

## CHALLENGES FACING TRIALS BY JURY

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**Abstract.** The institution of a jury trial, which is part of the Anglo-American legal system, is well established in a number of countries, including Georgia. A jury system has both advantages and disadvantages. On the plus side, it promotes the existence of a healthy legal system and protects the public in the sense that political leaders are not able to abuse the criminal justice system to silence their opponents. At the same time, its main disadvantage is possible bias on the part of jurors towards defendants. This article analyses the risks associated with a jury system in light of technological advances, in particular when jurors obtain information from social networks. In the age of social media, the institution of a jury trial faces a new set of challenges.

**Keywords:** Trial by jury, social media, fair trial

### INTRODUCTION

The concept of the institution of a jury trial first emerged in Britain following the Norman Conquest of Britain. Its early functions were very different from those of today. At an early stage, in England, jurors acted as witnesses who used to provide information on local matters. However, they gradually became arbitrators in both civil and criminal disputes.

A position gradually developed that jurors should know as little as possible about the facts of the case prior to a trial.

From Britain, the jury system spread to many countries, especially the British colonies. This system was particularly firmly established in the United States.

A trial by jury is considered a fundamental part of the English legal system, although only a small number of cases are currently tried by a jury. It is believed that this institution plays a crucial role in ensuring that the criminal justice system works for the benefit of society rather than unjust leaders.

Among the useful arguments in support of the institution of a jury trial is that it promotes not only a sound criminal justice system but also a healthy society where political leaders are not able to abuse the criminal justice system to silence their opponents.



## INSTITUTION OF A JURY TRIAL IN GEORGIA

The institution of a jury trial was first introduced in Georgia during the Democratic Republic of Georgia. The institution was abolished after the loss of Georgia’s independence, and was re-introduced in 2004 through a constitutional amendment.

Ana Dolidze, a legal scholar, writes that „people’s participation in the administration of justice was observed in Georgia from time immemorial. For example, the participation of the population in the judiciary is referred to by researchers in Ajara during the period when Ajara was part of the Ottoman Empire. Although justice was formally administered by a „Kadi“, a judge appointed by the Empire, who was also the head of the local executive authorities, the population’s trust in formal institutions was low. Sources indicate that the law was enforced by people united in an „Olka“ which heard cases and issued decisions“<sup>1</sup>.

It should be noted that in Georgia, as well as in a number of post-Soviet countries, the institution of a jury trial has not gone through a path of historical development. Irrespective of whether any form of public participation in the judiciary existed in certain parts of the country or throughout the country (the Law on the Introduction of Jury Trials was adopted on 17 January 1919<sup>2</sup>), it was not of a systematic and continuous nature. After the collapse of the Soviet Union, in addition to Georgia, the institution of a jury trial was introduced in Russia, Kazakhstan, Kyrgyzstan, Ukraine, and Azerbaijan.

„In 2009, amendments were made to the Criminal Procedure Code of Georgia, according to which the classical model of a jury trial was established in Georgia, which entails a strict separation of functions between the judge and the jury. In such case, a jury delivers a verdict on the guilt or innocence of a defendant, and a judge imposes a sentence on the person found guilty, and rules on various procedural issues. Until then, there was a hybrid model of the institution of a jury trial in Georgia, according to which the judge and the jury jointly ruled on the issue of the guilt and sentencing of a defendant“<sup>3</sup>.

