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## **The Problematic Issues of Jury Selection**

*It is known that the jury is not an institutionally separate legal entity. It functions alongside the Court of First Instance and is a special form of administration of justice. Unlike ordinary proceedings when a judge makes a decision based on the law, a jury trial relies on the opinions of ordinary citizens applying to their “inner voice” – conscience, “common sense”, folk wisdom and intelligence, public morality, sense of justice. That is why jury trial is considered the highest expression of democracy. It is an interesting institution in many ways. The article reviews the problematic issues of jury selection.*

*The article analyses theoretical and practical aspects of selecting non-professional judges, the preconditions of their selection, recusals and the jury composition. Legislative changes have been evaluated positively, but there are still challenges. Accordingly, the problems associated with jury selection are identified and the specific recommendations are made to prevent the process from delaying and choose independent, unbiased jurors.*

**Keywords:** *jurors, selection, incompatibility, self-recusal, justified and unjustified recusal, party.*

### **1. Introduction**

A jury trial is an alternative form of justice which within the competence of courts of general jurisdiction has to meet all the necessary requirements for the right to a fair trial.<sup>1</sup>

In the classical sense, in the court of jury, non-professionals, representatives of society decide the so-called question of “fact” – guilt or innocence of the accused, and the issue of law is decided by a professional judge. The institute of jury has been operating in many countries of the world for a long time. Nevertheless, it does not lose its relevance to this day, especially in Georgia where the court of jury has a short history.

The involvement of non-professionals in jury trial makes it possible to introduce the values, common views and experiences of ordinary people to the system that is governed by an elite of legal experts and abstract legal norms. Such involvement maintains the contact between society and judiciary and develops the trust of public to the system of justice and courts.<sup>2</sup>

Ilia Chavchavadze believed that the court of jury could have implemented fair justice in the country. He directly connected the institutions of a conciliator and jury with the ideas of fair justice among the society.<sup>3</sup>

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<sup>1</sup> The Decision of the Constitutional Court of Georgia on November 13, 2014 in case N1/4/557,571,576, II-98 (In Georgian).

<sup>2</sup> See *Bachmeier U.L., Daly B.L., Gerald T., Comparative Analysis: Systems of Trial by Non-Professional Judges in the Member States of the Council of Europe*, Tbilisi, 2013, 10 (in Georgian).

<sup>3</sup> The court of jury, history of origin and development, the Supreme Court of Georgia, Tbilisi, 2010, <<http://www.supremecourt.ge/files/upload-file/pdf/finaljudge.pdf>> [ 23.01.2023].

Justifying the existence of a jury trial mainly depends on the proper formation of the jury pool, which in turn, implies the selection of jurors in accordance with the sophisticated legislation. The formation of an honest and impartial jury is a prerequisite for a fair verdict. The purpose of the article is to study/investigate the issue of selecting jury, identify the reasons for delays in the process of jury selection that ultimately hinder the effective functioning of the jury. The aim of the paper is also to search for the mechanisms to develop scientific proposals/recommendations for the introduction of strict guarantees of legislation, which ensure to select objective and impartial jurors along with the perfection of the regulatory norms for forming the jury.

## **2. The Requirements to a Juror, an Incompatibility and a Refusal to Perform Duty of a Juror**

### **2.1. The Requirements to a Juror**

According to Article 29 of the Criminal Procedure Code of Georgia (GCPC), a person is entitled to participate as a juror in the trial if:

a) is recorded in the database of the Civil Registry system of Georgia as a person over 18 years old;

The Article 29 of the Civil Code refers to a person over the age of 18, however, the first part of the Article 221 of the Civil Code refers to a person who has reached the age of 18.<sup>4</sup> It is necessary to specify by legislation whether a person over the age of 18 can be a juror or not.

In addition, it is important to consider how optimal the minimum age of 18 years is for a jury candidate. Jurors are not professional judges but they have to decide the guilt or innocence of the accused in the cases assigned to them. They make a decision based on life experience, a sense of justice and folk wisdom. Accordingly, there arises question of how 18-year-olds with their intellectual development, life experience, and inner sense of justice can take such a high responsibility. In comparison with most common law countries the minimum age limit is higher than in Georgia. For example, in England, New Zealand the minimum age is 20 years. The age limit is even higher in continental European countries, in France – 23, in Russia – 25. Considering the best practices of other countries, it is desirable to increase the mentioned minimum age to 23 years in Georgia.

Besides, examining age may be important in relation to some offences. For instance, when considering a case of domestic violence<sup>5</sup>, it is essential to select age groups, taking into account the mental attitude towards the committed act. The perception of young people on this issue is sharply different from the views of middle-aged people and the elderly, who are more motivated by tradition and the obligation to protect the family (they act according to the principle of “what happens within the family, it should not be taken outside”) and violence can be justified, while young people considering the principle of protection of rights and equality, facts can be evaluated and judged more objectively and fairly. Regarding this category of crime, it is also important to take into account the

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<sup>4</sup> See, Part 1 of the Article 221 of the Criminal Procedure Code of Georgia.

