is a general ground for recusal for professional judges. This is due to a provision of the Law on Jurors, which permits citizens to be removed from the list of prospective candidates before final jury lists are composed and forwarded to the court.¹³² Ukraine is another country that does not impose on its citizens the mandatory civic duty to serve as a juror. As opposed to Kyrgyzstan, where citizens must notify the authorities that

¹³⁰ *Zakon RSFSF o sudoustroistve RSFSR*, Arts. 86, 87 (Russ.); *Zakon RF o prisyazhnykh zasedatelyakh*, Arts. 11, 12.

¹³¹ *Снегирева Е. Присяжный заседатель восстановлен на работе после незаконного увольнения // Российская юстиция. 1997. № 12. С. 7* [Snegireva E. *Prisyazhnyi zasedatel' vosstanovlen na rabote posle nezakonnoho uvol'neniya // Rossiiskaya yustitsiya. 1997. No. 12. S. 7* [Elena Snegireva, *Juror Reinstated after Wrongful Dismissal, 1997*(12) Russian Justice 7]].

¹³² *Zakon Kyr. o prisyazhnykh zasedatelyakh*, Art. 8(1).

they want their names to be removed from the preliminary jury list, Ukrainian law requires prospective candidates to give consent to be included into the jury list. In Kazakhstan, the authors of the alternative draft law on jurors initially proposed a provision that would require participation of citizens in lay adjudication to be based on a similar principle:

Voluntarism of participation of citizens of Kazakhstan in adjudication as jurors is ensured by the right of the citizen to waive his right to serve as a juror for any reason until he swears in.¹³³

The authors of the draft argued that, according to the Kazakh Constitution, participation in public affairs is a right of citizens and not a duty.¹³⁴ However, after discussion with OSCE experts the principle of voluntarism of lay adjudication was excluded from the revised draft.¹³⁵

The principle of voluntarism for participation in lay adjudication is a double-sided concept. Arguably, lay adjudicators with the motivation and willingness to serve as lay adjudicators would be more beneficial to the criminal justice system because they would fulfil their duties more responsibly and carefully. Moreover, reluctant lay adjudicators may neglect their duties by trying to be discharged from jury or lay assessors' service. Some lay adjudicators may cause delays in court hearings, or even cause a mistrial, by alleging illness or other 'good' reasons. On the other hand, exclusive inclusion of citizens who are enthusiastic to serve on juries or mixed tribunals would likely make lay adjudication unrepresentative of some age groups and social classes. In other words, lay adjudicators would be represented predominantly by people, such as the unemployed and pensioners, who have spare time and a material interest in the jury or lay assessor allowance. Although participation of these groups of people does not necessarily mean deterioration in the quality of lay adjudication, systematic excusing of citizens with full time jobs would make juries and mixed tribunals less representative, and hence less democratic.

In order to mitigate citizens' reluctance to participate in lay adjudication, the government should ensure several key principles. Firstly, citizens should be required to participate only in a single trial. Secondly, trials with the involvement of lay

¹³³ *Proekt Zakona Respubliki Kazakhstan o pris'yazhnykh zasedatelyakh*, Art. 3, in *Sudoproizvodstvo s uchastiem pris'yazhnykh zasedatelei*, supra n. 124, at 243.

¹³⁴ Transcript of the round table on the discussion of the draft laws on jury of 13 January 2005 (unpublished, on file with author).

¹³⁵ The author criticized the principle of voluntarism of lay adjudication in commentaries on the draft law, which were used by OSCE during round table discussions on 13 January 2005. *Ковалев Н. Комментарий к законопроекту о присяжных заседателях судов Республики Казахстан от 13 января 2005 г.* [Kovalev N. *Kommentarii k zakonoproektu o pris'yazhnykh zasedatelyakh sudov Respubliki Kazakhstan ot 13 yanvarya 2005 g.* [Nikolai Kovalev, *Commentaries on Draft Law on Jurors in Courts of the Republic of Kazakhstan*]], in *Sudoproizvodstvo s uchastiem pris'yazhnykh zasedatelei*, supra n. 124, at 277–78.

adjudicators should be uninterrupted by long recesses, which, in some cases, last for more than a month. Thirdly, those citizens who neglect their duties as jurors or lay assessors by not showing up for court hearings should be removed by the presiding judge and cited for contempt of court. For instance, Mr. Beletskii was selected as juror No. 4 for participation in the first jury trial of *Ulman et al.* in October 2003. After he had been sworn in as a juror, Beletskii did not show up in court on several occasions and did not provide evidence of 'good' reasons for his absence. The presiding judge inquired and discovered that Beletskii was reluctant to serve as juror. The presiding judge discharged Beletskii from the jury and fined him to 2.5 thousand rubles. Moreover, in January 2004, the trial judge, due to lack of alternates to replace Beletskii, had to discharge the whole jury and declare a mistrial. Beletskii appealed the fine to the Supreme Court of the Russian Federation. The Supreme Court dismissed the appeal and upheld the decision of the trial judge.¹³⁶

Given the loopholes in current legislation, and the resulting discretion of judges during jury selection, post-Soviet countries need to pass legislation stipulating an exhaustive list of legitimate reasons for exemption from jury or lay assessor service. Such a list should be limited to some exceptional cases of personal hardship, such as serious illness of a prospective juror or his relatives, death of a relative, *etc.* This would make juries and mixed tribunals in these countries more representative of different strata of society.

4.3. The Voir Dire Procedure

The rules of criminal procedure provide for questioning prospective jurors in Georgia, Kyrgyzstan and Russia, and lay assessors in Kazakhstan, about their knowledge and attitudes towards a particular case and parties, including the defendant and the victim. The purpose of this is to challenge lay adjudicators who possess, or may possess, bias against either of the parties.

The role of the judge in this *voir dire* process varies among states. According to the legislation of some post-Soviet countries, the presiding judge plays an active role in questioning prospective jurors or lay assessors, and parties have limited opportunities to participate in the *voir dire*. For example, in Georgia¹³⁷ and Kazakhstan,¹³⁸ the parties are unable to ask prospective jurors questions during *voir dire* without having to submit them first to the presiding judge. Contrarily, in Russia, the presiding judge, after questioning prospective jurors, allows the parties to ask their questions, which may elicit facts preventing candidates from serving as jurors in a particular case.¹³⁹

¹³⁶ Resolution of the Military Division of the Supreme Court of the Russian Federation No. 1-011/03 of 26 August 2004 (Re *Beletskii*).

¹³⁷ *UPK Gruzii*, Art. 223(3).

¹³⁸ *UPK Kaz.*, Art. 551(4).

¹³⁹ *UPK RF*, Art. 328(8).

Although in some U.S. jurisdictions the participation of parties in questioning prospective jurors can be also restricted,¹⁴⁰ for the most part, direct and active involvement of the presiding judge during *voir dire* is a legacy of the Soviet inquisitorial tradition of criminal procedure.

In order to make criminal procedure more adversarial and less protracted, parties in the criminal trial should have an opportunity to conduct *voir dire* independently. Optimally, the presiding judge might only intervene into questioning in cases when either party abuses its rights by asking indecent, illegal, irrelevant or other improper questions.

