

Lay Adjudication in Europe: The Rise and Fall of the Traditional Jury

JOHN D. JACKSON*
NIKOLAI P. KOVALEV*

Jackson, J.D., and Kovalev, N.P., 2016. Lay Adjudication in Europe: The Rise and Fall of the Traditional Jury. *Oñati Socio-legal Series* [online], 6 (2), 368-395. Available from: <http://ssrn.com/abstract=2782413>



Abstract

Drawing on a second survey of lay adjudication in Europe conducted by the authors in 2011-2012, this article points to a general decline across Europe in the use of the 'traditional' jury and a trend towards diminishing its capacity to deliver independent decisions. Two examples from Eastern and Western Europe are used to illustrate this trend: a case study of the Russian jury shows how a lack of respect within the legal culture of professionals for lay adjudication has reduced the jury in Russia to a mere 'decorative' institution and an analysis of the ECtHR's jurisprudence shows how the Court's concern to avoid arbitrary decision making has been encouraging Western European states to introduce greater accountability measures, which threaten the jury's independence. The article ends on a more optimistic note by arguing that greater accountability measures need not detract from the jury's traditional role in promoting lay and political participation in the administration of justice.

Key words

Criminal juries; lay adjudication; fair trial rights; Council of Europe; comparative criminal justice

Resumen

Basándose en una segunda encuesta sobre adjudicación de legos en Europa desarrollada por los autores entre 2011 y 2012, este artículo apunta a una disminución general en toda Europa del uso del jurado "tradicional" y una tendencia hacia su capacidad cada vez menor de prestar decisiones independientes. Se

Article resulting from the paper presented at the workshop "Juries and Mixed Trials across the Globe: New Developments, Common Challenges and Future Directions" held at the International Institute for the Sociology of Law, Oñati, Spain, 12-13 June 2014, and coordinated by Nancy Marder (IIT Chicago-Kent College of Law – Chicago), Valerie Hans (Cornell Law School, Ithaca – New York), Mar Jimeno-Bulnes (University of Burgos–Spain) and Stephen Thaman (Saint Louis University School of Law, St. Louis – Missouri).

We are grateful to anonymous reviewers and to the editors for their helpful comments on an earlier draft.

* Professor of Comparative Criminal Law and Procedure, University of Nottingham, UK. School of Law, University of Nottingham, University Park, Nottingham, UK NG7 2RD j.jackson@nottingham.ac.uk

* Associate Professor of Criminology, Wilfrid Laurier University, Canada. 73 George Street, Brantford, Ontario, Canada N3T 2Y3 nkovalev@wlu.ca



utilizan dos ejemplos de Europa oriental y occidental para ilustrar esta tendencia: un estudio de caso del jurado ruso demuestra cómo dentro de la cultura jurídica, la falta de respeto de los profesionales hacia la adjudicación de legos ha reducido el jurado en Rusia a una institución meramente “decorativa” y un análisis de la jurisprudencia del TEDH muestra cómo la preocupación de la Corte para evitar la toma de decisiones arbitrarias ha fomentado que los estados de Europa occidental introduzcan mayores medidas de control, que ponen en peligro la independencia del jurado. El artículo termina con una nota más optimista con el argumento de que mayores medidas de control no tienen que quitarle valor al papel tradicional del jurado en la promoción de la participación de legos y políticos en la administración de justicia.

Palabras clave

Jurados penales; adjudicación de legos; derecho a un juicio justo; Consejo de Europa; justicia penal comparada

Table of contents

1. Introduction	371
2. The second survey of European lay adjudication systems: a pattern of decline	374
3. Obstacles to the effective functioning of the traditional jury: a Russian case study	376
4. Threats to independence in the West	381
5. Conclusion: arresting the decline?	387
References	389
Case law	394
ECtHR	394
UN Human Rights Committee	395
England and Wales	395
Norway	395

1. Introduction

The use of juries has waxed and waned over time (Sikich 2013). On the European continent the jury enjoyed a remarkable rise in popularity after the French Revolution when French Enlightenment thinkers saw the spirit of democracy manifested in the English jury. The jury system was introduced as a “living incarnation” of French revolutionary and democratic ideals (Hans and Germain 2011, p. 742). Other European systems followed suit and during the course of the nineteenth century most European countries followed the approach taken in France and introduced a system of trial by jury, which was characterised chiefly by giving lay persons exclusive dominion over determining the defendant’s guilt without the input of professional judges.¹ During the twentieth century however, this system waned particularly in Western Europe as authoritarian rule in Germany, Italy, Portugal, Russia, Spain and elsewhere took hold over the continent. Although certain countries reinstated the jury once democracy was restored – Spain and Austria are prominent examples – in other countries, the jury has not been restored.

Within the last thirty-five years, however, there has been something of a resurgence in support for the jury as countries in Eastern Europe were freed from the shackles of the Soviet Union and have experimented with jury systems. In a survey (Jackson and Kovalev 2006) that the authors carried out in 2004-2005 (“2005 survey”) on lay adjudication in forty-six member states of the Council of Europe, we discerned a difference between systems that were members of the European Union (roughly western European states) and those undergoing a state of transition from the former communist bloc (roughly Eastern European states). Within the former group, there was a tendency to restrict or diminish the impact of lay adjudication. Within the latter group, there was a trend towards expansion of lay adjudication. This was particularly the case in relation to what in this article we call the ‘traditional’ jury model² – to differentiate this model from the French jury system in the *cour d’assises*. The authors carried out a second survey in 2011 – 2012 and the position is now somewhat more complicated. While the trend towards a diminution of the traditional jury in the west has been continuing, some of the new jury systems introduced in the east have been experiencing difficulties.

In the 2005 survey, nine countries across Europe besides those in the UK (England and Wales, Scotland and Northern Ireland) and the Republic of Ireland were counted as having ‘traditional’ jury systems – Austria, Belgium, Denmark, Malta, Norway, Russia, Spain, Sweden and some Swiss cantons. Since then, as we shall see, Denmark dropped out in 2008, Switzerland followed in 2012, and most recently (June 2015) the Norwegian Parliament has asked the government to propose a bill repealing the jury system and replacing it with a mixed panel of professional and lay judges sitting together wherein court decisions must be reasoned.³ Furthermore some of the remaining jury systems have been curtailed. Sweden permits this form of trial only for offences related to the freedom of the press. Russia has curtailed its use in cases involving crimes against the state (Kovalev and Smirnov 2014).

When we turn to common-law countries which have a longer tradition of jury trial, we also see signs of decline. In England, for example, the heartland of the jury system, we see for the first time in centuries the possibility of a professional trial usurping the role of the traditional jury in trials on indictment. Under section 44 of

¹ All European countries introduced jury trials in the nineteenth century with the exception of the Netherlands and Luxembourg (Vidmar 2000, pp. 429-432).

² This is the term used by the European Court of Human Rights (ECtHR), see *Taxquet v. Belgium* (2009), (para. 43).

³ According to some Norwegian academics, the jury system in Norway will be abolished some time in 2016. Correspondence with Professor Ulf Stridbeck (communication by email 26 Aug 2015) and with Professor Asbjørn Strandbakken (communication by email 2 Feb 2015).

the Criminal Justice Act 2003 (England and Wales and Northern Ireland), a judge may either continue a trial without a jury or order a new trial without a jury when he or she is satisfied that there is a real and present danger of jury tampering and there is so substantial a likelihood that it will take place as to make it necessary in the interests of justice for the trial to be conducted without a jury. Although this professional alternative has so far been used sparingly,⁴ the provision of it is symbolic of a growing tendency to sacrifice the principle of jury trial for a more expedient alternative (Jackson 2002a, Thornton 2004). In Ireland, the constitutional guarantee of jury trial under Article 38.5 of the Irish Constitution has always been subject to trial by Special Courts and Military Tribunals (Jackson *et al.* 1999, Davis 2007). But the role of the Special Criminal Court, which has traditionally been limited to trying terrorist trials, has in recent years expanded to include cases of organised crime as well (Campbell 2013, 2014). By contrast, the constitutional right to jury trial has remained almost untouched in the US even in terrorist trials.⁵

Besides the abandonment of the traditional jury, a theme of this article is that the traditional jury has also been undermined across the continent in a more subtle manner by taking away its power and independence. One of the strengths of the traditional jury is that it not only seeks to involve lay people in the administration of justice by giving them a 'judicial' role in passing judgment on their peers, but also it invests them with an important 'governance' or 'legislative' role whereby they can cast judgment on unpopular and oppressive laws. This role harkens to the political rather than the civil nature of citizens' rights – the right to be involved in governance. The most famous expression of this aspect of the jury's role is probably to be found in Tocqueville's *Democracy in America* (1835 cited in 1994). On the European side of the Atlantic many find it expressed particularly saliently in Lord Devlin's *Trial by Jury* (1966, p. 164) as follows:

Each jury is a little parliament. The jury sense is the parliamentary sense. I cannot see the one dying and the other surviving. The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice; it is the lamp that shows that freedom lives.

Although it is perhaps hard to find many modern examples where juries have prompted laws to be changed in the European context, this is not to say that juries have been lacking in influence. Law reformers have been said to engage in a kind of 'imaginary' dialogue with juries in order to make laws 'jury proof' in the sense of ensuring that they get past juries in terms of acceptability (Redmayne 2006, see also Brooks 2004). We shall see, however, that in those countries that have introduced or retained the traditional jury model, there are examples across the continent of juries' independence being diminished. This has happened most blatantly in Russia where a variety of tactics have been used by police and prosecutors as well as judges to subvert the independence of the jury. But even countries that have more established jury systems have seen judges exercising greater influence over jury deliberations and decision-making.

We do not want to exaggerate this decline. There remains a deep-rooted commitment to the traditional jury trial within the jurisdictions of the UK and the Republic of Ireland and, although less deeply embedded, it has survived in some

⁴ It was invoked in a retrial involving three defendants charged with a robbery at Heathrow Airport in January 2010 (Kennedy 2010). In *Twomey and Cameron and Guthrie v. UK* (2013), the ECtHR held that the reliance of the judge on undisclosed material when determining the question whether jury tampering had taken place did not deprive the applicants of the right to a fair trial.