### ADVANTAGES AND DISADVANTAGES OF THE INSTITUTION OF A JURY TRIAL

This paper aims to analyse the advantages and disadvantages of the institution of a jury trial, and to show how effective this institution is in today’s information-saturated world, because, as mentioned above, one of the main requirements of the institution of a jury trial

1. ანა დოლიძე, „ნაფიც მსაჯულთა სასამართლო საქართველოში და მისი შესაბამისობა ადამიანის უფლებათა ევროპულ კონვენციასთან“, ადამიანის უფლებები და სამართლის უზენაესობა, რედ. კონსტანტინე კორკელია, 2013, გვ. 4  
2. Ibid.  
3. ლიკა კვიციანიშვილი, დავით ხურციძე, „ნაფიც მსაჯულთა სასამართლო და მასთან დაკავშირებული საკითხები საქართველოში“, „ნაფიც მსაჯულთა ინსტიტუტი, თავისებურებანი და პრობლემები“, კავკასიის საერთაშორისო უნივერსიტეტი, საერთაშორისო სამართლის კვლევითი ინსტიტუტი, გამომცემლობა „უნივერსალი“, 2017

is to ensure that jurors are informed as little as possible about the facts of the case at hand prior to a trial.

Doctor of Law, Professor Mindia Ugrekhelidze, says that the Strasbourg Court reviewed the case of *Taxquet v. Belgium*, and notes that the Strasbourg Court ruled that „a jury trial in this case cannot be considered a real trial, because there is nothing substantiated there“<sup>4</sup>.

Ana Dolidze notes that „special attention should be given to the explanations provided by judges in cases of complicity in the crime. As it appears from the case of *Taxquet*, the clarity and specificity of the explanations of judges are especially important in such cases. Since the sentence is notified to the defendants without justification, it is the judges' explanations that individualise the guilt of each defendant in complicity cases, and determine the degree of complicity. The situation in Georgia is complicated by the fact that current legislation obliges jurors participating in a trial to familiarise themselves with the content of plea bargains available in the case. Such practices are unacceptable in the United States, the home of the institutions of a jury trial and plea bargaining“<sup>5</sup>.

Doctor of Law Ioseb Kelenjeridze underlines the risks arising from a failure to substantiate a judgment: „In a jury trial, there is a risk that citizens elected as jurors, contrary to the evidence, may knowingly show bias in favour of or against the defendant, out of solidarity or on some other grounds. Such an instance is known as nullification. The absence of the substantiation of a judgment gives them every opportunity to do so“<sup>6</sup>.

The main arguments in favour of a trial by jury is that it ensures that the people's voice is heard in the justice system and there is less risk of bias on the part of a jury.

Arguments against the above advantages are that jurors lack legal education, which prevents them from properly assessing evidence. Emotional factors influence them more than a judge who tries to be impartial. In addition, the fact that jurors are not accountable is contrary to the principles of democracy.

Bias may arise from jurors' attitude towards famous people. Examples include the cases of the American football star O. J. Simpson and the „King of Pop“ Michael Jackson. In the case of O. J. Simpson, the jurors were only Blacks and Latinos. Jackson's trial witnessed an unprecedented activity by his fans in the street. Many people believe that these stars did not receive the punishment they deserved. Consequently, these cases contributed to the deepening of distrust towards the institution of a jury trial, when in fact the task of the institution is to increase public trust in the judiciary.

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4. [Jury\\_trial\\_institute\\_Ge.pdf](#), p. 4

5. ანა დოლიძე, „ნაფიც მსაჯულთა სასამართლო საქართველოში და მისი შესაბამისობა ადამიანის უფლებათა ევროპულ კონვენციასთან“, ადამიანის უფლებები და სამართლის უზენაესობა, რედ. კონსტანტინე კორკელია, 2013, გვ. 15

6. <http://dl.sangu.edu.ge/pdf/dissertacia/iosebkelneridze.pdf>, p. 137



## CHALLENGES FACING TRIALS BY JURY IN THE DIGITAL AGE

In addition to these general arguments, another issue arises due to the peculiarities of the digital age. The rise of the digital world and the rapid and widespread dissemination of information have raised the pressing question of whether objective jurors can be found in the digital age.

Before the digital age, finding impartial jurors, even in high-profile cases, was not so difficult. After being elected, jurors had to maintain an impartial status, not discuss the case with anyone, and avoid radio, television, and newspapers. Today, the same approach does not work.