Arguably, *voir dire* is not an essential characteristic of the adversary process since several common law jurisdictions, such as England and Wales, Scotland Australia, New Zealand, Northern Ireland, Republic of Ireland, Canada, and some civil law jurisdictions such as France, do not allow, or restrict, the questioning of prospective jurors or lay assessors by parties.¹⁴¹ According to England's Fraud Trials Committee (hereinafter Roskill Committee), an English governmental committee chaired by Lord Roskill, which was charged with reviewing the methods of prosecuting serious fraud cases in England, judges should not question prospective jurors since it was established by practice that challenges for cause were permitted only if the party referred to *prima facie* evidence for such challenge.¹⁴² Similar grounds for restricting judges from extended questioning of prospective jurors are recognised in Canadian case law. In *R. v. Hubbert*, the Ontario Court of Appeal stated: 'Challenge for cause is not for the purpose of finding out what kind of juror the person called is likely to be – his personality, beliefs, prejudices, likes or dislikes.'¹⁴³ Moreover the Canadian Supreme Court in *R. V. Sherratt*, said that challenges for cause 'stray into illegitimacy if used merely . . . as a "fishing expedition" in order to obtain personal information about the juror.'¹⁴⁴ The reason behind abolition of the *voir dire* in some other countries, such as Scotland, is that this procedure undermines the randomness of jury selection.¹⁴⁵ Thus, in *M. v. H.M. Advocate*, the Scottish Appeal Court held:

[T]here should be no general questioning . . . of persons cited for possible jury service to ascertain whether any of them could or should be excused

¹⁴⁰ J. Alexander Tanford, *The Trial Process: Law, Tactics, and Ethics* 110 (LexisNexis 2002).

¹⁴¹ See Lloyd-Bostock & Thomas, *supra* n. 54, at 72–76; Duff, *supra* n. 16, at 257–60; Vidmar, *supra* n. 20, at 35; Jackson et al., *supra* n. 55, at 292; and Code de procédure pénale, Art. 298 (Fr.).

¹⁴² Fraud Trials Committee, Report 128–29 (Hansard 1986); Lloyd-Bostock & Thomas, *supra* n. 54, at 75 (fn. 137).

¹⁴³ Neil Vidmar, *The Canadian Criminal Jury: Searching for a Middle Ground*, in *World Jury Systems*, *supra* n. 16, at 234; Granger, *supra* n. 2, at 158.

¹⁴⁴ *R. v. Sherratt* [1991] 1 S.C.R. 509 (Can.).

¹⁴⁵ Duff, *supra* n. 16, at 257–60.

from jury service in a particular trial . . . The essence of the system of trial by jury is that it consists of fifteen individuals chosen at random from amongst those who are cited for possible service.¹⁴⁶

However, as Duff pointed out, the absence of the *voir dire* makes challenging jurors for cause difficult.¹⁴⁷

Taking into account the fact that Russian advocates obtain the names of prospective jurors on the date of the trial, challenges for cause without preliminary questioning of prospective jurors would be virtually impossible. Moreover, abolition of the *voir dire* procedure would be disadvantageous only for the defence. As opposed to the defence, the prosecution may investigate a panel of jurors by obtaining from the local police information on criminal records and references on prospective jurors and their relatives. In other words, this would turn peremptory challenges by the defence into taking shots in the dark. For instance, one European expert, Joachim Herrmann, in his assessment of the Draft Code of Criminal Procedure of Ukraine pointed out that, in order to make a deliberate decision on peremptory challenges, parties should have an opportunity to question jurors or to request the judge to do so. Otherwise, according to Herrmann, peremptory challenges would end up as a kind of lottery.¹⁴⁸

This hypothesis is supported by the responses of several Russian advocates to the survey the author conducted in 2004. Several advocates said that the defence needed more information on prospective jurors in order to make rational decisions on peremptory challenges. One of the advocates even pointed out that parties should know the names of prospective jurors, which implies that, in some Russian trials, the court did not provide the names of jurors to the defence. Several respondents among Russian judges also complained about the *voir dire* procedure. Two Russian judges said that besides superficial questioning of prospective jurors other methods needed to be introduced for obtaining information about prospective jurors, such as special questionnaires with an extended numbers of questions, psychological tests and examination by specialists.

The abolition or restriction of the *voir dire* procedure in Russia and other post-Soviet jurisdictions undermines public confidence in the selection of impartial and independent jurors or lay assessors. To ensure that court personnel do not deliberately include candidates favourable to the government and prejudiced against the defendant in the jury or lay assessors pool, the defence should have the right to investigate the pool by questioning prospective lay adjudicators in court.

¹⁴⁶ Duff, *supra* n. 16, at 258.

¹⁴⁷ *Id.* at 259.

¹⁴⁸ European Commission and Council of Europe, Коментарі до проекту Кримінально-процесуального кодексу України [Коментарі до проекту Кримінально-процесуального кодексу України] PCRED/DGI/EXP (2003) 63.

4.4. Peremptory Challenges

Another issue regarding selection of jury or lay assessors is related to the peremptory challenges of prospective lay adjudicators. By using a limited number of peremptory challenges, the parties do not have to support their decisions to strike a lay adjudicator for any reason.

Peremptory challenges are usually employed in jury systems; however, some current mixed court systems, for instance the French *cour d'assises* and *cour d'assises d'appel* and Greek *dikasteria* (Δικαστήρια), also allow the parties to challenge a certain number of lay assessors.¹⁴⁹

Although the tradition of peremptory challenges originates in common law jury systems, the process has come under question in recent years. Some common law countries, including England, Northern Ireland and Scotland, have abolished peremptory challenges.¹⁵⁰ In other common law jurisdictions, such as Australia, New Zealand and the U.S., the practice of peremptory challenges has become a controversial issue.¹⁵¹ The decisive reason for the abolition of peremptory challenges in England was, like in the case of the *voir dire* procedure, the need to ensure the principle of randomness of jury selection. Thus, for instance, the Roskill Committee shortly before the abolition of peremptory challenges in England in 1988, stated:

[T]he existence of the peremptory right of challenge must necessarily . . . tend to erode the principle of random selection, and may even enable defendants to ensure that a sufficiently large part of a jury is rigged in their favour.¹⁵²

Note, however, that English prosecutors are still able to ask a juror to stand by, which is 'virtually equivalent to a prosecution right of peremptory challenge.'¹⁵³ In other words, arguably, England abolished peremptory challenges not out of concern about the principle of randomness of jury selection, but so that the government could maintain control over the composition of juries. In Scotland, a major rationale for removing peremptory challenges was allegations of abuses of this right by the defence 'in attempt to secure a jury which was less likely to convict.'¹⁵⁴ However, this reasoning was criticized by Professor Peter Duff, of the University of Aberdeen, as 'unsatisfactory.' Duff, on the basis of empirical data, argued: 'there was little evidence it was being "abused" and no evidence whatsoever that this "abuse" had

¹⁴⁹ Code de procédure pénale, Arts. 297–301 (Fr.); Jackson & Kovalev, *supra* n. 5, at 104.