<sup>5</sup> Note: The jury sentencing includes the crime provided with the Article 126, Part 2 of the Criminal Code of Georgia.

gender of the judges, because some of the women, in a variety of circumstances, might not consider the violence of one family member against another as a crime at all (for example, the violence of a husband against his wife). Obviously, such judges cannot make an impartial decision.

b) knows the language of criminal proceedings;

Without a direct and complete perception of the case, it is impossible to make a correct and fair assessment, draw a conclusion and finally make a decision. The assistance of an interpreter is not allowed. The jurors should be in the deliberation room, and they have to take the responsibility for violating the secrecy of the deliberation. On the ground of analyzing the practice, the people, who do not know the language, are mostly ethnically non-Georgians. They refuse as soon as they receive the invitation. On this basis, some turn up at the session and announce self-recusal in the hall. One of the jurors claimed to be good at the language of the proceedings, but during the deliberation, it became clear that he did not know the Georgian language well, he understood the discussed issues in a completely different way, about which seven jurors appealed to the chairman of the session.<sup>6</sup>

c) lives in East or West Georgia – depending on which part of Georgia the jury process is held in the district (city) court;

Before the change in 2016, the mentioned paragraph was formulated in the following way – “lives in the territory that is included in the jurisdiction of the court where the process is taking place”. Such an arrangement created a danger of selecting for serving on the jury the acquaintances of the plaintiff or petitioner, the residents of the same city. In accordance with today's current version, the selection of the jury was specified within the scope of a relatively large territory taking into account the area of eastern and western Georgia, which, obviously, reduces the indicated danger. Therefore, it turns out that when a jury trial is held in the Tbilisi City Court, approximately 30% of summoned persons are from the population of Tbilisi/citizens registered in Tbilisi.

d) does not have such a limitation of opportunity that would prevent from fulfilling the duty of a juror.

As a result of the health assessment, it can be found that a person with a physical disability can serve as a juror due to mental health. For example, when discussing one of the criminal cases, a candidate for serving on jury was a disabled person who worked in the House of Justice and used a wheelchair. He did not declare recusal and he agreed to serve as a juror if he could move in the relevant infrastructure. The candidate was selected as a juror and participated in the discussion of the case until the end.<sup>7</sup> Almost everywhere in the world, jurors are members of the general public. In common law countries, it is a principle that the jury “shall represent the public”. In America, this principle is defined as the principle of cross-section of community.<sup>8</sup> The representative nature of the jury trial is an emphasis of the democratic nature of this institution. However, there was the period when not all members of society could participate in the administering justice. Preference was given to males and representatives of the middle class. The membership of the jury was often connected with

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<sup>6</sup> Interview with judge Eka Areshidze, see Georgian Court Watch, <<https://courtwatch.ge/articles/ekareshidze/>> [25.02.2023].

<sup>7</sup> Ibid.

<sup>8</sup> *Iorhandi L., Tsikarishvili K., Jury Court, Review of Western Systems, Tbilisi, 2009, 32 (in Georgian).*

the property census. For example, property census was imposed in England until 1972. Because of this, jurors were mostly “male, middle-aged, middle-intelligent, and middle-class.”<sup>9</sup> Another type of census was a residence restriction in England according to which a candidate for serving on jury must have lived in the United Kingdom<sup>10</sup> for at least 5 years after reaching the age of 13. In Belgium, they tried to select people with higher education and without education equally. In some American states, attention was focused on the candidates with education and moral values. In 1968, Congress passed Jury Selection and Service Act, which changed the requirements for jurors and established the principle of selecting at random from a fair cross section of the community. Even today, the requirements for education are different in various countries. In Italy, in the first instance, an incomplete secondary education is sufficient while in the Appellate Court, a complete secondary education is compulsory. The procedural legislation of Georgia does not include requirements for the education of jury candidates, since the nature of the jury trial is determined by folk wisdom and common sense.

## **2.2. Incompatibility**

The recusal of service for jury is identical to the recusal of a judge, prosecutor, an investigator, a secretary of the session and is provided with Article 59 of the Civil Code. In addition, Article 30 of the Georgia Civil Code lists the persons whose participation in jury trial is incompatible. Such persons are: a state-political person, prosecutor, cleric, police officer, lawyer, an investigator and employee of the state security service system, active military serviceman, a participant of the criminal proceedings of the mentioned case, an accused, a convicted person and a person who was imposed an administrative fine for abusing a small amount of drug and less than 1 year has passed since the imposition of this administrative fine. Before the change on June 24, 2016, this list included a lawyer, a psychologist, a psychiatrist, however, by the current edition, the restriction of serving on jury has been removed for them but the opinions about participation of a lawyer in jury trial split down the middle. One part believes that the participation of a lawyer can assist to reach a legal verdict. Another part supposes that with the participation of a lawyer, the main meaning of the jury trial can be lost, since it is important to make out the attitudes of people, citizens towards the fact and give a correct assessment based on folk wisdom and justice not on the law.