There are very few people who can go without using a smartphone or social media for a whole day, or even a whole week.

Many people share different moments of their lives with others in real time through social media, which is incompatible with the functions of jurors.

Today's jurors have much more information available to them. Where once it was difficult to obtain information about a crime or a defendant, especially in a case that involved ordinary people and not celebrities, now information about any defendant can be obtained with a single click on the Internet. Previously, if information disappeared from the news, it was impossible to find it, but now it can easily be found online.

1. Jurors mainly commit the following types of violations with regard to social media: They use the Internet to obtain additional information about a particular case. Jurors are required to form an opinion about a particular case based on the evidence they hear in the courtroom, but the research they do on the Internet shapes a certain attitude towards the figures of the case in advance.

2. Jurors are not allowed to publish „a post“ or „a tweet“ on social media or to comment on someone else's post during the court hearings, although many such cases occur in different countries. In some cases, there is a timely response to impermissible activity on social media, and jurors are removed from the trial. However, such actions cannot always be controlled, which raises serious questions about the jury system.

3. A social network facilitates the possibility for a juror to communicate with the defence or the defendant, which is unacceptable.

Article 6 of the Convention on Human Rights provides that „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“<sup>7</sup>. However, this right may be jeopardised in the age of social media. The jury system is of particular note in this respect. There are examples of the removal of jurors from the trial, disrupted trials, and criminal liability of jurors for their activities on social media. Below we will discuss some of such high-profile cases.

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7. European Convention on Human Rights, Article 6(1).

In 2016, two jurors were charged in Australia for deliberately not following the judge's direction, disobeying his request, and carrying out Internet research regarding the case at hand. They were found guilty because it was considered that such conduct could undermine the reputation of the jury system as an honest system, and pose problems for the administration of justice in general<sup>8</sup>. Both jurors were fined USD 3 000 each.

In Britain, juror Kasim Davey wrote a strongly-worded message on Facebook during the trial of a man for sex offences. His posting suggested that he was going to find the defendant guilty. He wrote, using offensive words, that he always wanted to punish a paedophile, and now he had an opportunity to do so within the law.

Davey was discharged from the jury for this post. He explained his behaviour by saying that he believed he was only prohibited from using the Internet to carry out research. Nevertheless, the judge found his explanation untruthful. He noted that Davey made clear to his Facebook friends that he would rely on his prejudices and not on the facts of the case.

Juror David Beard researched information about the fraud case via the Google search engine and shared it with fellow jurors. The trial collapsed, and it became necessary to hold a retrial. Sir John Thomas and Sir Nigel Sweeney, judges at London's High Court, sentenced Davey and Beard to 2 months imprisonment<sup>9</sup>.

The disadvantage of the institution of a jury trial in terms of the selection of impartial jurors in the digital age became evident in the case of Dzhokhar Tsarnaev, convicted of participating in the 2013 Boston terrorist act.

On 15 April 2013, a horrific terrorist act was carried out in Boston, during which participants in a marathon were bombed. Three were killed, and hundreds were injured near the finish line. Police identified the perpetrators of the bombing, brothers of Chechen origin Temirlan Tsarnaev and Dzhokhar Tsarnaev. The brothers were citizens of Kyrgyzstan and the United States. Temirlan was killed in a clash with police, and Dzhokhar Tsarnaev was imprisoned.

Dzhokhar Tsarnaev's lawyers requested that the trial not be held in Boston, as it would be impossible not to violate *voir dire*, or select impartial jurors, as the media intensively covered the Boston terrorist act. The judge rejected the defence's request<sup>10</sup>.

Out of a potential 1373 jurors, 265 candidates were called on the basis of individual *voir dire*. They were given a 100-point questionnaire. One of the demands of the lawyers during the individual *voir dire* was to find out whether potential jurors had access to the media.