¹⁵⁰ Vidmar, *supra* n. 20, at 34; Lloyd-Bostock & Thomas, *supra* n. 54, at 72–76; Duff, *supra* n. 16, at 260–63.

¹⁵¹ Vidmar, *supra* n. 20, at 35.

¹⁵² Fraud Trials Committee, *supra* n. 142, at 126.

¹⁵³ Blackstone's Criminal Practice 2006 1504 (Peter Murphy, ed.) (Oxford University Press 2005).

¹⁵⁴ Duff, *supra* n. 16, at 260.

any effect on the outcome of cases.¹⁵⁵ On the contrary, Duff agreed with the reasons for abolishing peremptory challenges suggested by his English colleagues: juries should be selected at random.¹⁵⁶

In some other common law countries, such as New Zealand and the United States, experts argue that the prosecution sometimes abuses its power by removing representatives of ethnic and racial minorities. In New Zealand, according to Neil Cameron, and Warren Young of Victoria University of Wellington, and Susan Potter, formerly of the New Zealand Law Commission, the Maori community strongly believes that 'peremptory challenges have a discriminatory effect and exacerbate the unrepresentativeness of juries already produced by the system of disqualifications and excuses.'¹⁵⁷

This issue has been a subject of litigation during the last fifty years in the United States.¹⁵⁸ For example, in *Batson v. Kentucky* (1986) the U.S. Supreme Court held:

Equal Protection Clause¹⁵⁹ forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.

The Court in *Batson* also decided that if the defendant established a *prima facie* case of purposeful discrimination concerning the prosecutor's exercise of peremptory challenges at the defendant's trial, the burden to come forward with a neutral explanation for challenging black jurors shifts to the State. The *Batson* principle was later extended to peremptory challenges based on ethnicity (*Hernandez v. New York*) and gender (*J.E.B. v. Alabama ex rel. T.B.*). At the same time the U.S. Supreme Court declined to extend the prohibition of peremptory strikes to religion (*Davis v. Minnesota*).

Laws of Georgia, Kazakhstan, Kyrgyzstan and Russia currently allow peremptory challenges of jurors. Table 1 provides a comparative overview of the number of peremptory challenges provided for in current legislation of the post-Soviet countries, as well as the number of peremptory challenges used in some other civil and common law jurisdictions.

¹⁵⁵ Duff, *supra* n. 16, at 262.

¹⁵⁶ *Id.*

¹⁵⁷ Neil Cameron et al., *The New Zealand Jury: Towards Reform*, in *World Jury Systems*, *supra* n. 16, at 192.

¹⁵⁸ *Swain v. Alabama*, 380 U.S. 202 (1965); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Powers v. Ohio*, 499 U.S. 400 (1991); *Georgia v. McCollum*, 505 U.S. 42 (1992); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Hernandez v. New York*, 500 U.S. 352 (1991); *Davis v. Minnesota*, 511 U.S. 1115 (1994); *Rivera v. Illinois*, 556 U.S. (2009).

¹⁵⁹ Equal Protection Clause is a part of the XIV Amendment to the U.S. Constitution which states: 'no state shall . . . deny to any person within its jurisdiction the equal protection of the laws.' U.S. Const. amend. XIV, § 1.

As Table 1 shows, the number of peremptory challenges in the post-Soviet legislation is usually limited to two, meaning that such challenges have a less significant impact on the composition of the jury or the collaborative court than it does in the common law jurisdictions where each party may challenge between seven and twenty-five prospective jurors. Note also, that in most post-Soviet legislation in joint trials, which are common in cases of serious felonies, the total number of peremptory challenges remains the same for all defendants and they should come to an agreement on how to use their limited number of challenges. Alternatively, the joint parties can choose by lot which defendant may solely use all peremptory challenges.¹⁶⁰ The only exception to this rule is Georgia where, as in common law jurisdiction, in joint trials each defendant is entitled to the number of peremptory challenges, to which the defendant would be entitled if tried alone.¹⁶¹

Table 1. Number of peremptory challenges in criminal cases of different jurisdictions

Jurisdiction	Defence	Prosecution	Jurisdiction	Defence	Prosecution
Kazakhstan	3	2	Belgium	6–12	6–12
Kyrgyzstan	Min 2	Min 2	Japan	4	4
Russia	Min 2 more on judge's discretion	Min 2 more on judge's discretion	Malta	2–3	3
Georgia	6 or 12 (life)	6 or 12 (life)	Norway	1–2	1–2
Spain	4	4	Rep. of Ireland	7	7
France	5–6	4–5	Greece	2	2
Australia	3–8 depending on jurisdiction	3–8 and/or 4–6 stand asides in some jurisdictions	New Zealand	6 for each defendant	6; 12 if there are several defendants
Canada	4; 12 or 20 depending on type of criminal offence	4; 12 or 20 depending on type of criminal offence	United States	2–25 depending on state and type of criminal offence	2–25 depending on state and type of criminal offence

¹⁶⁰ *UPK RF*, Art. 328(15); *UPK Kaz.*, Art. 555(5–6); *UPK Kyr.*, Art. 331-9.

¹⁶¹ *UPK Gruzii*, Art. 223(11); Canada Criminal Code, R.S.C. 1985, c. C-46, s. 634(4)(a); Juries Act 1981, § 24 (2)(b) (N.Z.); Juries Act, Act No. 4/1976, § 20 (1976) (Ir.).

If two peremptory challenges are insufficient for the parties to exclude all unfavourable prospective candidates, thus evincing merely a formal character, the question arises whether the number of peremptory challenges in post-Soviet countries should be increased or whether peremptory challenges should be abolished altogether. In the 2004 survey of Russian judges, prosecutors and advocates, the author investigated the attitudes of Russian legal practitioners towards peremptory challenges in nine Russian provinces. Table 2 summarises responses to the following question: 'Do you support or deny the idea that parties' rights for peremptory challenges should be preserved?'

Table 2. Support or decline of the right of peremptory challenges

Group of respondents	Support	Neutral	Decline
<i>Prosecutors (n=34)</i>	34	0	0
<i>Judges (n=45)</i>	39	1	5
<i>Advocates (n=56)</i>	55	0	1

Table 2 shows that the vast majority of respondents supported the right for peremptory challenges. Prosecutors and advocates were also asked whether, in their opinions, the minimum number of peremptory challenges should be increased. Table 3, below, summarizes these opinions.

Table 3. Minimum number of peremptory challenges should be increased

Group of respondents	Positive	Neutral	Negative
<i>Prosecutors (n=34)</i>	27	2	5
<i>Advocates (n=56)</i>	36	6	14

As can be seen, the majority of Russian respondents among both prosecutors and advocates supported an increased number of peremptory challenges. At the same time, some prosecutors (five) and advocates (14) were less enthusiastic about such an increase. Those respondents who answered positively to the question about increasing the minimum number of peremptory challenges were also asked about the number of challenges that should be introduced. The responses varied from three to ten peremptory challenges for each party, with a mean of 5.7 suggested by prosecutors and 5.3 proposed by advocates.