According to Prof. N. Kovalyov, the presence of a lawyer or a police officer in the deliberation room can intimidate and erroneously influence jurors who are less qualified in the field of law.<sup>11</sup> However, practitioners, the judge and the prosecution positively evaluate the participation of lawyers in the jury. The list of Article 30 of the Civil Code does not include the judge. The restriction should also apply to him, since his opinion, his vision will have a great influence on the rest of the jury. Before the 2016 amendments, the Code of Procedure did not provide for the incompatibility of a

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<sup>9</sup> *Widman N.*, Jury trial (Common Law Countries), 2005, 33 (in Georgian).

<sup>10</sup> *Iorhandi L., Tsikarishvili K.*, Jury Court, Review of Western Systems, Tbilisi, 2009, 32 (in Georgian).

<sup>11</sup> Jurors in criminal proceedings, Human Rights Network of Georgia, Tbilisi, 2016, 55, see, citation: *Kovaliov N.*, Analysis of the Draft Law on Amendments to Criminal Procedure Code of Georgia Regarding the Jury Trial, 2016.

person with a conviction. A person, who was sentenced an administrative penalty for abusing a small amount of narcotic drug, was forbidden to serve on a jury. Based on the mentioned change, convicted persons will not be able to participate in jury trial, which can be evaluated in two directions: first, the convicted person is always in solidarity with the accused and cannot review a case objectively and impartially; the second, the judge can directly administer justice by issuing a verdict. Consequently, the moral authority to decide the fate of other people and judge the crimes committed by them should be held only by a person with inviolable authority. Also, the Code should specify whether the mentioned limitation applies to persons whose convictions have been expunged or dismissed. By comparison, in most common law countries, incompatibility applies to high-ranking officials, professional lawyers, and persons of appropriate age.

### **2.3. Refusing to Serve as a Juror**

Legislation also regulates the grounds for refusing to be a judge. It is possible to evade the duty of a jury in the cases provided by the first part of Article 31 of the Code of Procedure. In particular:

a) If he was already a juror during the last year.

As during the last year, he has already fulfilled his civil obligation and served as a juror the person has the right to refuse to fulfill this duty again. Accordingly, he has to make a choice – either he repeatedly participates as a juror in the trial, or he refuses to perform this duty;

b) If he performs work related to the protection of human life, health or civil safety and it is impossible to change it in a specific period or it might cause significant harm proved by convincing information. This rule can be also applied to a person who does specific work only in exceptional cases. Before the change, the law provided for a different basis – “if he performs such work, the change can cause significant damage”. The latter was further specified and explained by the legislator, and with the amendment of June 28, 2021, the people occupied with professions related to the protection of human life, health or civil safety were allowed to recuse. For example, if a surgeon has to make an operation at the time of jury trial, by submitting the appropriate documents, he can refuse to serve as a jury, since the patient is certain of competence, qualifications, experience, and high trust of the doctor.

Also, the last sentence of the mentioned paragraph – “this rule can be applied to a person performing other work of special importance only in exceptional cases” – is vague and requires additional clarification of the category of people performing other work of special importance and the exceptional cases they can be exempted from the duty of a jury;

It is necessary to evaluate each specific case and find out whether the interest of professional activity should be given priority.

c) due to health condition;

It is also essential to specify what is meant by health condition. A person may have certain health problems, in particular, he can suffer from a chronic disease, be under the supervision of a doctor and get the treatment consistently but simultaneously he is able to fulfil his professional duties at work. This is different from the case when a person suddenly experiences health problems, he is in need of being hospitalized and operated on or has to start to receive some an urgent therapeutic or a

surgical treatment immediately. This can be the main reason for a refusal, otherwise, the law can be used as a means of malicious recuse to serve a juror.

d) if he stays or traverses outside of Georgia;

When a person has been abroad for a long time, it is obvious that he cannot participate in the jury trial, but “traverse outside of Georgia for a long time” allows for different interpretations. If a person thinks/plans to go abroad and start working or continue studying for a non-specific period of time or he does not intend making for abroad in general, but knows exactly when he will go, because he has already booked a ticket, these facts should be the basis for refusing to serve on jury.

e) if he is over 70 years old;

An elderly person should have the right to choose and be able to refuse to fulfill the civic duty. The law allows an elderly citizen to recuse to serve as a juror. Unlike Georgia, in the majority of foreign countries with the experiences of jury trial, the maximum age limit for participation in the judicial process generally varies between 65-70 years (for example, in England the maximum age limit is 70, in New Zealand 65, etc.).