⁵ The trials in the US of the British Muslim cleric Abu Hamza Al-Masri and of the son-in-law of Osama Bin Laden serve as recent examples. At the same time, it should be noted that cases involving so-called enemy combatants held at Guantánamo are adjudicated by military commissions without a jury (Ní Aoláin and Gross 2013).

other European countries such as Belgium, Spain and Austria. Nevertheless, it is worth asking why we have seen a decline. The waxing and waning of juries is commonly attributed to whether countries have embraced democracy or not. There would seem to be some truth in Lord Devlin's claim that authoritarian regimes would find it impossible to tolerate jury systems. As Tocqueville (1835 cited in 1994, p. 283) has said, throughout the history of trial by jury, "[a]ll the sovereigns who have chosen to govern by their own authority, and to direct society instead of obeying its directions, have destroyed or enfeebled the institution of the jury."⁶

This does not, however, explain why perfectly well functioning democracies should decide to jettison or marginalise jury systems. Some, of course, have never resorted to lay adjudication – the Netherlands, for example. But there appears to be an increasing trend in recent years in those democracies that have embraced the jury system of turning away from it. This suggests that democratic government may be a necessary, but it is certainly not a sufficient, condition for a traditional jury system to function. The essential conditions that should be in place in a state for the effective functioning of lay adjudication systems have been discussed by a number of British, German, Russian and American scholars and practitioners in the past two hundred years (see e.g. Spencer 1851, Mittermaier 1869, Vladimirov 1873, Jearey 1960, Foinitskii 1996, Vidmar 2002). The most elaborate list of conditions was suggested by Neil Vidmar with reference to two other jury researchers: Jearey (1960) and Kiss (2000). These conditions are as follows: (1) the society must be racially, culturally, linguistically, and religiously homogeneous; (2) the members of the society must be sufficiently educated to understand their responsibilities, including having the willingness to set aside prejudices that they may hold; (3) lay adjudicators must be in agreement with the basic laws that they are required to enforce; (4) the culture of the society must be such that it is supportive of the idea of citizen participation in the legal system; (5) the country must be able to afford the costs of a lay adjudication system; (6) the legal culture itself, including judges and other members of the legal profession, must support the idea of lay participation in the administration of justice; (7) the government itself must be democratically inclined.

Apart from the link between democratic government and the traditional jury, this article suggests that a number of the above conditions have a particular significance for the traditional jury being able to exercise its judicial and legislative functions effectively. One is the need for the legal culture within a state to be supportive of the idea of lay participation in the administration of justice. As the experience of countries in Eastern Europe, such as Russia, illustrates, without this support it is difficult to embed a properly functioning jury system into the administration of justice. Even with the support of the legal establishment, however, traditional jury systems can lose their appeal if there is a decline in confidence in their ability to come to impartial and fair decisions. As societies become less racially, culturally, linguistically and religiously homogeneous, more questions can be asked about the ability of juries to set aside their prejudices and more pressure can mount for judges to exercise greater control over jury deliberations and decision-making. Bodies, such as the European Court of Human Rights (ECtHR), are also increasingly requiring states to put systems in place to ensure that jury decision-making is impartial in order that they meet their fair trial obligations under Article 6 of the European Convention on Human Rights (ECHR).

The article begins in Part 2 by mapping the decline of the traditional jury in both Eastern and Western Europe since our first survey. It then goes on in Part 3 to consider the obstacles in some countries in the east that make it difficult to establish an effective jury system as they have transitioned towards democracy.

⁶ Lempert (2001, pp. 9-10) has argued that it is "no coincidence that jury systems, which spread throughout continental Europe after the French revolution, disappeared in countries like Spain, Germany, and Russia when these countries came under authoritarian control."

The article focuses particularly on the Russian jury and the challenges to jury independence in that country after the jury was re-introduced in the 1990s. The article then turns in Part 4 to consider the challenges to jury independence in the west where the traditional jury has been more established and suggests that some of these challenges, rather paradoxically, can be attributed to the need, which has been reinforced by the ECtHR, to ensure that the jury is seen to act impartially. The article concludes in Part 5 by considering how the independence of the traditional jury might be assured without sacrificing the need for juries to be seen as impartial in their decision-making.

2. The second survey of European lay adjudication systems: a pattern of decline

The survey of Council of Europe member states was conducted by the authors between October 2011 and December 2012 via e-mail. We contacted Ministries of Justice, Higher Courts, Bar Associations, private lawyers and academics. The authors received forty-seven completed questionnaires⁷ from thirty-three countries. Experts from the following countries responded: Albania, Andorra, Austria, Bosnia and Herzegovina, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Greece, Hungary, Italy, Latvia, Liechtenstein, Luxembourg, Macedonia, Monaco, Montenegro, Norway, the Netherlands, Poland, Portugal, San Marino, Slovakia, Slovenia, Spain, Sweden and five cantons of Switzerland. The authors did not send questionnaires to the following countries since they knew the legal status of lay adjudication in those jurisdictions: Armenia, Azerbaijan, Moldova, Russia, the Republic of Ireland, the United Kingdom and Ukraine. The authors did not receive answers from several countries: Germany, Iceland, Lithuania, Malta, Romania, Serbia and Turkey.

In their 2005 survey the authors found that several countries did not employ any lay participation in the adjudication of criminal cases: Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Cyprus, Georgia, Lithuania, Luxembourg, Moldova, the Netherlands, Romania, and Turkey. With the exception of Georgia, none of these countries has since introduced lay participation in any form. Although Azerbaijan has provisions for jury trials in its legislation, the system has never been implemented since a Criminal Procedure Code was introduced in 2000. The 2005 survey did not include several countries either because we were unable to establish any contact with them, for example Andorra and San Marino, or those countries were not members of the Council of Europe, such as Monaco and Montenegro. The new survey revealed that several jurisdictions, which were not part of our 2005 survey, do not have lay participation: Andorra and San Marino. It also revealed that several countries which had some forms of lay participation in 2005 have now abolished it in criminal trials. In particular, Latvia abolished mixed courts in July 2009 through amendments to the Code of Criminal Procedure. In Montenegro, which was not part of our 2005 survey, the new Criminal Procedure Code of 2009 also abolished the system of mixed courts in regular courts. In addition, new legislation, which came into force in September 2012, abolished lay participation in juvenile cases. In total there are fifteen European jurisdictions that have no lay participation in criminal trials.

Another abolitionist reform since the 2005 survey was in the Swiss canton of Geneva where traditional juries have been abolished as a result of the unification of criminal procedure law, which was introduced in January 2011. Before the reform of 2011, each of the twenty-six jurisdictions had its own rules of criminal procedure. For example, the Code of Criminal Procedure of the Canton of Geneva, which was adopted in 1979, provided for a jury system. Twelve jurors sat together with a professional judge who could answer their questions regarding the law during their

⁷ From some countries, we received more than one completed questionnaire. From Switzerland, we received completed questionnaires from five out twenty-six cantons.

deliberation, but could neither give advice nor exercise any right to vote (Jackson and Kovalev 2006). Geneva was the only canton that retained juries until recently. Other cantons either did not have lay participation at all or had it in the form of mixed courts, for example Zurich. Since a unified Code of Criminal Procedure had to adopt an approach that would not conflict with the practices existing in other cantons before the reform, lay adjudication in the form of the jury has been abolished in Geneva.

In contrast to these abolitionist reforms, several countries have introduced new systems of lay adjudication. For example, Georgia adopted a new Criminal Procedure Code in October 2009, which contains provisions regarding jury trials. Its first trial was conducted in November 2011. The Georgian jury system has been influenced by the common-law jury model. For instance, Georgia adopted a US system of jury selection involving a *voir dire* and a significant number of peremptory challenges.⁸ Similar to common-law juries, Georgian juries do not usually have access to previous convictions of the accused. The Georgian jury system also borrowed a requirement for a supermajority verdict rule of 8 out of 12 votes,⁹ which is very rare in civil-law jurisdictions.

Another post-Soviet country, Ukraine, has recently reformed its lay adjudication system. In May 2011, the system of lay assessors was abolished and the Government planned to introduce a new jury system along with a new Code of Criminal Procedure. In April 2012, the Ukrainian Parliament adopted a new Code of Criminal Procedure and the President signed it into law on May 15, 2012. Although the lay participation system, introduced by the Code in November 2012, is called trial by jury (*sud prisiashnikh*), in reality it is a mixed court model. It resembles the German model, with two professional judges sitting together with three lay jurors to decide questions of guilt and sentencing as a single panel.¹⁰ Ukraine is the second country in the post-Soviet region, after Kazakhstan, that introduced a mixed court system but called it a 'jury' system. The new Ukrainian system shares many elements with the German system by making its 'juror' in theory a quasi-judge with virtually all the rights and responsibilities of the professional judge. Professional judges alone decide on challenges of jurors for cause and preventive measures such as bail and detention on remand.

Ukraine, unlike its former 'sister republic' Georgia, failed to adopt the traditional jury system partly because there was not the same commitment within the government for such a reform. Georgia, after the Rose Revolution Government of Mikheil Saakashvili, a graduate of a U.S. law school, was very enthusiastic about introducing the Anglo-American model of the jury. Ukrainian politicians, such as Victor Yushchenko and Yulia Timoshenko who were leaders of the Orange Revolution in 2004, saw the jury as part of their judicial and legal reform, but they did not hasten to implement this reform when they became President and Prime Minister respectively. They lost power after Victor Yanukovich won the presidential election in February 2010 and jury reforms were no longer pursued. Now that the 2014 *coup d'état* has resulted in the ousting of President Yanukovich and his government from office, there is a possibility that criminal justice reforms may be influenced by U.S. policy advisers.¹¹

Unlike Ukraine, which has never had a traditional jury in recent times,¹² some other European countries that did retain the traditional jury have recently replaced it with

⁸ Parties are entitled to up to twelve peremptory challenges in cases punishable by life imprisonment.