Several Russian scholars also proposed that the number of peremptory challenges for both parties be increased. For example, the late Professor Igor Petrukhin, of the Institute of State & Law of the Russian Federation, argued that the number of

peremptory challenges provided by Russian legislation is lower than 'international standards' and refers to France and the U.S.¹⁶² Pashin has suggested that the number of peremptory challenges should be increased to six for each defendant in Russia.¹⁶³ Although Pashin does not explain why the number of peremptory challenges should be increased to six, his proposal seems to be based on the legislation of the Russian Empire of 1864, according to which prosecutors could challenge no more than six prospective jurors and the defence could challenge at least six prospective jurors. This historical law also stipulated that if the prosecution did not use all its peremptory challenges, the defence might have more than six challenges.¹⁶⁴

Note, however, that the Russian Tsarist government, 20 years later, reduced the number of peremptory challenges from six to three for each party by a law on the 12th of June 1884.¹⁶⁵ This reduction of peremptory challenges was criticized by some 19th century Russian lawyers, for instance, a former senator Foinitskii, who argued that the number of peremptory challenges might be reduced only for less significant criminal cases, but should be preserved for criminal cases of greater importance.¹⁶⁶

The main argument in favour of preserving peremptory challenges is that they serve as an additional safeguard for selecting impartial lay adjudicators. Arguably, if a prospective juror or lay assessor is prejudiced against either prosecution or defence, any party can challenge this lay adjudicator for cause and, hence, there is no need for peremptory challenges. However, effective application of challenges for cause may be hampered by several factors such as availability of evidence of a lay

¹⁶² Петрухин И.Л. Суд присяжных: проблемы и перспективы // Государство и право. 2001. № 3. С. 5–15 [Petrukhin I.L. *Sud prisyaznykh: problemy i perspektivy* // *Gosudarstvo i pravo*. 2001. No. 3. S. 5–15 [Igor L. Petrukhin, *Trial by Jury: Issues and Prospects*, 2001(3) State and Law 5–15]].

¹⁶³ Pashin, *supra* n. 123.

¹⁶⁴ Устав уголовного судопроизводства // Полное собрание законов Российской империи. Собрание второе. № 41476. Ст. 656 [*Ustav ugovornogo sudoproizvodstva 1864* // *Polnoe Sobranie Zakonov Rossiiskoi Imperii. Sobranie vtoroe*. No. 41476. St. 656 [Law on Judicial Institutions of the Russian Empire, in 39 Complete Collection of Laws of the Russian Empire. Second Collection, No. 41476, Art. 656]] (Типография II Otdeleniya Sobstvennoi E.I.V. Kantselyarii 1864). In the famous trial of Vera Zasulich the prosecutor did not challenge any prospective jurors, and this provided the defence with an opportunity to strike eleven jurors off from the panel. The result of the trial was an acquittal. Радутная Н.В. Порядок разрешения на предварительном следствии ходатайства о рассмотрении дела судом присяжных. Предварительное слушание. Подготовительная часть судебного заседания. Формирование состава присяжных заседателей // Рассмотрение дел судом присяжных [Radutnaya N.V. *Poryadok razresheniya na predvaritel'nom sledstvii khodataistva o rassmotrenii dela sudom prisyaznykh. Predvaritel'noe slushanie. Podgotovitel'naya chast' sudebnogo zasedaniya. Formirovanie sostava prisyaznykh zasedatelei* // *Rassmotrenie del sudom prisyaznykh* [Nona V. Radutnaya, *Rules Regarding Resolution of Applications for Trial by Jury During Pre-trial Investigation. Preliminary Hearing. Preparatory Session. Jury Selection*, in *Trial by Jury*] 79 (Vyacheslav Lebedev, ed.) (Yurid. lit. 1998).

¹⁶⁵ Фойницкий И.Я. Курс уголовного судопроизводства. Т. 1 [Foinitskii I.Ya. *Kurs ugovornogo sudoproizvodstva*. T. 1 [Ivan Ya. Foinitskii, *Criminal Procedure Course*] 425 (Al'fa 1996).

¹⁶⁶ *Id.*

adjudicator's bias and the discretion of the judge. In order to challenge a juror or lay assessor for cause, the party should be able to convince the presiding judge that this lay adjudicator is prejudiced against the state, victim or defendant on the basis of information obtained before selection in court and during the *voir dire* procedure.

Sometimes, during *voir dire*, prospective jurors or lay assessors do not disclose their interest in the outcome of the trial, nor admit that they cannot be impartial; but for some reason the party may perceive a high risk that a particular lay adjudicator is prejudiced against the party. In several cases studied by the author in the Moscow City Court in 2004, the defence challenged, without cause, those prospective jurors who claimed that they were impartial despite some controversial facts in their backgrounds. In one case, for instance, the defence attorney challenged a male sculptor who served as a volunteer community police warden (*narodnyi druzhinnik*). In another case the defence used a peremptory challenge to exclude a prospective juror whose son worked in the office of the prosecutor. In both cases the challenged jurors were eager to serve but the defence doubted their impartiality because of their relationships to law enforcement agencies.

It is questionable that the judges would have allowed these candidates to be challenged for cause on the basis of information provided by prospective jurors during the *voir dire*. For instance, in one case, the Russian Supreme Court dismissed the appeal of a defendant who argued that the presiding judge wrongfully did not grant challenges for cause of two jurors who had relatives in law enforcement agencies and another juror who was a victim in another criminal case. The Supreme Court pointed out that the court transcript did not support these allegations and all other challenges for cause from the defence were granted.¹⁶⁷

According to Professor Nancy S. Marder, Director of the Justice John Paul Stevens Jury Center at Chicago-Kent College of Law, American defence attorneys 'worry that without peremptories, prospective jurors who cannot be impartial will be seated on the petit jury because judges are not always generous about granting for cause challenges.'¹⁶⁸ In post-Soviet criminal justice systems where judges are often infected by accusatorial bias, such a threat could be even worse and more pronounced. In other words, a presiding judge would tend to grant challenges for cause to the prosecution and refuse those made by the defence. Although this statement cannot currently be bolstered by empirical evidence, since Russian lawyers do not use their challenges for cause very often, presumably, if peremptory challenges were abolished, parties would try to challenge for cause more frequently.

However, several arguments weigh against the application of peremptory challenges in post-Soviet countries. One is the threat that in cases involving alleged

¹⁶⁷ Appellate Decision of the Supreme Court of the Russian Federation No. 88-005-59SP of 15 May 2006 (Re *Prusskikh et al.*).

¹⁶⁸ Nancy S. Marder, *The Jury Process* 98 (Foundation Press 2005).

racial, ethnic or religious tensions between defendants and victims, parties would attempt to exclude prospective jurors or lay assessors on the basis of race, ethnicity or religion. For example, in one case the author studied in Moscow City Court, several defendants were charged with the murder of Chechens and the defence attorney asked whether any of prospective jurors belonged to ethnicities from the Caucasus (*litsa kavkazskoi natsional'nosti*) or had relatives from such groups.¹⁶⁹ None of the prospective jurors answered positively, but it was obvious that the defence attorney was trying to identify potential candidates for challenges for cause or peremptory challenges. Remarkably, neither the prosecution objected to this question nor the judge denied it in his discretion. Thus, defence counsel was allowed to examine the jury panel in a discriminatory manner.