### **3. Selection, Removal and Self-removal of Jurors**

#### **3.1. Compilation of the List of Jury Candidates**

The selection of jury takes place in the courtroom where are potential jurors, parties, including the accused, the chairman and the secretary of the session. The court is obliged to inform the parties about the place and time of electing jury. The parties have the right to attend the procedure of jury selection.<sup>12</sup> The law does not consider the participation of the parties in the session of picking jury mandatory, which is not correct. The parties must file motions for reasonable and unreasonable reliefs and the court shall satisfy the claims. In general, the participation of a prosecutor in the court session is mandatory.<sup>13</sup> The participation of a lawyer is also essential if a jury hears criminal case.<sup>14</sup> Accordingly, Part 3 of Article 221 of the Civil Code does not coincide with Part 4 of Article 33 and subsection “g” of Article 45 of the Civil Code. In practice, it is impossible to form a jury without the presence of the parties and their active participation. It is in the interest of the parties to select judges who are likely to share their positions, meet their demands and reach an acceptable verdict. Consequently, it is necessary to eliminate the gap and instead of the entry – “the parties have the right”, the law should mention – “the parties are obliged”. Candidates are not impersonated at the selection meeting; they are assigned a serial number, which aims at protecting their personal data. According to the initial version of the current procedural code, the judge, after hearing the opinions of the parties, established a list of 50 candidates from the unified list of voters considering the limit determined by him. If less than 14 candidates were selected, the judge would adjourn the hearing for 10 days and invite no more than 30 additional candidates to complete the composition of the jury to the established number. In accordance to the change of September 24, 2010, the list of candidates serving on jury increased to 100, following

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<sup>12</sup> See, Article 221-3 of the Code of Criminal Procedure.

<sup>13</sup> Ibid, Article 33, Section 4.

<sup>14</sup> Ibid, Article 45, subsection “g”.

the selection at random, and instead of the unified list of voters, the National Civil Registry Agency (based on the change of May 25, 2012, the State Services Development Agency) provided the obligation to introduce an annual list of the citizens who reached 18, no later than July 1. Because only 1/5 of the summoned appeared at the hearing, the selection often lasted for 3-4 months, sometimes it was necessary to hold more than 20 hearings to elect the candidates for serving on jury. In order to solve the problems, on June 24, 2016, the Criminal Procedure Code was amended, which came into force on January 1, 2017. According to the mentioned change, instead of 100 candidates, there was established the selection of 300 persons. They were sent the questionnaire, approved by the judge for 20 days before the session. At the first session, no more than the first 150 candidates from the list of 300 persons were sent summons by their serial numbers. If all jurors could not be picked at the first session, the session would be postponed for 10 days and the judge would invite the remaining 150 candidates from the list of candidates. In case of selecting less than 14 jurors, the judge would adjourn the session again and call 100 candidates based on the law, from which the required number of jurors would be chosen. However, the mentioned changes did not contribute to speeding up the selection process and therefore, were not effective. On June 28, 2021, the procedural code experienced another amendment, according to which, after hearing the opinions of the parties, the judge, following the principle of selecting at random, initiates a list of candidates for jury duty with a composition of no more than 300 people. The mentioned list should be loaded into a special program. Prosecutors and defense attorneys propose a combination of numbers – for example, 12 and 15 can be conventionally suggested which are indicated in the program and a list of 300 people is made from every 1215 people. At the first stage of selection 300 people should be summoned who are sent a notice and a questionnaire. However, the actual addresses of candidates often do not match the addresses of registration, or some of the candidates are abroad, and in most cases only 60-65 people turn up at the session. Compared to the previous procedure, the trend is positive because a number of candidates increased three times that makes it possible to complete the jury selection within a few sessions.

Not less than 15 days before the jury selection, the candidates are sent the questionnaire, which is approved by the judge after consulting with parties, to their places of residence. The candidates have to answer and return the completed questionnaire to the judge within 5 days.<sup>15</sup> If less than 10 candidates are elected, the judge can adjourn the hearing for 10 days and invite no more than 300 additional candidates to complete the composition of the jury to the established number.<sup>16</sup>

### **3.2. Selection, Removal and Self-removal of Jurors**

The jury selection procedure involves the implementation of interrelated actions, removal and self-removal of jurors by the parties in accordance with the rules and procedures established by law.<sup>17</sup> The Civil Code provides the grounds for removing a juror, which are identical to the removal of a judge, prosecutor, investigator, secretary of the session, and therefore, it is formulated in one article,

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<sup>15</sup> See, Section 1 of Article 221 of the Criminal Procedure Code of Georgia (in Georgian).

<sup>16</sup> See, Article 223-9 of the Criminal Procedure Code of Georgia (in Georgian).

<sup>17</sup> *Gabisonia I.*, Courts of Jury, Magistrates and Conciliation (Meditation), Tbilisi, 2008, 447 (in Georgian).