⁹ Criminal Procedure Code of Georgia, adopted October 9, 2009, art. 261(4).

¹⁰ This composition of mixed courts (two professional judges and three lay judges) was also adopted in some other European jurisdictions, such as Croatia, Slovenia and Poland.

¹¹ According to some researchers, Ukraine is currently a U.S. client state. There are reports that the US Ambassadors are involved in the selection and appointment of Ukrainian political leaders. It is noteworthy that former Georgian President Saakashvili has been recently appointed as the Governor of the Odessa Region in Ukraine (Katchanovski 2015).

¹² Ukraine, as a part of the Russian Empire, had a jury system between 1864 and 1917.

a mixed court system along the lines of the French or German model.¹³ One such country is Denmark, where reforms in 2006 converted the jury of twelve into a mixed court of either three professional judges and six lay jurors, who try cases as the court of first instance, or three professional judges and nine lay jurors, who hear cases on appeal. As opposed to the Ukrainian 'jury' system, which adopted the German model of a mixed court, the Danish Government chose to transform its traditional jury into a mixed court system that bore a similarity to the French model of lay participation in a number of respects. First, the new Danish system has two different juries for trials and appellate stages similar to the French *cour d'assises* and *cour d'assises d'appel*. Second, the ratio of professional judges and lay jurors in the Danish trial and appellate courts is now identical to that in both the *cour d'assises* and the *cour d'assises d'appel* following legislation in France in 2011 to reduce the ratio of lay assessors.¹⁴ In each jurisdiction, there are now three professional judges and six lay jurors at the trial level and three professional judges and nine lay jurors at the appellate level. Third, Danish juries, like their French counterparts, can render a guilty verdict only by a qualified majority of the mixed panel: at least four lay jurors and at least two professional judges.

Other countries belonging to the Council of Europe have debated whether to transform their jury systems into a mixed court based on the German or French model. For example, in Belgium, the Federal Ministry of Justice organized a special Commission on the reform of "hof van assisen/ cour d'assises" in 2004. According to our Belgian respondent, the Commission initially proposed the abolition of the jury system in favour of a mixed court system. This proposal, however, was not adopted and the Belgian jury remains the sole and independent decision-maker of guilt, even though it is now required to provide reasons for its verdicts, as we discuss below. Similar attempts to abolish or transform the jury system into a mixed court have been made in Spain, but have been unsuccessful. As mentioned above, Norway will soon replace its traditional jury by a mixed court. It is unclear at this point which model of mixed court Norway will choose: the French model of *cour d'assises* as favoured by Denmark or the German model favoured by Ukraine.

Despite the efforts made to stem calls for abolition of the traditional jury in countries such as Belgium and Spain, the picture to emerge from our second survey is one of declining use of the traditional jury across a number of European countries. However, in assessing the health of an institution, it is important to monitor not only the frequency of its use but also the way it is used. Sadly, we see that even in those countries that have tried to introduce the traditional jury or have held on to it, there have been attempts to diminish its capacity as an independent institution. Perhaps the most blatant example of diminution is in Russia. The Russian jury serves as a useful case study of how an institution that was introduced amid a new dawn of democratisation of the criminal justice system has degenerated into a mere 'decorative' institution in a system that functions in much the same manner as it did before (Thaman 2007, p. 428).

3. Obstacles to the effective functioning of the traditional jury: a Russian case study

The successful introduction of trial by jury into post-Soviet systems, such as Georgia, Russia, Kazakhstan and Ukraine, that have had no experience with such an institution for more than seven decades depends on the support of the legal community and the national judiciary to make it work. Unlike common-law systems in which judges, prosecutors and lawyers are nurtured in the system of trial by jury, the experience of post-Soviet legal professionals with lay adjudicators was,

¹³ For more on the difference between German and French models of collaborative or mixed courts, see Jackson and Kovalev (2006, pp. 96-98), Kovalev (2010, pp. 59-67).

¹⁴ The change in the ratio of lay assessors was established by Loi n° 2011-939 du 10 août 2011 sur la participation des citoyens au fonctionnement de la justice pénale et le jugement des mineurs.

until recently, limited to their work with lay assessors. Lay assessors were subordinates of the judge rather than independent decision-makers (Kovalev 2006, pp. 125-127). The attitude of legal professionals in these jurisdictions towards trial by jury has been sharply divided into two camps. The majority of judges, prosecutors and virtually all law enforcement agencies involved in criminal investigation have been strongly opposed to the jury. By contrast, the vast majority of defence lawyers have been among its supporters (Kovalev 2010, pp. 222-242).

According to Thaman (1995, p. 81), who observed the debates on the jury draft law in Russia in the early 1990s, the Prosecutor General Valentin G. Stepankov (1991-1993) was "the most vocal opponent of judicial reform." Virtually all of Stepankov's successors,¹⁵ including the current Prosecutor General Iu. Chaika (2006-present), have also opposed trial by jury. One of the main reasons for the hostility of post-Soviet prosecutors to the institution of the jury has been the fear of unfavourable outcomes for the prosecution. Acquittal rates in Russian bench and jury trials are 0.5% and 10-20% respectively (Kovalev 2010, p. 225). Another high-ranking Russian law-enforcement official, the First Deputy Prosecutor General and the Head of the Investigative Committee, Alexander Bastrykin, has advocated the transformation of the Russian jury system into a mixed court based on the continental European jury model. According to Bastrykin, one-half of this new court should be composed of professional judges because the current model of jury "does not satisfy the expectations which are established for it" (Bogdanov 2009).

However, it is not just prosecutors who are opposed to the jury system. Many high-ranking judges, including chairpersons of Supreme Courts in some European jurisdictions, have also strongly opposed the introduction of a jury in their countries. For instance, the ex-Chairperson of the Ukrainian Supreme Court, Vasil Maliarenko, wrote in one of his publications: "Introduction of the jury clause into the constitutional law is a populist action and a blind imitation of foreign experience" (Maliarenko 1999, p. 42). Similar examples can be found in other post-Soviet countries, such as Belarus and Kazakhstan, which are not members of the Council of Europe (Kovalev 2010, pp. 226-228).

The question arises why judiciaries in these jurisdictions are so ardently involved in the politics of lay adjudication reform and try so hard, sometimes with success, to prevent or at least influence the introduction of lay adjudication. One explanation is the judges' adherence to a strong civil-law tradition, which harbours a bias against the accusatorial tradition and perceives the judicial role, not as umpire, but as quasi-investigator. The judge's task is to establish the material truth, which usually results in the conviction of the defendant. This ideology clashes with constitutional declarations, human rights principles and new legislation in post-Soviet states that highlight fair trial principles and values, such as an independent and impartial tribunal and an adversarial trial. These values are particularly incompatible with the enduring Soviet legal culture that prioritises the need for the court to exercise an inquisitorial function (to seek the truth and solve the crime at issue) and a crime control function (to ensure that all guilty defendants are convicted and punished). Against this background of deep ideological resistance to the traditional jury model, it is not surprising that Supreme Courts, trial court judges, prosecutors and law enforcement bodies fiercely oppose any reform that moves in the direction of the traditional jury and attempt to sabotage such reforms when they are enacted.

Russian law enforcement agencies, politicians, judges, prosecutors and journalists have consistently criticised juries for their unreasonable, biased and unlawful not-guilty verdicts in cases involving Russian military officers accused of the murder of Chechen civilians such as Captain Ulman (Kovalev 2008) and Russian youths accused of hate crimes against ethnic minorities (Kovalev 2011). Periodically, these

¹⁵ Among jury opponents were former Prosecutors General Alexei Iliushenko (1994-1995), Yury Skuratov (1995-2000) and Vladimir Ustinov (2000-2006).

critics have proposed limiting the jurisdiction of juries, transforming the jury system into a mixed court, or abolishing jury trials altogether. Although critics have not yet succeeded in abolishing the jury system, at the end of 2008 they succeeded in persuading the Russian Parliament to enact a law abolishing jury trials in terrorism and espionage cases (Kovalev and Smirnov 2014). One of the main justifications for this law was the claim that there had been too many acquittals for these types of crimes in the North Caucasus due to tribalism, anti-government bias, and jury intimidation (Kovalev and Smirnov 2014, p. 119). The sponsors of the Russian anti-jury law, however, did not provide any data on alleged jury intimidation or bias during the parliamentary hearings, and the law passed extraordinarily quickly, coming into force in January 2009. Politicians' use of the 'jury intimidation' argument in cases of terrorism, without having any substantial evidence of such 'intimidation', is not new. During the 1970s, the Diplock Commission used exactly the same arguments to abolish jury trials in terrorism cases in Northern Ireland (Finnegan 2011, p. 78; Roach 2011, p. 248, Davis 2013). Jury trials have also been abolished in terrorism cases in Spain.

Russian police and prosecutors have also sought to avoid the use of juries in particular cases. Since defendants are eligible for trial by jury in only a limited number of criminal cases (usually the most serious offences punishable by a life sentence), the police and prosecution have adopted a practice of so-called "correctionnalisation."¹⁶ This refers to the intentional downgrading of offences in order to avoid jury trials. The cases are then transferred to bench trials where the government has a greater chance of securing a conviction. According to Alekseev (2005), one high-profile case in which a group of defendants was accused of spilling concentrated sulphuric acid on the victim, a finalist of a beauty contest, was deliberately downgraded from the charge of attempted aggravated murder to intentional infliction of grievous bodily harm. Defendants charged with deliberate infliction of grievous bodily harm are not eligible for trial by jury in Russia. This case was downgraded because of the perception that a jury would acquit.