After Dzhokhar Tsarnaev was sentenced to death, the defence appealed the decision. The

8. Registrar of the Supreme Court of South Australia v C [2016] SASC 93 (22 June 2016), <http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SASC/2016/93.html> {26.03.2022}.

9. <https://www.gov.uk/government/news/two-jurors-convicted-for-internet-use> {25.01.2022}.

10. Boston Bomber's Death Sentence Should Not Have Been Vacated Based on Insufficient Voir Dire [United States v. Tsarnaev, 968 F.3d 24 (1st Cir. 2020)]. <https://www.washburnlaw.edu/publications/wlj/online/volume/60/mccoyst-boston-bomber.pdf>, p. 105.



defence's argument was that the jury was not impartial: two jurors lied under oath about their comments on social media. It turned out that one of the jurors had tweeted 22 times about the bombing. She also commented on the psychological problem she had during the search for Tsarnaev. The juror herself was at work at the time, while her family was locked up at home. The juror concealed information about her activity on social media during the selection of the jury<sup>11</sup>.

Despite the court order, the second juror posted on Facebook that he had been selected as a juror. One of his friends wrote a comment telling him to contribute towards sending him (i.e. Tsarnaev) to prison where he would be taken care of. Another friend wrote that the guy should be sent to hell. Despite the request of the defence, Judge O'Toole refused to question the jurors and discharge them from the jury<sup>12</sup>.

In 2019, based on the arguments put forward by the defence, the Court of Appeal held that the judge had failed to provide a fair trial and overturned the decision sentencing Tsarnaev to death. The case was sent back for retrial. The opponents disagreed with this decision, and in October 2021, the US Department of Justice again presented arguments to have the case of Tsarnaev's death sentence re-examined. On 4 March 2022, the Supreme Court upheld the decision sentencing Dzhokhar Tsarnaev to death. Judge Clarence Thomas wrote: „Dzhokhar Tsarnaev committed heinous crimes. The Sixth Amendment nonetheless guaranteed him a fair trial before an impartial jury. He received one“<sup>13</sup>.

This case sets a precedent and proves how difficult it is to act within *voir dire* in the age of social media. Even in a country like the USA, which has enormous resources and a long-established tradition of the institution of a jury trial, it is challenging to select completely impartial jurors in the modern era.

In Georgia, a number of cases have been heard by a jury. The general public is not aware whether the high standard of impartiality has been respected by the jurors, which includes limiting their involvement in social media.

## CONCLUSION

In conclusion, we can say that the idea of a trial by jury, in which a defendant is tried by people from his or her own community, according to the morals established in this society, has, alongside its advantages, also disadvantages, some of them being highlighted below:

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11. Supreme Court Overturns Appeals Court Decision Reversing Death Sentence in Boston Marathon Bombing <https://deathpenaltyinfo.org/news/supreme-court-overturns-appeals-court-decision-reversing-death-sentence-in-boston-marathon-bombing>.

12. Ibid.

13. <https://edition.cnn.com/2022/03/04/politics/tsarnaev-supreme-court/index.html>.



- Jurors lack legal education and are often unable to properly assess evidence, understand complex issues, and draw appropriate conclusions.
- Jurors may be biased in favour of or against certain individuals or groups on grounds of solidarity or non-acceptance, for example, on the basis of race or towards recognisable people.
- Recently, this age-old institution has faced new challenges. Selecting impartial jurors in the information age, which means excluding or minimising their involvement in social media, is likely to be one of the main challenges along with other disadvantages of the institution.

**RECOMMENDATION:** To overcome the challenge relating to jurors' involvement in social media, it is essential to work with jurors to make them aware of exactly what the consequences of inappropriate use of social media might be. However, strict measures such as taking away devices with Internet access during the trial may discourage people from participating in jury trials. It is therefore necessary to strike a balance between the impartiality of the institution of a jury trial and respect for the personal freedom of jurors.

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