Article 59 of the Civil Code. In addition, if there is any reason featured in the article, the juror is obliged to immediately declare about removal.

The Civil Code considers self-removal not only of the juror, but also of the candidate for serving on jury. In particular, according to section 6 of Article 221 of the Civil Code, the candidate for jury duty is obliged to notify the court within 2 days about receiving the summons if there is a reason for recusal based on Article 30 of the Civil Code. So, the code differentiates not only the precluding circumstances for participation in the process, but the conditions proving the state of being incompatible for serving a juror. In other words, incompatibility for a candidate, and for the juror who has already overcome the incompatibility, the precluding circumstances to participate in the process provided with Article 59 of the Civil Code are the grounds for recusal. Accordingly, Section 6 of Article 221 requires clarification because it should not be about the recusal defined by Article 30 of the Civil Code, but the cause of incompatibility established by Article 30 of the Civil Code.

Before arranging selection session, the candidates, eligible for jury duty, are sent a questionnaire with a notice indicating the time and the place of the session and the obligation to appear at the session. But they are not informed about the requirements established by law, incompatibility, and reasons for refusing to serve as a juror. Being aware of the mentioned provisions is necessary in order to be a candidate able to file a justified motion for self-recusal. Accordingly, the law should provide the obligation for supplying potential jurors with the information. If the jury candidate does not want to publicly make a statement regarding self-recusal, he can inform the chairman of the session. When considering one of the cases of domestic violence, the jury candidate made a self-recusal and told the chairman that she herself was a victim of domestic violence, her husband abused her. It turned out that her son also insulted his wife and once she had to call for the patrol police.<sup>18</sup> Obviously, a candidate with such a negative experience would not be able to maintain objectivity and fulfill the duty of an impartial judge.

In practice, when making a recusal, jury candidates often indicate health conditions, for example, depression and a severe emotional state which are considered impediment to an objective decision. Mothers of young children often have to refuse because they don't have a babysitter. Also, one of the reasons is self-employment because employees have no guarantee of keeping a job and salary, especially when the salary of a candidate depends on the output, for example, a taxi driver, a flower seller, a babysitter. Self-employed persons, in the event of making a plea for self-recusal, are usually exempted from serving on a jury since the method of compensating them still has not been developed but it is essential to regulate this issue by law.

Criminal liability is imposed for a juror or a candidate for serving on jury if he/she fails to submit information to the court about his/her incompatibility with the jury or provides false information.<sup>19</sup> If the candidate does not appear in the court at the specified time without a good reason, fail to fulfill his/her duty or perform in an improper way, the chairman of the session will impose a

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<sup>18</sup> Interview with the judge Eka Areshidze, see Georgian Court Watch, <<https://courtwatch.ge/articles/ekaareshidze/>> [25.02.2023] (in Georgian).

<sup>19</sup> See, Article 3672 of the Criminal Procedure Code of Georgia (in Georgian).



fine from 500 to 1500 GEL.<sup>20</sup> The amount of the fine should be deterrent, proportional to the damage and affordable for the person to pay.

At the jury selection session, the parties raise compelling and unconvincing recusals. Compelling recusal means refusing on a specific basis while an unconvincing recusal is a protest without explaining.<sup>21</sup> The prosecutor/advocate is not limited in presenting compelling recusals. If the presented charge provides for life imprisonment as a punishment, the party has the right to apply for 10 unconvincing recusals (before the amendment of July 10, 2015, the party had the right to decide 12 unconvincing recusals), in other cases, the party has the right to declare 6 unreasonable recusals.<sup>22</sup> In addition, each defendant could decide additional 3 convincing recusals. The prosecution was entitled to additionally address as many unreasonable recusals as the defendants used together. The mentioned rule delayed the already protracted selection process. If less than 50 candidates appeared in the court, the judge was allowed to start the session and select the jurors.<sup>23</sup> For example, if 40 candidates turned up at the selection session and the parties applied 5-5 unconvincing recusals, 5-5 compelling recusals, and in a case with 3 defendants, each would utilize additional 3-3 unreasonable recusals, i.e. 9, accordingly, the prosecutor also made an use of 9, for the total of 38 candidates could be disqualified and only two candidates could be selected at the first meeting. Therefore, it can be said that by canceling the right to additional recusals for the accused and the prosecution, implemented by the amendment of the Procedural Code on June 28, 2021, another step was taken to prevent delays in process of selecting jury. However, taking into account the given example, it is better not to emphasize the possibility of starting the selection in the event of appearing less than 50 candidates, but to set a lower limit and only in case of turning up at least 60 candidates, it could be allowed to hold the selection session to be the procedure more effective and successful. The right to each type of recusal is exercised by the parties in turn: first – the prosecution, and then – the defense. In practice, the defense always fully applies the statutory quota of unconvincing recusal defined by law while the prosecution does not administer it. In general, it is believed that the parties screen potential jurors. Creating a psychological portrait of the candidates in advance will obviously help to set up a motion to compel a recusal. However, in this regard, the parties have few legal mechanisms. The personal data of the candidates are fully provided only to the chairman of the session, and the parties are given only the names and surnames of the potential jurors, which is not enough to fully identify a person.