Another way to sabotage the effective functioning of juries is by manipulating the jury lists to include people loyal to the prosecution within the jury pool (Kovalevskii 2004). Some human rights activists, jury researchers and advocates in Russia believe that this approach was used in the high-profile espionage case of scientist Igor Sutyagin, who was tried in Moscow city court in 2004 (for full details see the ECtHR judgment in *Sutyagin v. Russia* (2011)). According to Sutyagin's defence attorneys, one of the jurors, Grigorii Yakimishin, was selected from the jury list of the Moscow district military court rather than from the jury list of the Moscow city court (Medetsky 2004, Kriger 2004). This means that the court officials responsible for jury selection included an improper juror within the jury pool, thus violating the provision of the Russian criminal procedure law that states that the jury venire should be selected randomly from existing jury lists compiled for a particular court (Criminal Procedure Code of the Russian Federation, art. 326(1)). After the verdict the defence team discovered that this juror was allegedly a former KGB agent who was involved in a spy scandal in Poland in the 1990s (Borogan and Soldatov 2004). Although all the jurors were asked during the *voir dire* if they had any relationship to the Intelligence Service, Grigorii Yakimishin failed to reveal that he had been an undercover foreign intelligence officer. Thus, the defence could not use its right of peremptory challenge or challenge for cause (Medetsky 2004, Kriger 2004, Trenina-Strausova 2004). These irregularities were serious enough to call into question the impartiality of the tribunal and quash the conviction, yet the Russian Supreme Court dismissed the appeal of the defence and upheld the conviction on the ground that the defence had an opportunity to challenge the juror. Some scholars and human rights activists argue that the Russian secret services conduct "operational

¹⁶ The term *correctionnalisation* is derived from the French *tribunal correctionnel*, which tries defendants without the participation of jurors or lay assessors (Munday 1993).

supervision" of jury trials (*operativnoe soprovozhdenie suda prisiashnykh*) as a matter of course in politically motivated criminal cases by "infiltrating" their agents onto juries (Borogan and Soldatov 2004, Pashin and Levinson 2004). In its consideration of Sutyagin's case in 2011, the ECtHR unanimously found violations of both Articles 5 and 6 of the ECHR. According to the ECtHR, the replacement of the presiding judge in the middle of the trial violated Article 6 § 1 of the Convention (requiring an independent and impartial trial court). However, the ECtHR considered it "unnecessary to examine separately the applicant's other misgivings about the independence and impartiality of Moscow City Court on account of the selection and composition of the jury" (*Sutyagin v. Russia* 2011, para. 194).

To limit the number and scale of trials by jury, professional judges try to persuade defendants to waive their right to jury trial. Although defendants know that their chances of being acquitted in a jury trial in Russia are 40 times higher than in a bench trial (Kovalev 2010, p. 225), many waive their right to a jury trial. In 2003, 286 or 13.8% of the 2,072 defendants who initially requested a jury trial later waived their right (*Upolnomechennyi po pravam cheloveka v Rossiiskoi Federatsii* 2004). In recent years, the number of jury waivers has increased and every fifth defendant who initially requested a jury trial has waived his or her right in court.¹⁷ Although plea-bargaining is practised in Russia in cases punishable up to ten years imprisonment only (Criminal Procedure Code of the Russian Federation, art. 314(1)), it is not allowed in cases in which the defendant is eligible for a jury trial. However, according to interviews carried out with Supreme Court judges and officials of several provincial courts by one of the authors of this article, presiding judges in some trial courts discourage defendants from pursuing their initial choice to be tried by twelve fellow-citizens and persuade them to opt instead for a bench trial of three professional judges (Kovalev 2010, p. 236). This is usually done during preliminary hearings by the judge offering an off-the-record "deal," including, for instance, a promise of a less severe punishment in exchange for a jury waiver. It was also revealed during the interviews that sometimes defence attorneys try to convince their clients to waive the right to a jury trial because many lawyers still do not feel confident enough to participate in this relatively new procedure and prefer to work with professional judges even if their chances of winning a case are minimal. If the defendant refuses to follow the recommendations of the judge, he or she runs the risk of a harsh sentence if there is a guilty verdict. If the defendant agrees and waives the right to a jury trial, he or she is not guaranteed a more lenient sentence by the judge and has to rely on the judge's word of honour.

Another device that undercuts the effective functioning of the jury is the discharge of the entire jury in cases where there is a high probability of a not-guilty verdict. This practice was allegedly adopted in several high-profile cases in Russia.¹⁸ The Russian human rights activist Elena Bonner (2005) called this practice 'Basmannyi Justice' (*bassmannoe pravosudie*), which has become a common name for biased courts orchestrated by the central and local government. One Russian advocate, who participated in Pichugin's trial, argued that such a practice is not illegal *per se*, but is a shortcoming of the current legislation (Butorina 2004). In a resolution in November 2005, the Supreme Court of the Russian Federation clarified that if the presiding judge drops out of the trial for any reason, the court hearing is declared

¹⁷ According to statistics available on the website of the Judicial Department at the Supreme Court of the Russian Federation, in 2007, 416 of 2,021 (20.5%) defendants waived their right to a jury trial; in 2008 396 of 1,986 (19.9%) defendants; in 2009 386 of 1,989 (19.4%) defendants; in 2010 457 of 1,888 (24.2%) defendants; in 2011 256 of 1,430 (17.9%) defendants; in 2012 374 of 1,447 (25.8%) defendants; and in 2013 146 of 654 (22.3%) defendants waived their right. Statistics are available at <http://www.cdep.ru/index.php?id=79>.

¹⁸ Examples include the Pichugin murder case (Bush 2005, Svetova 2005, Butorina 2004), the first Sutyagin espionage trial (Solomon 2004), the first and second trials of Kvachkov, Iashin and Naidenov charged with terrorism and the attempted murder of Anatolii Chubais (Mironova 2008). For more details on Pichugin's case see the ECtHR's decision in *Pichugin v. Russia* (2013).

invalid and the jury is dismissed (Postanovlenie Plenuma Verkhovnogo Suda RF, 22 November 2005 No. 23) According to the Supreme Court, the dismissal of the jury in such cases is in conformity with article 328 of the Code of Criminal Procedure, which states that the duty of jury selection belongs to the presiding judge. The removal of the presiding judge thus leads to a mistrial and the selection of a new jury. The reasoning of the Supreme Court is farfetched and does not appear to be based on any legal authority. Although the Code of Criminal Procedure stipulates that the presiding judge bears the responsibility for jury selection, the law does not require that the same judge should participate in the trial from jury selection to verdict.

The case of Vlasov and Klevachev, heard in Moscow Provincial Court, and the case of the so-called Kingisepp assassin gang, tried at Moscow City Court, demonstrate that trial judges may even reject a jury verdict of not guilty in spite of the requirement of Russian law that such cases should result in acquittals. In the case of Vlasov and Klevachev, who were charged with blowing up a passenger train, the jury returned a verdict of not guilty. When the verdict was handed to the presiding judge, Judge Tatiana Romanova, she did not allow the foreman to announce it and later dismissed the jury (Kozlova and Fedosenko 2006, Kadrmatov 2006, Stenin 2006). A similar scenario was repeated a year later in Moscow City Court. In the case of Irman Il'iasov and eight other defendants (members of the so-called Kingisepp gang), Judge Andrei Zubarev sent the jury back to the deliberation room three times to correct "errors" in the verdict. At midnight, the foreperson of the jury told the judge that the jurors had spent more than twelve hours in the jury room without fresh air and some of them needed to catch the last subway train home. The judge decided to announce the verdict the next morning, but the following morning the verdict was not announced because two jurors did not return. The judge dismissed the jury (Kozlova 2007).

In some Russian jury trials, the professional judges may intentionally allow procedural errors to occur during the trial. In a study conducted by Karnozova (2000, p. 152), one Russian judge acknowledged that during his summation of the evidence he intentionally omitted some prosecution evidence. This gave the prosecution an opportunity to object and to argue that the presiding judge had violated the principle of impartiality in his instruction to the jury. There are a number of ways for a judge to create a ground for an appeal if the jury reaches a not-guilty verdict. The concept of harmless error is not known in the Russian legal system and many jury verdicts are reversed on insignificant grounds. In fact, quashing jury verdicts on farfetched grounds is another form of judicial sabotage of jury trials. Verdicts are also quashed by the Supreme Court judges who review cases on appeal. The scope of the appellate review of the case is not limited to the issues mentioned by the appellants, which means that the Court of Appeal has to investigate and consider all procedural errors made in the trial (Thaman 2000, p. 349, Lebedev 2003, p. 619). Judicial statistics reveal that the Supreme Court of the Russian Federation in some years quashed every second not-guilty verdict while dismissing the vast majority of appeals from guilty verdicts (Karnozova 2000, p. 307, Thaman 2000, p. 349, Pashin and Levinson 2004, p. 21).

All these methods of interference with the functioning of the jury are related to the powers of the judge. However, the Russian experience illustrates another means of obstructing trials by jury that involves the police and prosecutors. There have been several cases where jury tampering by police and prosecution was revealed to the public through media reports. In one case the defendant, A. Khakhulin, was charged with the murder of a police officer on duty. The jury in Briansk provincial court delivered a not-guilty verdict based on the defendant's claim that he stabbed the policeman in self-defence. After the verdict had been delivered, the police approached all the jurors in their homes and demanded that they sign written statements admitting that they misunderstood some technicalities in the case so that the verdict could be reversed. As a result of such pressure, three of the twelve

jurors signed the statement and confirmed they had been “confused by the wording of the question list, which resulted in a technical error.” The Supreme Court quashed the acquittal and none of the policemen involved in the intimidation of jurors was even questioned (Andriukhin 2004, Pasechnik 2004, Skoibeda 2004).