Instead of the abolishing peremptory challenges as a remedy against discrimination during jury selection on the basis of race, ethnicity or religion, post-Soviet legislators might consider the *Batson* approach: both parties could be required, in cases of alleged discrimination, to provide a neutral explanation for peremptory challenges. In the context of post-Soviet countries an approach similar to the *Batson* rule should be applied not only to race or ethnicity, but also to religion, as these three demographic characteristics are closely linked (specific ethnic groups belong to certain religious communities, for instance, Russians are predominantly Orthodox Christians, Chechens are predominantly Muslims, Kalmyks are predominantly Buddhists, etc.). Moreover, in some cases, religion is a more evident criterion for discrimination than race or ethnicity. For instance, hypothetically, in the trial of a Muslim Chechen defendant in North Osetia, a Russian province with mixed communities of Christians and Muslims, the prosecution could strike Muslim Osetins and keep Christian Osetins in the jury panel.

Application of the *Batson* rule would require the fulfilment of several conditions. Firstly, the parties can only object to a peremptory challenge by establishing a *prima facie* case of racial, ethnicity, gender or religious discrimination by the opposite party. Secondly, the party making the peremptory challenge should explain, in a race, ethnicity, gender or religion-neutral manner, the motives for challenging a particular candidate. Thirdly, the explanation for peremptory challenges should be credible and related to a particular case.¹⁷⁰ Otherwise, the proponent of the peremptory challenge

¹⁶⁹ The term 'person of the Caucasian ethnic group' (*litso kavkazskoi natsional'nosti*) in the Russian common language refers to the indigenous population of the Southern provinces of Russia, such as Chechnya, Dagestan, Ingushetiia, and North Osetiia, and three other post-Soviet countries: Azerbaijan, Armenia and Georgia. Although this term is used in media and official documents it is discriminatory.

¹⁷⁰ In *Purkett v. Elem*, 514 U.S. 765 (1995) the U.S. Supreme Court, however, held that: 'race-neutral explanation tendered by proponent of peremptory challenge need not be persuasive, or even plausible.' In *Purkett* the prosecution justified its peremptory challenge of one black prospective juror by the following explanation: 'I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to me to

might be able to strike prospective jurors or lay assessors in a discriminatory manner on far-fetched grounds, as in *Purkett v. Elem* (1995) when long hair, a moustache and a goatee-type beard were openly identified as motives for challenging a prospective juror.

Getting away from the issue of abolition and bias in peremptory challenges, and getting back to the optimal number of peremptory challenges, as mentioned above, two are stipulated in the majority of post-Soviet jurisdictions, but should it be more? According to the majority of advocates (36 of 56 respondents) and prosecutors (27 of 34 respondents) who participated in the author's Russian survey, the current two peremptory challenges is not sufficient (see Table 3 above). By using peremptory strikes, parties aim to exclude those prospective lay adjudicators whom they do not trust, and who are more likely to reach unfavourable decisions.

Sufficient peremptory strikes for either party can be defined as the minimum number of peremptory challenges needed to exclude those 'untrustworthy' and 'undesirable' jurors or lay assessors who might prejudice either party from winning its case. Sufficiency of the number of peremptory strikes depends on several factors, such as the model of lay adjudication, the number of lay adjudicators in court, the verdict rules, the number of defendants in trial, the number of alternate lay adjudicators in trial and the nature of the trial.

In different models of lay adjudication, the number of peremptory strikes may vary. For instance, in a collaborative court, the model in which three professional judges and nine lay assessors decide questions of fact together, the sufficient number of peremptory strikes for the defence should arguably be higher than in a twelve-member jury court because it is more likely that three professional judges would vote against the defendant, which means that the defence may confront three unfavourable adjudicators in the panel. In a collaborative court the defence should have additional peremptory challenges and this additional number might depend on the number of professional judges on the panel. For instance, in a panel of one professional judge and ten lay assessors the defence might have two additional peremptory strikes. According to French¹⁷¹ and Kazakhstani¹⁷² rules of criminal procedure, the defence has only one additional peremptory strike, although there are three professional judges in French collaborative courts and two professionals in Kazakhstani courts. In France, the tradition of additional peremptory challenges

not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee type beard . . . I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me.' Justice Stevens, however, dissented: '[T]he Court replaces the *Batson* standard with the surprising announcement that any neutral explanation, no matter how "implausible or fantastic" even if it is "silly or superstitious" is sufficient to rebut a prima facie case of discrimination.'

¹⁷¹ Code de procédure pénale, Art. 298 (Fr.).

¹⁷² *UPK Kaz.*, Art. 555.

for the defence has a long history. According to the Napoleonic Code of Criminal Procedure of 1808,¹⁷³ both the prosecution and the defence could challenge an equal number of jurors, between eight and twelve, depending on whether there were alternate jurors and depending on the number of prospective jurors who appeared in court (between thirty and thirty-six). However, the defence had the right to challenge an additional juror if the number of prospective jurors in the pool was odd, for instance thirty-one. The French law of 1958¹⁷⁴ allowed the defence to challenge five and the prosecution – four out of nine lay assessors in the *Cour d'assises*, and the Law of the 15th of June 2000, which amended the Code of Criminal Procedure and introduced *Cour d'assises d'appel*, allowed the defence to challenge six and the prosecution to challenge five out of twelve lay assessors in the appellate courts. Thus, in many countries throughout history, the number of peremptory challenges allowed has been higher than in post-Soviet countries. In the post-Soviet context, moreover, it would be justifiable to increase the number of additional peremptory challenges for the defence in collaborative courts as an additional safeguard against improper judicial influence.

The second factor affecting the sufficiency of peremptory challenges, is the size of the jury or mixed court. In small courts consisting of seven jurors, the number of peremptory challenges can be less than in jury courts consisting of twelve members.

Another factor that determines the number of peremptory challenges is verdict rules. In jury systems with simple majority verdicts, the number of peremptory challenges might be less than in the jury systems with unanimous or qualified majority verdicts. For example, if, in a jury of twelve members, which decides the question of guilt by a simple majority, the party fails to challenge five 'untrustworthy' and 'undesirable' jurors, it may still win its case by a simple majority of votes of seven impartial jurors. On the contrary, in a jury system with the unanimous verdict rule, even one or two 'suspicious' jurors with hidden biases may cause defeat to either party.

The fourth factor that determines the number of peremptory challenges, is the number of defendants in the trial. As mentioned above, according to the legislation of post-Soviet countries, in joint trials the total number of peremptory challenges for a group of defendants remains the same as for a single defendant in a separate trial.¹⁷⁵ In post-Soviet countries, defendants tried together need to come to an agreement on who should be challenged by using peremptory strikes. Otherwise peremptory challenges should be made by lot (Russia, Kazakhstan and Kyrgyzstan) or by dividing peremptory challenges between the defendants. Russian legislation also permits the issue of peremptory challenges to be decided by defendants' votes.

¹⁷³ Code d'instruction criminelle 1808, Art. 401 (Fr.).