In comparison, foreign countries have various regulations regarding compelling and unconvincing disqualifications. Some countries apply both or only one. For example, unconvincing recusal is not provided in England, Scotland, Northern Ireland, Austria, Norway. Both are allowed in Ireland where the parties have the right to 7 unreasonable recusals, and in Russia. In France and Belgium, the parties have only the possibility of using unconvincing recusal.

In America, the parties have the right to 5-12 unconvincing recusals, in Spain – 4, in Russia – 4, in Canada – 12, etc. As a rule, the parties have equal rights to unconvincing disqualifications, but there

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<sup>20</sup> See, Section 5 of Article 236 of the Criminal Procedure Code of Georgia (in Georgian).

<sup>21</sup> *Bachmeier U.L., Daly B.L., Gerald T.*, Comparative Analysis: Systems of Trial by Non-Professional Judges in the Member States of the Council of Europe, Tbilisi, 2013, 60 (in Georgian).

<sup>22</sup> See, Section 10 of Article 223 of the Criminal Procedure Code of Georgia (in Georgian).

<sup>23</sup> *Ibid*, Article 222, Part 2 (in Georgian).

are exceptions. For example, in France, the defense has more right to unconvincing recusal than the prosecution. In particular, the defense has the right to 5 unreasonable disqualifications, and the prosecution has 4. In England, unreasonable excuses were abolished, however, at the beginning of the 20th century, the defense had the right to 20 unreasonable excuses, then this number was reduced to 7, in 1982 – to three, and in 1988 the right to unconvincing recusal was abrogated as it delayed the process and hindered the effective administration of justice. The prosecution has never had the legal right to recusals, and today, the defense still can apply to the court with an appeal and demand a recusal of a candidate for serving on jury. If the jury is composed of other invited candidates, then the question of excluding the person will not be raised and he/she will not be included in the jury without motivation. But if he/she has to turn, then the judge reverts her/him and asks the accuser to present a reason for recusal. In such a case, recusal is motivated.<sup>24</sup>

Section 6 of Article 223 of the Criminal Procedure Code of Georgia provided for the inadmissibility of unjustified dismissal on grounds of discrimination, in particular, unjustified dismissal could not be used to discriminate against judicial candidates on the basis of race, skin color, language, gender, faith, worldview, political views or the membership of any association, ethnic, cultural and social affiliation, origin, family, property and rank status, place of residence, state of health, lifestyle, place of birth, age or any other characteristics.

This provision was not used in practice because it is very difficult to prove unjustified dismissal on the grounds of discrimination, so the legislator removed this part despite opposing international experts as the legislations of many foreign countries provide for similar regulations.

In the opinion of non-governmental organizations, for the purpose of banning all forms of discrimination, it is necessary to have an appropriate legal regulation, which will eliminate the possibility of a discriminatory approach in the judicial system... In general, the difficulty in proving the fact of discrimination cannot lead to the argument of refusing specific legal basis.<sup>25</sup>

In America, the exclusion of representatives of ethnic or religious minorities from the list of judicial candidates without compelling recusal means abusing the power by the prosecution.<sup>26</sup>

On the one hand, unjustified rejection seems to be an arbitrariness, since it provides an opportunity to exclude a candidate without any argumentation, on the principle of “having no special sympathy”. But, on the other hand, there is a way for the party to dismiss an applicant without making the sensitive issues of his/her personal life so public (which would make him appear as a biased, undesirable candidate).

Despite the mentioned above, unconvincing delays the process. The OSCE and the Council of Europe gave the following recommendation to Georgia: to define the purpose of unjustified dismissal of jurors and make jurors immediately report when they have doubt about subjective or objective impartiality.<sup>27</sup>

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<sup>24</sup> See *Gutsenko K., Golovko L., Filimonov B.*, Criminal Law Process of Western States, translation, *Gogshelidze R. (ed.)*, 2007, 175 (in Georgian).

<sup>25</sup> Jurors in criminal proceedings, Human Rights Network of Georgia, GNHR, Tb., 2016, 39 (in Georgian).

<sup>26</sup> Jury Institute (characteristics and problems), Caucasus International University, Tb, 2017, 44 (in Georgian).