In another case, two defendants, entrepreneurs Poddubnyi and Babkov, were charged with contraband of cigarettes and forming a criminal association. The defendants were entitled to a jury trial. The first jury, which tried both defendants in Moscow City Court, was dismissed because one member of the jury withdrew on medical grounds (Nikitinskii 2004). The second jury found both defendants not guilty, but shortly after the verdict almost all the jurors were called to the office of the Moscow City prosecutor to be questioned about their deliberations and votes. According to the interviews some jurors gave to a Russian newspaper, investigators in the office of the prosecutor threatened them with arrest for their refusal to “collaborate with the investigation” (Nikitinskii 2005). The office of the prosecutor violated several provisions of Russian law in this case. First, the Code of Criminal Procedure prohibits jurors from disclosing opinions and statements expressed by jurors in the deliberation room (*Criminal Procedure Code RF*, art. 341(4)). Second, the Russian jury law guarantees jurors the status of a judge and they cannot be detained or interrogated (*Zakon RF ‘O prisiashnykh zasedateliakh,’* art. 12). Third, such acts by the prosecutors could be considered contempt of court, a criminal offence under the Russian Criminal Code (*Criminal Code RF*, art. 297). None of the prosecutors who conducted the interrogations was questioned. The Supreme Court quashed the acquittal and ordered a retrial, which again resulted in the acquittal of both defendants (Nikitinskii 2006).

The resistance of the post-Communist legal community is the most serious obstacle to effective jury reforms in the post-Communist countries. By using loopholes or violating the law, law enforcement agencies, prosecutors and judges can distort the proper functioning of lay adjudication. The Russian experience with juries demonstrates that if the police, the office of the prosecutor and trial judges are united in their effort to undermine the jury system, the Supreme Court will do little to protect the jury.

This example of the Russian jury demonstrates that attempts to impose reforms that are ‘alien’ to the prevailing criminal justice legal culture are likely to be unsuccessful.¹⁹ A government in a post-Communist country determined to introduce a genuinely independent jury system can take steps to prevent or reduce the manipulation of jurors. Legislation can provide such a system with appropriate safeguards, such as transparency in jury selection, the prohibition of interrogation of former jurors by the police or prosecutor’s office and the prohibition of appeals against acquittals. However, if the legal community is determined to resist the jury system, the chance that the jury will succeed is slim.

4. Threats to independence in the West

There is less evidence in Western Europe of fierce opposition to jury systems on the part of the legal community. The jury system has long been embedded within the common-law traditions in the UK and Ireland. As we have seen, opposition here has come more from legislation intent on restricting jury trial where there is a danger of jury tampering and, more specifically, in terrorist and organised crime cases. It has been argued that even in England there has been a continuing decline that is due in large part to professional aggrandizement by influential members of England’s legal elites combined with their mistrust of lay participation (Vidmar 2002, p. 405). This can be exaggerated. There is still a groundswell of support for juries among

¹⁹ Other scholars have observed that an enduring legal culture can hamper the implementation of criminal procedure reforms. In her discussion of the reformed Italian Code of Criminal Procedure, Grande (2000) concluded that despite the efforts to import a more adversarial procedure into the criminal trial, the Code retained a very strong civil-law flavour (see also Marafioti 2008).

prominent members of the legal establishment.²⁰ Within civil-law countries, the traditional jury, as has been explained, is less easy to reconcile with a legal culture that demands that the court becomes an active seeker of truth. It has also been suggested that there is still a legal cultural conception in German-speaking countries that the law can be made as accurate and precise as certain of the sciences claim to be which lends itself to a view that amateur laypersons should not be “let loose in the vineyard” (Taylor 2011, p. 324, see also Lundmark 2012). Professional judges on the continent have been able to exert more control over juries, more subtly than in Russia, but in a manner that deprives the jury from exercising full democratic control over what the verdict should be. Thus, in a number of continental countries such as Norway, Austria, Spain and Belgium, judges have the power to overturn jury verdicts and there are strict appellate controls over verdicts.

Another factor that is putting greater constraints on the independence of the jury has been a growth in demand for juries to be made more accountable for their decisions. So long as juries were traditionally *of* the community they did not need to be accountable to the community but the increasingly diverse nature of the communities from which juries are chosen has engendered less confidence in their ability to apply undifferentiated community standards in their decision-making (Jackson 2002b). The traditional means of trying to ensure that jury decisions are not based on prejudice and discrimination has been to try to influence the jury selection process. But as input control has proven an ineffective tool in eradicating bias and impropriety in the jury room, there have been calls for greater judicial supervision of the deliberation process, greater criminalisation of juror impropriety and greater accountability for jury decisions.

Over the last thirty years there have been periodic crises in England and Wales arising out of the ability of juries to perform their impartial and independent role. In particular, there have been concerns about jury tampering, about racial bias within juries,²¹ and most recently about juries’ use of the internet to discover information about a case which has not been forensically tested in the courtroom (Law Commission (England and Wales) 2012, 2013, Irish Law Reform Commission 2010, 2013). Judges have had to be increasingly vigilant in warning juries about their ‘judicial’ responsibilities in the jury room (*R v. Thompson* 2010) and Parliament has intervened to create specific offences to prevent jurors from seeking extraneous information in cases (see Criminal Justice and Courts Act 2015, secs. 71(1), 72 and 73).

Looming over these concerns is the requirement that jurors behave as an impartial tribunal as required under Article 6 of the ECHR. Across Europe, the ECtHR has the responsibility for setting the standards required of decision-makers in this respect. It has consistently held that impartiality has both a subjective and an objective dimension. Subjective bias involves the question whether the tribunal was actually biased whereas objective bias involves the question whether an objective and fair-minded observer would have legitimate doubts as to the impartiality of the tribunal (*Hauschildt v. Denmark* 1989, para. 48, *Ferrantelli and Santangelo v. Italy* 1997, para. 58). The objective test has been justified by the ECtHR on the ground that what is at stake is “the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused” (*Hauschildt v. Denmark* 1989, para. 48, *Incal v. Turkey* 2000, para.

²⁰ See, e.g., the remarks of the Lord Chief Justice of England and Wales (Judge 2010).

²¹ The issue of racial bias and racism within the criminal justice system has received much exposure since the Stephen Lawrence case which revealed ‘institutional racism’ within the London Metropolitan police force (Macpherson 1999). As it happens, research has found that black and minority defendants are not more likely than white defendants to be found guilty by juries where there is a large proportion of black minority defendants and a very low level of ethnic diversity in the local population. Furthermore, white defendants accused of racially motivated crimes are not more likely to be acquitted by all-white juries than racially-mixed juries (Thomas 2010).

71). A number of decisions have served to reinforce the need for juries to be impartial and independent. For example, the ECtHR has ruled while the mere fact that jurors have held positions as police officers or prosecutor does not by itself give rise to any justified fears of bias, where a police juror has known or worked with an officer in the case, there is a risk that the juror may "albeit subconsciously" favour the evidence of the police (*Hanif and Khan v. UK* 2012, para 148).

The need to ensure there are mechanisms for guarding against the risk of objective bias may require some inroads to be made into the jury's independence. In England and Wales there has been a long-standing common-law rule that provides that jurors may not divulge the contents of their deliberations at any time even after the conclusion of the trial. Such a rule safeguards the jury's independence by enabling unpopular verdicts to be reached that are uninhibited by the threat of exposure. The ECtHR has upheld the secrecy rule as a "crucial and legitimate feature of English jury trial which serves to reinforce the jury's role as the ultimate arbiter of fact and to guarantee open and frank deliberations among jurors on the evidence which they have heard" (*Gregory v. UK* 1997, para. 594). But there are signs that this rule may need to be reviewed in order to uncover any allegations of wrongdoing in the jury room (Law Commission 2012, p. 82). In *Remli v. France* (1996, para. 48) the ECtHR considered that Article 6(1) of the ECHR imposes an obligation on every national court to check whether, as constituted, it is an 'impartial tribunal' where this is disputed "on a ground that does not immediately appear to be manifestly devoid of merit." In a case where allegations were made by a juror that at least two other jurors were making racist comments and jokes, the ECtHR held that it was not enough for the judge to redirect the jury on the need to come to a verdict unaffected by bias (*Sander v. UK* 2000). *Sander* suggests that there may be circumstances that compel judges to make inquiries of what went on in the jury room, if they do not wish to discharge the jury altogether. Criticism has been made of a later House of Lords decision (*R v. Connor; R v. Mirza* 2004) which upheld the secrecy rule even in the light of allegations of juror misconduct subsequent to the delivery of a verdict (Quinn 2004). In a compelling dissenting judgment, Lord Steyn considered that a "jury is not above the law. As a judicial tribunal it must comply with the requirements of Art. 6(1) of the convention" (*R v. Connor; R v. Mirza* 2004, para. 6).

The need for juries to act as a judicial body also calls into question another long-standing practice of the traditional jury in common-law countries, namely that they do not need to give reasons for decisions. This practice harkens to the jury's governance or legislative role mentioned above. Just as parliamentarians vote on laws without having to give reasons for their votes, so there is a long history of the common-law jury rendering a collective general verdict after voting on it without having to give reasons. The right of juries to bring in an unaccountable 'general' verdict as opposed to a 'special' verdict based on questions put to the jury by the judge has long been regarded as one of constitutional standing guaranteeing the independence of the jury (Green 1985). A general verdict permits juries to bring in verdicts in the teeth of the law. It might be possible to require juries to explain their verdicts whilst still respecting their power to 'nullify' the law but such a requirement would inevitably invite greater scrutiny of their justification for their verdicts either by the judge or by an appellate body. This would appear to happen in those traditional jury systems on the European continent that require explanations to be given by juries (Thaman 2000, 2011). When judges or clerks are, moreover, drafted to help juries articulate their reasons, as seems to happen in a number of continental jurisdictions that have retained the jury system (Thaman 2011), the governance role clearly plays a more subordinate role to that of justifying the verdict in terms of the existing law.