¹⁷⁴ Code de procédure pénale, Art. 298 (Fr.).

¹⁷⁵ *UPK RF*, Art. 328(15); *UPK Kaz.*, Art. 555(5–6).

The application of these methods, however, raises several concerns. Defendants in joint trials cannot always attain mutual consent. In some trials, for instance, defendants may have opposite views about the criminal case, and if one defendant may see a prospective lay adjudicator as 'untrustworthy' or 'undesirable,' another defendant may see the same person as a favourable candidate. Furthermore, defendants may be of different ethnic origins and backgrounds, and some prospective lay adjudicators suitable for one defendant may be unfavourable for others. Dividing peremptory challenges between defendants is hardly a better solution because, in some cases, the number of defendants can be greater than the maximum number of peremptories, or the number of peremptory challenges is not divisible by the number of defendants, for instance, three peremptory challenges for two defendants. Peremptory challenging by lot, or by defendants' votes, can protect the interests of some defendants but violate the interests of others. Therefore, it would be preferable to grant each defendant the same number of peremptory challenges as he would be entitled to if tried alone.

The fifth factor to be accounted for in establishing the number of peremptory challenges, is the number of alternate jurors or lay assessors allowed in the trial. Legislation in post-Soviet jurisdictions usually stipulates for choosing two alternate lay adjudicators in each trial.¹⁷⁶ In Russia, a presiding judge, depending on the nature and complexity of trial, can increase the number of alternate jurors. In ten of fifteen cases studied by the author in the Moscow City Court, the presiding judge increased the number of alternate jurors to four.

An alternate juror or lay assessor can replace a member of the jury or the mixed tribunal at any time during trial. Enlargement of the court by means of introducing alternates, increases the probability of including biased or other unfavourable candidates in a jury or mixed tribunal. Thus, arguably, if the number of alternate jurors or lay assessors increases, parties should be entitled to additional peremptory challenges. For example, in Canada, the total number of peremptory challenges for each party increases by one for each alternate juror.¹⁷⁷ The U.S. Federal Rules of Criminal Procedure [hereinafter Fed. R. Crim. P.] follows a different approach to the determination of the number of additional peremptory challenges for alternate jurors: one peremptory challenge is permitted when one or two alternates are empanelled; two additional peremptory challenges for three or four alternates; three additional peremptory challenges for five or six alternates.¹⁷⁸ Similar rules for additional peremptory challenges for alternate jurors or lay assessors would constitute safeguards for empanelling impartial lay adjudicators in post-Soviet jurisdictions.

¹⁷⁶ *UPK RF*, Art. 328; *UPK Kaz.*, Art. 556.

¹⁷⁷ Canada Criminal Code, s. 634(2.1).

¹⁷⁸ Fed. R. Crim. P. 24(4).

Finally, the nature of the trial may create the need for a party to be able to challenge more prospective jurors or lay assessors. For example, in cases of high treason, the government may attempt to include loyal lay adjudicators who would be more likely to convict the defendant. In some common law jurisdictions the number of peremptory challenges varies depending on the type of criminal charge, from a relatively small number of peremptory challenges in misdemeanour cases to a large number of peremptories in cases of serious felonies. For instance, in the U.S. federal courts there are three peremptory challenges for both parties when the defendant is charged with a crime punishable by fine, imprisonment of one year or less, or both. The government has six peremptory challenges and the defendant has ten peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year. However, in capital cases or cases where the government seeks the death penalty each party is entitled to twenty peremptory challenges.¹⁷⁹ Canadian law entitles the prosecution and the defendant to twenty peremptory strikes in cases of high treason and first-degree murder; to twelve peremptory challenges when the accused is charged with an offence, other than high treason or first-degree murder, for which the accused may be sentenced to imprisonment for a term exceeding five years; and to four peremptory challenges for other types of offences.¹⁸⁰

Lay adjudication in post-Soviet jurisdictions would benefit if the number of peremptory challenges for parties in serious felony cases were increased, in particular in treason cases. Each defendant in a joint trial should be provided with the number of peremptory challenges to which the defendant would be entitled if tried alone. Additionally, parties should be entitled to additional peremptory challenges if alternate lay adjudicators are empanelled.

4.5. Challenge to the Entire Jury

According to Russian law, before jurors are sworn in, either party may request the presiding judge to discharge the entire jury on the grounds of *tendentiousness of composition of jury* (*tendentsioznost' sostava kollegii prislyazhnykh*), which means that a particular jury might be seen as incapable of reaching an impartial verdict due to its characteristics.¹⁸¹ The presiding judge can sustain or deny such a motion but he needs to provide a rationale for his decision.¹⁸²

¹⁷⁹ F. R. Crim. P. 24(b).

¹⁸⁰ Canada Criminal Code, s. 634(2).

¹⁸¹ *UPK RF*, Art. 330(1).

¹⁸² *Nauchno-prakticheskii kommentarii, supra* n. 79, at 572; Пашин С.А. Отбор присяжных заседателей в суде // Состязательное правосудие [Pashin S.A. *Otbor prislyazhnykh v sude // Sostyazatel'noe pravosudie* [Sergei A. Pashin, *Jury Selection in Court*, in *Adversarial Justice*] 38 (Sergei A. Pashin & Lyudmila M. Karnozova, eds.) (Izd-vo Mezhdunar. kom. sodeistviya pravovoi reforme 1996).

In theory some Russian scholars and commentators give several examples when the composition of the jury could be considered *tendentious* or partial. According to Pashin,¹⁸³ claims of jury partiality are usually made on grounds of the gender or ethnic structure of the jury. Professor Petrukhin¹⁸⁴ argued that a party can move to discharge the jury on grounds of partiality if, for example, jurors who were affected by an ecological disaster are selected to try a case of criminal pollution of the environment, or if, in a trial of an Orthodox Christian, the majority of jurors are Muslims.

In real practice, however, the success of such a motion to challenge the entire jury is very rare. For instance, Pashin¹⁸⁵ and the late Professor Nona Radutnaya, Head of the Criminal Procedure Department at the Russian Academy of Justice,¹⁸⁶ refer to a single case when the defendant was charged with rape and eleven of twelve jurors were women. At the same time, in other trials, defendants also attempted to challenge the entire jury on grounds of its religious composition. They did not succeed. For instance, in the case of *Namazov*, a Muslim defendant of Azeri origin, the defence argued that the composition of the jury was tendentious because there were no Muslim jurors in the jury.¹⁸⁷ The defendant was convicted and appealed. The Russian Supreme Court, however, disagreed with the defence's submission and held that the defence argument unjustifiable because the trial court had examined the jury panel for their ability to participate in fact-finding. Moreover, the Supreme Court referred to the equality clause of the Russian Constitution, which states:

All people shall be equal before the law and court. The State shall guarantee the equality of rights and freedoms of citizens, regardless of sex, race, nationality, language, origin, property and official status, place of residence, religion, membership of public associations, and other circumstances.¹⁸⁸

In other words, the Russian Supreme Court claimed that the Constitutional declaration was fully enforced in Russia and all juries would fulfil the equality clause, regardless of their composition.