<sup>27</sup> Joint Opinion on The Criminal Code of Georgia, OSCE/ODIHR and Council of Europe, Opinion-Nr.: CRIM – GEO/257/2014 [RJU], Warsaw/Strasbourg, 22 August 2014, §26

Impartiality of jurors may be affected by actual or potential acquaintance or family ties with a party or a witness, their affiliation or occupation, past involvement in litigation, an attitude of a juror toward the race of a judge or preconceived opinion about the accused.<sup>28</sup>

According to the definition of the European Court of Human Rights ( the European Court), “in general, impartiality is defined quite logically, in a negative sense, as the absence of a preconceived opinion or bias.”<sup>29</sup>

Regarding impartiality, the European Court in the case “Holm v. Sweden” stated -- “A connection between a juror and the accused or the prosecutor may be considered a violation of the provisions on an impartial trial.”<sup>30</sup> In this case, the Strasbourg Court found that the relationship between the defendant and the five judges called their objectivity and impartiality in question, which in turn undermined the independence and impartiality of the Court. Accordingly, the European Court determined that there had been a violation of Article 6 (1) of the Convention.<sup>31</sup>

In accordance with Neil Widman, “arbitrary dismissal is still an important tool for recruiting an impartial jury”, however, the author simultaneously focuses on the recommendation of the Washington Commission, following which the use of this right should be reduced as much as possible.<sup>32</sup>

The European Court also indicates the inconsistency of unjustified dismissal with the principle of random selection of jurors. Consequently, the abrogation of unjustified dismissal would facilitate the speeding up selecting jury without delay and make the process more optimal.

“Voir Dire” (jury selection process) is the process of interviewing, selecting, and removing potential jurors.

At the session of jury selection, when interviewing potential candidates, the parties try to achieve four main goals: 1. To obtain information from the jurors; 2. establish mutual understanding with them; 3. to introduce the basic legal issues to them; 4. To convince them to see the case in their (prosecutor/lawyer) point of view.<sup>33</sup>

The goal of parties is to find out the nature and approaches of each potential arbitrator. The past, experience and opinions of a candidate determine his/her worldview, how he/she can evaluate an evidence, argument and other issues related to the case. Specific skills and attitudes help the prosecutor/attorney to obtain such information from judicial candidates.<sup>34</sup>

The questions of the parties may refer to the personality of a candidate for serving on jury, personal qualities, authoritarianism, education, work activities, membership of various organizations,

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<sup>28</sup> *McBride J.*, Ensuring that the Operation of Jury Trials in Georgia Are Fully in Accordance with European Standards, Tbilisi, 2017, 14-15, (in Georgian), see citation: *Procedo Capital Corporation v. Norway*, no. 3338/05, 24/09/2009; *Hanif and Khan v. United Kingdom*, no. 52999/08, 20/12/2011; *Kristiansen v. Norway*, no. 1176/10, 17/12/2015 (in Georgian).

<sup>29</sup> See *Piersack v. Belgium*, Application no.8692/79, 1 October 1982, §30.

<sup>30</sup> See *Holm v. Sweden*, Application no.14191/88, 25 November 1993.

<sup>31</sup> *Jurors in criminal proceedings*, Human Rights Network of Georgia, Tb., 2016, 12, (in Georgian)

<sup>32</sup> Cf. *Widman N., Hans P.V.*, *American Jury, Verdict*, 2019, 120 (in Georgian).

<sup>33</sup> *Texbook of Judicial Skills*, American Bar Association, Tbilisi, 2012, 58 (in Georgian).

<sup>34</sup> *Ibid*, 67-68.

family status, children, the information about the case under consideration<sup>35</sup>, religious/philosophical views, ideas on legal issues, direct and indirect experiences, areas of interest: books the candidate reads, movies the candidate watches. It is also necessary for the parties to receive information if the candidate is aware about drugs and firearms, if she/he trusts the police, the Public Prosecutor's office, if he/she thinks that because an accusation has been made, the accused is guilty. How he/she evaluates the silence of the accused, if he/she thinks that whether the accused was innocent, he would not have benefited from silence, if the candidate is a law abiding citizen, if he/she has bias towards the party, what information he has about the case, if he/she knows the victim, the accused, other participants in the process, whether he/she or their family members have ever been victims of a similar crime or other crime, regardless of such experience, if he/she can make an objective and fair decision, etc.

The candidate is obliged to give correct and comprehensive answers to the questions. The questions shall not interfere with the right to privacy, professional and/or commercial secrets, except when it is necessary for the interests of justice. A candidate of jury can be required the mentioned information if the part represents the justified request. If the disclosure of this information may cause irreparable damage to the interests of the candidate, he/she should provide the chairman of the session and the parties with the information.<sup>36</sup>

During the session of selection, the parties have to pay attention not only to the answers given by the candidates, but also to their "body language" that includes behaving, making movements and eye contact, showing favor, facial expressions which ensures to come to the conclusion. Gestures, manner of speaking, voice and tone provide an opportunity to find out the feelings and emotions of a potential juror. In general, it is believed that 60-65% of human relationships involve non-verbal communication. "There are two types of nonverbal indicators of jurors' feelings or a desire to avoid telling the truth: visual cues (what we see) and auditory cues (what we hear)."<sup>37</sup> Therefore, it is essential to make a constant observation of potential jurors both in the session hall or outside it, during the selection process or even breaks, before the selection, in the corridor, in the court building.