The ECtHR's original attitude towards the absence of reasons by juries, as with the secrecy rule, was that this aspect of jury trial should be respected. In *Saric v. Denmark* (1999), the Court held that the absence of reasons in a judgment, owing

to the fact that the applicant's guilt had been determined by a lay jury, was not in itself contrary to the ECHR. This apparent vindication did not prevent the Danish government from using the lack of reasons as a ground for abandoning Denmark's traditional jury system in 2006.²² But then in 2009 the Second Section of the ECtHR appeared to reverse the ECtHR's earlier position in a decision that sent shock waves to those countries that had established traditional juries that did not have to give reasons.

The applicant in *Taxquet v. Belgium* (2009) had been convicted, along with seven others, of murdering a government minister by a jury without any reasons given to him. The presiding judge had issued a total of 32 questions to the jury but only four of these related specifically to Taxquet and these merely reiterated the constituent elements of the offences, asking the jury (i) whether Taxquet was guilty of murder and/or of attempted murder and (ii) if he was guilty on either count, whether he had acted in either case with premeditation. The jury answered 'yes' to all questions but provided no further explanation for its verdicts. On appeal to the Belgian Court of Cassation it was argued that the defendant's human right to an independent and impartial tribunal guaranteed by Article 6(1) of the ECHR and Article 14 of the International Covenant of Civil and Political Rights implied a right to a reasoned verdict. The Belgian court dismissed the appeal on the ground that in accordance with the classic conception of *intime conviction* all the jury had to do was to answer one question: "are you inwardly convinced?" The ECtHR, however, considered that such "laconic answers to vague and general questions" could have left the applicant with an impression of arbitrary justice lacking in transparency. The ECtHR continued as follows:

Not having been given so much as a summary of the main reasons why the Assize Court was satisfied that he was guilty, he was unable to understand – and therefore to accept – the court's decision. This is particularly significant because the jury does not reach its verdict on the basis of the case file but on the basis of the evidence it has heard at the trial. It is therefore important, for the purpose of explaining the verdict both to the accused and to the public at large – the 'people' in whose name the decision is given – to highlight the considerations that have persuaded the jury of the accused's guilt or innocence and to indicate the precise reasons why each of the questions has been answered in the affirmative or the negative (*Taxquet v. Belgium* 2009, para. 48).

There was no reference in this judgment to the possible compensation of a direction from the judge, which is not perhaps surprising as the case originated from a Belgian trial where there was no tradition of the judge summing up to a jury. But in the absence of any reference to judicial directions compensating for the lack of reasons, the judgment promoted a degree of panic and (perhaps needless) remonstrance. It seemed to suggest that there were only two choices facing countries with the traditional jury system: either move to require juries to give reasons or abolish the system altogether. Belgium reacted by hastily joining Spain in requiring its juries to give reasons (Thaman 2011).

The decision also gave rise to considerable debate in Norway. After *Taxquet* was decided, the Supreme Court ruled in 2009 (HR-2009-01192-P) that a conviction based on an absence of reasons could not in itself be considered a violation of ECHR Article 6 §1. The Supreme Court stated that the decisive issue was whether the purpose behind the requirement to give reasons was sufficiently satisfied in some other way. The Norwegian jury system contained mechanisms to satisfy these purposes as the jury in Norway determines the issue of guilt by answering 'yes' or 'no' to specific questions which not only describe the particular characteristics of the criminal act but also describe in brief how the criminal act was committed with

²² In her reply to our questionnaire, Professor Smith contends that the lack of reasons by juries could have been overcome without abandoning the jury system altogether. Under the old Danish traditional jury system, judges sat down with juries after a guilty verdict to decide on sentence and she suggests that they could also have been required to formulate reasons for the verdict as well.

details of time and place. These questions could be distinguished from the very general questions put to the jury in the *Taxquet* case. In some cases, however, in order to ensure that the Supreme Court could effectively review the application of the law, the Supreme Court considered that it may be necessary for the Court of Appeal to tape or make a written record of the summing-up and/or describe its understanding of the law in the grounds that are given for the sentence.

This decision was followed by another Norwegian Supreme Court decision in November 2009 which held that the Court of Appeal in general was not required to give reasons for the assessment of evidence when the jury delivers a guilty verdict (HR-2009-02153-A, 2009). However, the Court considered that a reason for the assessment of evidence must be given in cases where this is necessary to give the defendant and the general public a sufficient basis on which to verify why he or she was found guilty. Although these decisions seemed to allay concerns that the Norwegian system was in breach of human rights law,²³ they did not prevent the Government from setting up a Jury Committee in 2011 to consider whether Norway should move towards a mixed court.²⁴ The Committee was divided on the question. However a political decision was made in June 2015 to convert the jury system into a mixed court. As mentioned above, Norwegian scholars expect that juries will be abolished some time in 2016.

The *Taxquet* decision caused even greater consternation in other jurisdictions. The UK and Ireland (and interestingly also France) joined the Belgian government as intervening state parties in referring the Chamber's Second Section ruling to the Grand Chamber in Strasbourg. The Grand Chamber in *Taxquet v. Belgium* (2012) upheld the Second Section's ruling that the questions put to the jury did not enable the applicant to ascertain which of the items of evidence and factual circumstances discussed at the trial had ultimately caused the jury to answer the questions put to it in the way that it did. But in what must have been a relief to the interveners, the Grand Chamber differed from the Second Section Chamber by stating that its case law does not require jurors to give reasons for their decision and Article 6 of the ECHR does not preclude a defendant from being tried by a lay jury even when reasons are not given for a verdict. It reiterated the principle that "for the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness" (*Taxquet v. Belgium* 2012, para. 90). However, the Chamber considered that this understanding could be met in a variety of ways (*Taxquet v. Belgium* 2012, paras. 91-92):

In a proceeding conducted before professional judges, the accused's understanding of his conviction stems primarily from the reasons given in judicial decisions In the case of assize courts sitting with a lay jury Art. 6 requires an assessment of whether sufficient safeguards were in place to avoid any risk of arbitrariness. Such procedural safeguards may include, for example, directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced, and precise unequivocal questions put to the jury by the judge, forming a framework on which the verdict is based or sufficiently offsetting the fact that no reasons are given for the jury's answers.

It has been suggested that this apparent reversal of the stance taken by the Second Section is disappointing in that it engages in sophistry by presenting processes such as a summing up as accountability safeguards and it appears reluctant to do anything that would "remould domestic trial procedures of long standing" (Coen 2014, p. 125). The Grand Chamber certainly appeared to go out of its way to offer some reassurance that the lay jury system of several Council of Europe states is guided by the "legitimate" desire to involve citizens in the

²³ Consider also *TLN v. Norway* (2010) where the UN Human Rights Committee concluded that the jury's failure to provide grounds for its decision did not violate the applicant's human rights under Art 14(5) of the UN Covenant of Civil and Political Rights.

²⁴ Professor Asbjørn Strandbakken emailed this communication on 2 Feb 2015.

administration of justice [(*Taxquet v. Belgium* 2012, para. 83). In the view of one of the concurring judges, “[f]or the ECtHR to require juries to give reasons for their verdicts would . . . not only contradict its case-law, but would also, more importantly, undermine the very existence of the jury system, and thereby trespass . . . on the member State’s prerogative to choose its criminal justice system” (*Taxquet v. Belgium* 2012, Judge Jebens’s concurring opinion, para. 3).

Whatever short-term damage the Second Section decision did to the traditional jury, the Grand Chamber decision might seem to have put the matter to rest and business could go on in the UK and Ireland as normal. But there are a number of grounds for thinking that the ECtHR has not given the system of judicial summation followed by a general verdict the completely clean bill of health that may appear to be the case (Roberts 2011).

The first point to make is that the Court’s rulings relate to particular facts and circumstances of individual cases and they consequently do not create precedents in the strict common-law sense. Hence, the Court was simply not able to give the traditional jury model of trying cases without giving reasons its complete approval. Rather, in the section of the judgment dealing with the application of general principles to the present case, it stated that its task in reviewing the absence of a reasoned verdict was to determine whether, in the light of all the circumstances of the case, the proceedings afforded sufficient safeguards against arbitrariness and made it possible for the accused to understand why he or she was found guilty.

Secondly, the kind of safeguards mentioned against arbitrariness, if read literally, include directions on the legal issues and the evidence *and* unequivocal questions put to the jury by the judge that would seem to rule out general verdicts. The ECtHR’s opinion was stated in the context of a Belgian appeal and it may be that the Court did not mean to overthrow the whole common-law system of general verdicts (Ashworth 2011). But this only adds to the uncertainty and anxiety. In its previous case law, the ECtHR has accepted that directions to the jury can be a sufficient guarantee of impartiality (*Condrón v. UK* 2001). Perhaps, more comfortingly, there has been at least one case since *Taxquet* where the ECtHR has followed this approach. In *Judge v. UK* (2011), the applicant complained that a Scottish jury had convicted him of serious sexual offences without giving reasons and the ECtHR considered that the application was inadmissible. According to the Court (*Judge v. UK* 2011, paras. 36, 37):

[I]n Scotland the jury’s verdict is not returned in isolation but is given in a framework which includes addresses by the prosecution and the defence as well as the presiding judge’s charge to the jury. Scots law also ensures there is a clear demarcation between the respective roles of the judge and jury: it is the duty of the judge to ensure the proceedings are conducted fairly and to explain the law as it applies in the case to the jury; it is the duty of the jury to accept those directions and to determine all questions of fact. In addition, although the jury are ‘masters of the facts’ . . . it is the duty of the presiding judge to accede to a submission of no case to answer if he or she is satisfied that the evidence led by the prosecution is insufficient in law to justify the accused’s conviction . . .

These are precisely the procedural safeguards which were contemplated by the Grand Chamber at paragraph 92 of its judgment in *Taxquet*. In the present case, the applicant has not sought to argue that these safeguards were not properly followed at his trial. Nor has he suggested that the various counts in the indictment were insufficiently clear. Indeed, the essential feature of an indictment is that each count contained in it must specify the factual basis for the criminal conduct alleged by the prosecution: there is no indication that the indictment upon which the applicant was charged failed to do so. It must, therefore, have been clear to the applicant that, when he was convicted by the jury, it was because the jury had accepted the evidence of the complainers in respect of each of the counts in the indictment and, by implication, rejected his version of events.