In the case of *Tarasov, Bal' & Repnikov* the defendants, ethnic Russians, were tried by a jury in the Far-Eastern district military court for murder of an ethnic Ingush victim.¹⁸⁹

¹⁸³ Pashin, *supra* n. 182, at 37.

¹⁸⁴ Petrukhin, *supra* n. 162, at 9.

¹⁸⁵ Pashin, *supra* n. 182, at 37.

¹⁸⁶ Radutnaya, *supra* n. 164, at 73.

¹⁸⁷ Appellate Decision of the Supreme Court of the Russian Federation No. 37-005-01SP of 12 April 2005 (Re *Namazov*).

¹⁸⁸ *Konst. RF*, Art. 19 (Russ.).

¹⁸⁹ Appellate Decision of the Supreme Court of the Russian Federation No. 2-054/02 of 19 October 2004 (Re *Tarasov, Bal' and Repnikov*).

The prosecution attempted to challenge the all-woman jury on the grounds that an ethnically all-Russian, all-woman jury could not reach an impartial verdict in a trial of Russian defendants charged with murder of an ethnic Ingush. The prosecution also argued that an all-woman jury had no understanding of the conditions of military service, which was a central issue in this case since the defendants and the victim were soldiers. In this case, all defendants were acquitted and the prosecution and the victim's relatives appealed to the Russian Supreme Court. The Supreme Court held that the ratio of men and women in juries was not stipulated by law and *jurors were selected without taking into consideration their gender or race*. Moreover, the Supreme Court pointed out, the prosecution's claim regarding women's limited understanding of military service was irrelevant, since the law did not require jurors to have any special knowledge.

On the one hand, in its recent appellate decisions, the Russian Supreme Court clearly excluded gender, ethnicity, race and religion as possible grounds for challenging the entire jury. It seems that a trial court decision that discharged an all-woman jury in a rape trial, was erroneous as well. On the other hand, however, the Supreme Court did not clarify what grounds trial courts can use for discharging the entire jury when a party claims jury partiality. In the mandatory guidelines for trial courts,¹⁹⁰ the Plenum of the Supreme Court of the Russian Federation explained that the term *tendentiousness of composition of the jury* refers to cases where there are reasons to believe that the jury that was selected for a particular case was not able to consider a criminal matter objectively and comprehensively and reach a just verdict due to, for example, the homogeneity of the jury composition in terms of age, professional, social and other factors. It is unclear why the Supreme Court in its appellate decisions did not consider homogeneous juries as tendentious in terms of gender, race or ethnicity, but recognized that homogeneous juries are potentially biased when it comes to age, professional, social and *other* characteristics.

At least three possible explanations exist for this paradox. Firstly, perhaps the decisions in *Namazov* and *Tarasov, Bal' & Repnikov* seem to contradict the later guidelines of the Supreme Court because the appellate decisions in these cases were reached by only three Supreme Court judges, while the Resolution of the Plenum of the Supreme Court was adopted by a larger panel of Supreme Court judges. Secondly, the decisions in the trials of *Namazov* and *Tarasov, Bal' & Repnikov* involved the interests of parties who were members of ethnic minorities, which could indicate that courts of all levels were reluctant to consider issues of racial, religious and ethnic bias of jurors from racial and ethnic majority groups. Such reluctance may be caused by perceived difficulties in summoning prospective jurors from the same community as the defendant in some regions. Thirdly, the decisions in *Namazov* and *Tarasov, Bal' & Repnikov* might not have been in conflict with the guidelines stipulated in the

¹⁹⁰ Regulations of the Plenum of the Russian Supreme Court of 22 November 2005 No. 23, ¶ 16.

Resolution of the Supreme Court because, in *Namazov* and *Tarasov, Bal' & Repnikov*, the homogeneity of jury structure was not a sufficient ground for the trial judge and the appellate court to believe that the juries in both cases were tendentious. In other words, according to the Supreme Court judges the religion of the defendant in *Namazov*, and the gender and ethnicity of the victim in *Tarasov, Bal' & Repnikov*, were not significant factors in those cases, while the gender factor in the case of a male defendant charged with rape, when eleven of twelve jurors were female, was significant enough to infer partiality. In sum, the Plenum of the Russian Supreme Court failed to clarify any concrete standards that could be applied to establish partiality. This gap doubtless causes inconsistencies in trial court decisions. Moreover as Dr. Khasbulat Rustamov, a noted Dagestani lawyer and legal scholar, has pointed out, it is unclear what proportion of jurors in a jury may constitute a partial jury.¹⁹¹

Although in theory challenging the entire jury on the ground of tendentiousness of jury composition can be a safeguard for an impartial tribunal, experience in Russia shows that this rule is practically unworkable. If post-Soviet jurisdictions adopt challenges to the entire jury, the legislature needs to account for the following two issues. Firstly, the legislation should be more explicit about the kind of criminal cases where the presiding judge is allowed to discharge the entire jury for partiality: for example, racial, ethnic or religious motivation of the crime, or cases of sexual assault against female victims. Secondly, the legislation should stipulate the proportion of jurors that may create a tendentious jury.

5. Selection of Racially, Ethnically and Linguistically Mixed Lay Adjudicators

Besides restrictions on the use of peremptory challenges on the basis of race or ethnicity and the possibility of challenging the entire jury, for trials involving inter-ethnic crimes post-Soviet jurisdictions should consider selecting racially, ethnically and linguistically mixed courts of lay participation, or courts *de medietate linguae*.¹⁹² These courts could consist of members of the defendant's and victim's communities. This approach was suggested by some American scholars.¹⁹³ Professor Deborah Ramirez, an expert on racial profiling and jury selection, for example, argued:

¹⁹¹ Рустамов Х.У. Проблема отвода в суде присяжных // Государство и право. 1997. № 6. С. 80, 81 [Rustamov Kh.U. *Problema otvoda v sude prisyzhnykh* // *Gosudarstvo i pravo*. 1997. No. 6. S. 80, 81 [Khasbulat U. Rustamov, *The Issue of Jury Challenges*, in 1997(6) State and Law 80, 81]].

¹⁹² This is a Latin term meaning a court 'of halfness of language' (Black's Law Dictionary 934 (9th ed., West 2009)).

¹⁹³ Sheri L. Johnson, *Black Innocence and the White Jury*, 83 Mich. L. Rev. 1611–1708 (1985); Marianne Constable, *The Law of the Others. The Mixed Jury and Changing Conceptions of Citizenship, Law and Knowledge* (University of Chicago Press 1994); Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and Proposal for Change*, 74 B.U.L. Rev. 777–818 (1994).

Currently there is widespread consensus that a racially mixed jury, particularly in cases involving tangible and unmistakable elements of race or racism, offers many benefits. Many judges, scholars, and litigants believe that a racially mixed jury may help to overcome racial bias, improve the fairness of trial proceedings, and enhance public respect and acceptance of criminal and civil verdicts.