The parties must inform potential jurors of the important issues about the case that determine their legal position. Despite the fact that the chairman of the session provides the explanations about the applicable law, if the candidates have a wrong view of the legal provisions, the parties should also clarify the legal principles and find out whether the candidates understand the true essence of the legal provisions. It is vital for jurors to assess the information received at the trial correctly.

The questioning process indirectly aims at creating a favorable mood for the party and to have a certain influence on the views of the jury.

In the US experts, psychologists help differentiate between desirable and undesirable candidates. They observe behaviors of potential jurors not only answering questions but throughout the selection process. In the way of distinguishing between standard and non-standard behaviors of candidates, they advise the prosecutor/attorney about rejecting or selecting as a juror. Obviously, such

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<sup>35</sup> In addition, it is important not to find out whether they know anything at all about the case under consideration, but to determine what they know about the given case, which will reveal their bias and the existence of a preconceived opinion (in Georgian).

<sup>36</sup> See, Parts 4 and 5 of Article 223 of the Criminal Procedure Code of Georgia (in Georgian).

<sup>37</sup> See, Textbook of Judicial Skills, American Bar Association, Tbilisi, 2012, 95-98, 109 (in Georgian).

assistance is associated with certain finances. The role of the judge is significant in selecting process because the judge makes the decision on excluding or self-excluding the jury candidate. According to Neil Widman, the court tries to establish more control over the trial process.<sup>38</sup> The parties often provide specific information to the judges in their own interpretation. At this time, the judge has to be vigilant to avoid making a mistake by jury.<sup>39</sup>

The judge, as a neutral person, is required to select an independent and impartial juror. These criteria are the starting point when considering the motions of the parties and making a decision on recusal.

The independence of the jury is assured by the fact that they are not accountable to anyone and have complete freedom to reach their verdict.

In addition, the juror should not have an interest in the outcome of the case, regardless of what factors may influence it (it will be family ties, friendships, work attitudes, simple acquaintances, etc.). “An impartiality of a person is related to his/her integrity to exclude the possibility of being bribed. The independence and honesty of each juror ensures an objective and fair trial.”<sup>40</sup>

According to the procedural legislation, the chairman of the session appoints 12 selected candidates as the main members of jury and two as spare jurors. However, depending on the complexity of the case, it is possible to choose more substitute jurors.<sup>41</sup>

Under the original version of the Code of Procedure, an alternate juror attended the jury deliberations. Following the amendment of 2016, the substitute juror is not allowed to be present at the court hearing. He participates only in the court session. He takes part in deliberations and voting of the court only if he has replaced the juror. On this occasion, the court hearing starts from the beginning.

The deliberation of the jury is quite long and exhausting. The longest time period for rendering a verdict is 15 hours plus a reasonable time limit. Accordingly, based on the amendments alternate jurors do not waste time at the meeting as they do not engage in discussion and participate in voting, however, when an alternate juror is replaced in the deliberation room, the trial starts again that delays the long process of making a decision.

#### **4. Conclusion**

The jury court is unique because the case is discussed by representatives of the public, ordinary citizens who do not have legal education. The right of the accused to a fair trial can be challenged if the jury is interested in the case outcome. Therefore, it is especially important the procedure of selecting jury to be meticulously specific, relevant and complete for electing conscientious, objective and impartial jurors.

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<sup>38</sup> *Widman N., Hans P. W., American Jury, Verdict*, Tbilisi, 2019, 103 (in Georgian).

<sup>39</sup> See Interview with judge Eka Areshidze, see Georgian Court Watch, (in Georgian) <<https://courtwatch.ge/articles/ekareshidze/>> [25.02.2023].

<sup>40</sup> Commentary on the Criminal Procedure Code of Georgia, Authors' Collective, Tbilisi, 2015, 673 (in Georgian).

<sup>41</sup> See Part 1 of Article 224 of the Criminal Procedure Code of Georgia, (in Georgian)

The paper highlighted the legal gaps which can delay the process of selecting. In addition, as mentioned in the special literature, “the parties win the case at the session of selection”, which means that the parties have to inform the potential jurors about their own positions and the legislation confirming the positions and the main legal principles, get information from the candidates through surveys, and make the candidates feel positive about the prosecution or the defense and create the impression that the position of the party is reliable, sufficiently argued, correct and shareable. A high level of preparation of the parties ensures a correct formation of the jury. Ultimately, the judge has a responsibility for satisfying or denying the motions of compelling or un compelling recusals and selecting objective and impartial jurors.

The recommendations highlighted in the paper are aimed at avoiding delays in formation of jury, conducting the selection process accurately and ensuring the election of fair and impartial jury.

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