Even if there is comfort to be found in decisions like this following the Grand Chamber's approach that judicial directions to the jury can themselves be a sufficient guarantee of judicial impartiality, there is a third ground for anxiety which is that the underlying principle considered to be pre-eminent by the ECtHR is that the accused must be given an understanding of the basis for his or her conviction. In *Judge* the evidentiary issue was a fairly simple one, whether to believe the complainant's evidence or whether to believe the defendant's evidence, and a verdict of guilty followed. In these circumstances, it is easy to understand that the reasons for the conviction were that the jury believed the complainant and not the defendant. But in a more complex case such as *Taxquet*, where there were eight defendants allegedly involved in a conspiracy to murder and Taxquet was convicted of the premeditated murder of a government minister and the attempted premeditated murder of the minister's partner, a general verdict in itself may not be enough to explain what his role in the conspiracy was given the fact that others were not convicted of premeditated murder.²⁵

Of course, it might be said that *Taxquet* was an exceptionally complex case and it was, moreover, presented to the jury in the absence of a careful judicial summing up of the kind that would be required in English and Irish criminal trials. But if the same facts had come before an English or Irish court, the ECtHR might very likely have come to the same conclusion that, notwithstanding the carefulness of the directions given, any general verdict on these facts would be insufficient. In *Taxquet*, the ECtHR Court emphasised that the accused was unable from the questions answered by the jury to find out whether he had been convicted as a perpetrator or as an accomplice. The same problem arises with the English law of complicity where a defendant is liable to be convicted as a perpetrator whether the jury takes the view that he or she was the principal or an aider or abettor, counsellor or procurer or was involved in a joint criminal enterprise (Ashworth 2011). In these cases, it seems likely that the ECtHR might require more than a general verdict from the jury and instead require that specific questions are put to the jury relating to the accused's role so that the accused understands the basis for his or her conviction.

5. Conclusion: arresting the decline?

In our article on the first European survey of lay adjudication in criminal cases (Jackson and Kovalev 2006), we identified a number of human rights arguments that can be made for lay adjudication, even though none of the international human rights instruments specifically require lay adjudication to be incorporated within the judicial branch of government. The traditional jury in particular has the potential to make a strong contribution towards the promotion of rights to political participation as well as civil rights such as the right to a fair trial. It is this democratic aspect of the jury's role that is one of the reasons for its popularity in some of the new democracies in Eastern Europe.

This article, however, has pointed towards a general decline across Europe in the use of traditional juries in serious criminal cases and a trend towards diminishing its capacity to deliver independent and impartial decisions. Some of the reasons are to be found in a growing disenchantment with the traditional jury by legislatures and governments that has resulted in its abandonment or curtailment. Others are to be found in a lack of respect given to lay decision-making within the legal culture of the professionals in those systems that have retained or have tried to introduce the traditional jury. Russia serves as perhaps the most egregious example of this disrespect. Finally, we have seen there is a growing demand that juries become more accountable for their decision-making which is threatening to diminish their historic 'legislative' or 'governance' role in casting judgement on the law.

²⁵ In *Taxquet* the jury provided a simple 'yes' or 'no' in relation to questions whether the defendant was guilty of murder or attempted murder and whether by premeditation or not.

The article has also pointed to a tension between the exercise of political participation and the need to safeguard civil rights within the criminal justice system. This tension is reflected in the rather ambiguous attitude that the ECtHR has taken towards the traditional jury. On the one hand, it has acknowledged the “legitimate” desire of member states that have a traditional jury to involve citizens in the administration of justice and has refused to condemn practices such as the secrecy rule and the lack of reasoned verdicts, that strengthen the independence of juries even though they contribute to a lack of transparency in criminal justice decision-making. On the other hand, the ECtHR has had to prioritise the need for a fair trial over these practices when there is a risk in individual cases of a jury engaging in partisan and arbitrary decision-making.

In prioritising the need to avoid arbitrary decision-making, the ECtHR would seem to be pointing towards the need for a change in the way that traditional juries have been regarded. Jurors are no longer merely citizens passing judgment on their peers; they are being required to exercise ever-increasing judicial responsibilities in their collective-decision making. This is not just a question of directing juries to be impartial in their decision-making. As jurors become exposed through the internet to ever more extraneous information about cases, there is a need to educate them in the importance of their judicial responsibilities as lay judges, and as their role changes in this manner, pressures may also extend towards them accounting more for the product of their reasoning (Jackson 2016). This need not take the form of fully reasoned verdicts. Already we are seeing judges being encouraged across a number of common-law jurisdictions to work more hand in hand with juries by providing them with step by step directions – taking the form of flow charts, ‘question trails’, ‘routes to verdict’ etc. (Ogloff *et al*, 2006). In England and Wales, there have been cases (*R v. Green* 2005, *R v. Thompson* 2010, para. 13) and reports (Leveson 2015) that refer to these tools. The main aim here is to aid jury comprehension but as these practices take hold, it is not such a large step to require that juries actually demonstrate that they have gone through this reasoning process to reach their verdict (Auld 2002, paras. 52-55).

The growing judicial role that the jury is expected to play appears to diminish the political role that has been part of the traditional jury’s heritage. As the modern jury exercises a greater judicial role, educated in how to act judicially and supervised increasingly by the professional judge, its political or governance role seems destined to decline. For those like Lord Devlin, this takes away the very *raison d’être* for juries. Professional judges may be just as good at finding facts as juries; they may appreciate better the importance of acting fairly, but what they cannot do is to act as legislators. They cannot decide cases on the merits of a case when the criminal law is against them. Only juries can act as a check on unpopular laws and, if necessary, deviate from the law they are directed to apply.

But it would be wrong to end on too pessimistic a note. One of the strengths of the traditional jury in common-law countries, where it has endured over many centuries, has been its capacity to adapt to changing circumstances (Jackson 2002b). Although the traditional jury remains a great inspiration for countries trying to transition towards democracy, it may have to account more for its verdicts in the future and adopt some of the accountability mechanisms that are taking root in certain European jurisdictions, such as Spain and Austria. One way of maintaining the jury’s political role would be to make a distinction between requiring juries to account more for convictions while giving them the freedom to continue to act on the basis of a general verdict when they decide to acquit (Jackson 2002b, Jackson and Kovalev 2006, p. 116). An alternative approach would be to explore mechanisms for enabling juries to give fully reasoned decisions subject to a flexible standard of judicial review (see Lippke 2009, Csere 2013). Whatever degree of latitude we give juries to decide cases on the merits, they must uphold the defendant’s right to a fair trial. They cannot be permitted to convict simply because they believe the defendant deserves to be punished. Convictions must be based on

an impartial appraisal of the evidence and an application of the law. But this need not infringe upon their political role to vote against unpopular laws and acquit defendants who may be legally guilty but do not *deserve* to be punished. Seen in this way, there is no necessary tension between giving juries a greater sense of judicial responsibility in determining whether defendants are guilty on the evidence and the law while at the same time permitting them to vote against conviction when they believe that although the defendants may be guilty under the law, they do not deserve to be punished.

The challenge for the traditional jury in the future will be to ensure that the important role it has played in promoting not only lay but also political participation in the administration of justice is maintained, as it adapts to meet the growing 'judicial' demands that are placed upon its decision-making. For some, this challenge may seem insurmountable. The political and judicial roles cannot be harmonised and as professional judges continue to exercise their hold over juries in both civil and common-law traditions, the political role may slowly wane. But if we consider the jury as representing a 'tradition' – one that combines both political and judicial roles in the criminal justice sphere – then we need not be so pessimistic. The strongest traditions, as Glenn (2014) has reminded us, are those that are constantly being contested and re-interpreted rather than remaining set in an unchanging 'life-form.' The traditional jury may survive through its ability to adapt to changing expectations with respect to its judicial role without sacrificing the political role that it can play in the criminal justice system.

References

- Alekseev, I.N., 2005. Sud prisiashnykh zasedatelei kak ugroza rossiiskoi pravovoi sisteme. *Ugolovnyi protsess*, 5, 52-59.
- Andriukhin, A., 2004. Prisiashnye prosiat otmenit' svoi prigovor. *Izvestiia* [online], 20 February. Available from: <http://izvestia.ru/news/287256> [Accessed 16 May 2016].
- Ashworth, A., 2011. Commentary on *Taxquet v. Belgium*. *Criminal Law Review*, 3, 237-239.
- Auld, R.E., 2002. *Review of the criminal courts of England and Wales*. London: Stationery Office.
- Bogdanov, V., 2009. Sledovatel'no... Predsedatel' Sledstvennogo komiteta pri prokurature RF Alexander Bastrykin o gromkikh delakh, sudakh prisiashnykh i bor'be s korruptsieie ot pervogo litsa. *Rossiiskaia Gazeta* [online], 19 October. Available from: <http://www.rg.ru/2009/10/19/bastrykin.html> [Accessed 26 April 2016].
- Bonner, E., 2005. Ne veriu. Doc. *Za prava cheloveka*, 24 (42) [online]. Available from: <http://www.zaprava.ru/images/24-news.pdf> [Accessed 16 May 2016].
- Borogan, I., and Soldatov, A., 2004. Shpionov budet bol'she. *Moskovskie novosti* [online], 12 November. Available from: <http://www.sutyagin.ru/prensa/041112-1.html> [Accessed 16 May 2016].
- Brooks, T., 2004. The right to trial by jury. *Journal of Applied Philosophy*, 21 (2), 197-212.
- Bush, J., 2005. Russian trials: what justice? *Business Week* [online], 27 May. Available from: <http://www.bloomberg.com/news/articles/2005-05-26/russian-trials-what-justice> [Accessed 26 April 2016].
- Butorina, E., 2004. Zsedateli ustali: Raspushchena kollegiia prisiashnykh na protsesse po delu Alekseia Pichugina. *Vremia Novostei* [online], Dec. 10. Available from: <http://vremya.ru/2004/227/51/114327.html> [Accessed 26 April 2016].