However, the court *de medietate linguae* raises other practical issues. The first issue is to decide which party is entitled to such courts: the defendant, the prosecution, (which includes the victim or victim's relatives according to Russian law and the law of other post-Soviet jurisdictions),¹⁹⁴ or both parties. The second challenge is to decide whether there should be any quotas on the number of jurors or lay assessors representing different communities, for example, no more than half of the lay adjudicators from the defendant's community and the same from the victim's community. Thirdly, it is important to determine whether a not-guilty verdict should be unanimous or reached by a qualified majority.

Regarding the first issue, arguably both parties should be entitled to a court *de medietate linguae* and their motion to have representatives of their community should be granted if the presiding judge decides that the case involves racial or ethnic tensions. As opposed to the Anglo-American criminal procedure, in which victims or their relatives are merely regarded as witnesses for the prosecution, in the criminal procedure of civil law jurisdictions, including post-Soviet countries, the aggrieved person receives the full rights of a party. Hence, disregarding the rights of victims, including their relatives, in the legal system of post-Soviet states can be interpreted as violating the principle of equality of parties. This principle impacts the second issue mentioned above – the optimal number of jurors representing each community.

Historically, early mixed juries in 12th – 14th century Britain and Ireland consisted of an equal numbers of natives and foreigners.¹⁹⁵ In some former British colonies, such as Aden, Barbados, Brunei, Federal Malay States, Gold Coast, Johor, Kelantan, North Borneo and Nyasaland, aliens, who were mostly Europeans or American defendants, could require a jury with a majority of jurors of their race.¹⁹⁶

An interesting approach to the issue of language in the jury system is applied in Québec. According to the Jurors Act, three different types of jury can be called in this Canadian province: a French unilingual jury, which is composed exclusively of French-

¹⁹⁴ According to the Criminal procedure law of Russia and other post-Soviet countries, the term 'prosecution' (*storona obvineniya*) comprises the public prosecutor (*prokuror*), private prosecutor (*chastnyi obvinitel*), victim and his or her representative, civil plaintiff and his or her representative. See *UPK RF*, Art. 5(47); *UPK Kaz.*, Art. 7(12); *UPK Kyrg.*, Art. 27.

¹⁹⁵ Constable, *supra* n. 193, at 16–25.

¹⁹⁶ Ramirez, *supra* n. 193, at 788.

speaking persons; an English unilingual jury, composed of English-speaking persons; and a mixed jury, composed of French-speaking and English-speaking persons in equal proportions.¹⁹⁷ In the latter case, all jurors should be bilingual or fluent in both French and English.¹⁹⁸ Based on this example, some multi-lingual post-Soviet countries could probably introduce a similar additional safeguard for ensuring defendants' right to a fair trial. Generally speaking, the language of the trial and adjudication should be determined by the defendant's native language or the language in which he or she is proficient. In case of a bilingual jury, the defendant should also have an opportunity to address the trier of fact directly in one of the languages in which he or she is proficient, without the intermediary of an interpreter.

Some jury researchers, for example Professor Sheri Lynn Johnson, of Cornell Law School, a specialist in racial bias in American juries, has argued that in the twelve-member mixed jury, only three jurors from the defendant's racial group are required in order to prevent a racially motivated conviction.¹⁹⁹ At the same time, Johnson recognizes that such a proposal would result in hung juries rather than acquittals and, in order to acquit the defendant, the number of same race jurors should be ten.²⁰⁰ Note, though, that a 'hung jury' situation is impossible in the current Russian jury system. According to the current Russian legislation, a not-guilty verdict could be reached by six votes, while a guilty verdict requires at least seven votes. In other words, it is doubtful that in the present Russian context Johnson's proposal could overcome the bias of the majority against the defendant.

It seems, however, that there are several other solutions for establishing effective courts *de medietate linguae* in Russia and other post-Soviet countries. Firstly, verdict rules could be changed to require a unanimous or qualified majority verdict of ten out of twelve votes for convictions and acquittals, as Georgia did in its criminal procedure law.²⁰¹ Alternatively, verdict rules could be changed only for acquittals and require a simple majority for all types of verdicts. In this case, both communities should be represented in equal proportions: six from the defendant's community and six from the victim's community. The outcome of the trial therefore would depend on a single 'swing' juror.

¹⁹⁷ Jurors Act, R.S.Q. 1977, c. J-2, s. 14 (Can.).

¹⁹⁸ E-mail from Professor Louise Viau (the Université de Montréal) to author (June 5, 2005) (on file with author).

¹⁹⁹ Johnson, *supra* n. 193, at 1698–99.

²⁰⁰ *Id.* at 1699.

²⁰¹ According to Art. 261 of the Georgian CPC, the jury should try to arrive at the verdict unanimously. 'If, however, the jury fails to achieve an unanimous decision within three hours, the decision should be made within next six hours with the following majority of votes: if the jury is composed of not less than 11 jurors, the verdict shall be passed if 8 jurors vote for it; if the jury is composed of 10 jurors, the verdict shall be passed if 7 jurors vote for it; if the jury is composed of 9 jurors, the verdict shall be passed if 6 jurors vote for it; if the jury is composed of 8 jurors, the verdict shall be passed if 5 jurors vote for it, if the jury is composed of 7 or 6 jurors, the verdict shall be passed if 4 jurors vote for it.'

The first proposal suggested above for changes in verdict rules is more suitable for the transitional criminal justice systems of the post-Soviet countries for two reasons. Firstly, verdicts reached by unanimous or qualified majority juries would enjoy more public confidence than verdicts reached by a simple majority, which sometimes are criticized as 'questionable.' Secondly, the selection of a court with a mixed racial composition, in which half of the lay adjudicators represent the defendant's race or ethnicity can be very complicated in some areas where the defendant's community represents a small ethnic minority group. By way of example, Chechens constitute less than 1% of the total population in Russia and, while they make up more than 90% of the population in Chechnya, they are not well represented in other regions.

6. Conclusion

This article focused on the analysis of current laws of several post-Soviet states in relation to the selection of prospective lay adjudicators at different stages of the selection process: at the stage of qualification of persons for jury or lay assessors lists, at the stage of summoning prospective lay adjudicators, and at the selection stage in court. This analysis of current legislation reveals a significant number of defects and gaps that allow executives and court personnel to manipulate the selection process and hamper the formation of impartial, independent and representative lay courts. One of the defects is the restrictive list of qualifications for the jury or lay assessors' service, including the minimum age of candidates for lay adjudication service, and knowledge of the official language. Such restrictive eligibility criteria may unfairly exclude many young citizens and those who are incompetent in the official language in some multilingual and multi-ethnic countries such as Kazakhstan and Ukraine.

Lack of a transparent and public selection process and lack of accountability of selective bodies are other challenges. Russian scholars and lawyers have also voiced concerns about the genuine nature of random selection of prospective lay adjudicators. Several Russian cases demonstrate that court personnel sometimes tend to include 'repeaters' into the jury pool and may even 'plant' favourable jurors.

An examination of the legislation in post-Soviet countries and of the empirical data collected in Russia lead to the conclusion that the mechanisms of the *voir dire*, peremptory challenges and challenges to entire juries should be reviewed and improved in order to provide reliable safeguards for the selection of impartial and independent lay adjudicators and prevent parties from excluding prospective lay adjudicators for discriminatory reasons.

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