- Campbell, L., 2013. *Organised crime and the law*. Oxford: Hart.
- Campbell, L., 2014. The prosecution of organised crime: removing the jury. *International Journal of Evidence & Proof*, 18 (2), 83-100.
- Coen, M., 2014. 'With cat-like tread': jury trial and the European Court of Human Rights. *Human Rights Law Review*, 14 (1), 107-131.
- Csere, M., 2013. Reasoned criminal verdicts in the Netherlands and Spain: implications for juries in the United States. *Connecticut Public Interest Law Journal* [online], 12 (1), 415-438. Available from: <https://cpilj.files.wordpress.com/2013/09/12-conn-pub-int-l-j-415.pdf> [Accessed 26 April 2016].
- Davis, F.F., 2007. *The history and development of the special criminal court 1922 – 2005*. Dublin: Four Courts Press.
- Davis, F.F., 2013. The jury as a political institution in an age of counterterrorism. *Politics*, 33 (1), 5-18.
- Devlin, P., 1966. *Trial by jury*. London: Stevens and Sons.
- Finnegan, R.B., 2011. What lessons can be drawn from a sui generis case? The global "war on terror" and Northern Ireland. In: M.L. Volcansek and J.F. Stack eds. *Courts and terrorism: nine nations balance rights and security*. New York: Cambridge University Press, 72-88.
- Glenn, H.P., 2014. *Legal traditions of the world: sustainable diversity in law*. 5th ed. Oxford University Press.
- Grande, E., 2000. Italian criminal justice: borrowing and resistance. *American Journal of Comparative Law*, 48 (2), 227-260.
- Green, T.A., 1985. *Verdict according to conscience*. Chicago University Press.
- Hans, V., and Germain, C.M., 2011. The French jury at the crossroads. *Chicago-Kent Law Review* [online], 86 (2), 737-768. Available from: <http://scholarship.kentlaw.iit.edu/ccklawreview/vol86/iss2/10/> [Accessed 29 April 2016].
- International Protection Centre, 2003. *Basmanoe pravosudie. Uroki samooborony. Posobie dlia advokatov*. Moskva: Publichnaia reputatsiia.
- Irish Law Reform Commission, 2010. *Consultation paper: jury service*. Dublin: CP 61.
- Irish Law Reform Commission, 2013. *Jury service*. Dublin: LRC 207.
- Foinitskii, I.Ia., 1996. *Kurs ugolovnogo sudoproizvodstva*. Sankt-Peterburg: Alfa.
- Jackson, J.D., 2002a. Modes of trial: shifting the balance towards the professional judge. *Criminal Law Review*, 4, 249-271.
- Jackson, J.D., 2002b. Making juries accountable. *American Journal of Comparative Law*, 50 (3), 477-530.
- Jackson, J.D., 2016 forthcoming. Unbecoming jurors and unreasoned verdicts: realising integrity in the jury room. In: J. Hunter *et al.*, eds. *Realising the integrity of criminal process: from theory into practice*. Oxford: Hart, 281-307.
- Jackson, J., Quinn, K., and O'Malley, T., 1999. The jury system in contemporary Ireland: in the shadow of a troubled past. *Law and Contemporary Problems* [online], 62 (2), 203-232. Available from: <http://scholarship.law.duke.edu/lcp/vol62/iss2/8/> [Accessed 29 April 2016].
- Jackson, J.D., and Kovalev, N.P., 2006. Lay adjudication and human rights in Europe. *Columbia Journal of European Law*, 13 (1), 83-123.

- Jearey, J.H., 1960. Trial by Jury and trial with the aid of assessors in the superior courts of British African Territories: I. *Journal of African Law*, 4 (3), 133-146.
- Judge, I., 2010. *Jury trials. Judicial Studies Board Lecture, Nov 2010* [online]. Available from: <http://webarchive.nationalarchives.gov.uk/20131202164909/http://judiciary.gov.uk/media/speeches/2010/speech-by-lcj-jsb-lecture-jury-trials> [Available from 20 May 2016].
- Kadmatov, R., 2006. Rospusk bez opravdania, *Lenta.ru*, Dec 1 [online]. Available from: <https://lenta.ru/articles/2006/12/01/jury/>. [Accessed 17 May 2016].
- Karnozova, L.M., 2000. *Vozrozhdennyi sud prisiashnykh. Zamysel i problemy stanovleniia*. Moskva: Nota Bene.
- Katchanovskii, I., 2015. *The "snipers' massacre" on the Maidan in Ukraine* [online]. Paper presented at the Annual Meeting of American Political Science Association in San Francisco, California, Sept 3-6. Available from: <http://ssrn.com/abstract=2658245> [Accessed 29 April 2016].
- Kennedy, M., 2010. Legal history made four stand trial without Jury. *The Guardian* [online], 10 January. Available from: <http://www.theguardian.com/uk/2010/jan/12/court-legal-history-juryless-trial> [Accessed 28 April 2016].
- Kiss, L.W., 2000. Reviving the criminal jury in Japan. In: N. Vidmar, ed. *World Jury Systems*. Oxford University Press, 353-379.
- Kovalev, N.P., 2006. Lay adjudication of crimes in the Commonwealth of Independent States: an independent and impartial jury or a "court of nodders"? *Journal of East European Law*, 11 (2-3), 123-157.
- Kovalev, N.P., 2008. Trial by jury in Russian military courts. *The Journal of Power Institutions in Post-Soviet Societies*, 8. [online] Available from: <http://pipss.revues.org/1533> [Accessed 29 April 2016].
- Kovalev, N., 2010. *Criminal justice reform in Russia, Ukraine, and the former Republics of the Soviet Union*. Lewiston, NY: The Edwin Mellen Press.
- Kovalev, N., 2011. Jury trials for violent hate crimes in Russia: Is Russian justice only for ethnic Russians? *Chicago-Kent Law Review* [online], 86 (2), 669-736. Available from: <http://scholarship.kentlaw.iit.edu/cklawreview/vol86/iss2/9/> [Accessed 29 April 2016].
- Kovalev, N., and Smirnov, A., 2014. The nature of the Russian trial by jury: Jurata Patriae or Raison d'Etat. *European Journal of Crime, Criminal Law and Criminal Justice*, 22 (2), 115-133.
- Kovalevskii, I., 2004. Sudoden': novoe iavlenie v reforme rossiiskogo pravosudia, *Novaia gazeta* [online], 6 September. Available from: <http://2004.novayagazeta.ru/nomer/2004/65n/n65n-s23.shtml> [Accessed 29 April 2016].
- Kozlova, N., 2007. Prisiashnye na vyhod! Sudei iz naroda opiat' vypustili na voliu. *Rossiiskaia Gazeta*, 4475 [online], 25 September. Available from: <http://rg.ru/2007/09/25/prisyajnyie.html> [Accessed 17 May 2016].
- Kozlova, N., and Fedosenko, V., 2006. Prisiashnym ukazali na dver': sud'i iz naroda stali meshat' pravosudiiu. *Rossiiskaia gazeta* [online], 2 December. Available from: <http://rg.ru/2006/12/02/prisyazhnye-rospusk.html>. [Accessed 17 May 2016].
- Kruger, I., 2004. Sud kak razvedmeropriatie, *Novaia gazeta* [online], 4 November. Available from: <http://2004.novayagazeta.ru/nomer/2004/82n/n82n-s10.shtml> [Accessed 29 April 2016].

- Law Commission (England and Wales), 2012. *Contempt of court: a consultation paper*. London: Law Commission.
- Law Commission (England and Wales), 2013. *Contempt of court (1): juror misconduct and internet publications*. London: Law Commission.
- Lebedev, V.M., 2003. *Nauchno-prakticheskii kommentarii k Ugolovno-protsessual'nomu kodeksu Rossiiskoi Federatsii*. Moskva: Spark.
- Lempert, R., 2001. Citizen participation in judicial decision making: juries, lay judges and Japan. *Saint Louis-Warsaw Transatlantic Law Journal*, 2001-2002, 1-14.
- Leveson, B., 2015. *Review of efficiency in criminal proceedings* [online]. London: Judiciary of England and Wales. Available from: <http://www.judiciary.gov.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf> [Accessed 29 April 2016].
- Lippke, R., 2009. The case for reasoned criminal trial verdicts. *Canadian Journal of Law and Jurisprudence* 22, 313-330.
- Loi n° 2011-939 du 10 août 2011 sur la participation des citoyens au fonctionnement de la justice pénale et le jugement des mineurs. Available from: http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=5ABC45047B37CD5A0E35CC8DBC507C05.tpdjo04v_2?cidTexte=JORFTEXT00024456769&dateTexte=20110812 [Accessed 11 May 2016].
- Lundmark, T., 2012. *Charting the divide between the common and civil law*. Oxford University Press.
- Macpherson, W., 1999. *The Stephen Lawrence inquiry: report of an inquiry by Sir William Macpherson of Cluny*. London: Home Office. Cm. 4262-I.
- Maliarenko, V.T., 1999. Do pitannia pro uchast' predstavnikov narodu u zdiisnenni kriminal'nogo pravosuddia. *Visnik Verkhovnogo Sudu Ukrainy*, 6, 42-49.
- Marafioti, L., 2008. Italian criminal procedure: a system caught between two traditions. In: J. Jackson, M. Langer and P. Tillers, eds. *Crime, procedure and evidence in a comparative and international context: essays in honour of Mirjan Damaška*. Oxford: Hart, 81-98.
- Medetsky, A., 2004. Juror in Sutyagin's trial was a former intelligence officer, *The Moscow Times* [online], 26 October. Available from: <http://www.themoscowtimes.com/news/article/juror-in-sutyagins-trial-was-a-former-intelligence-officer/227444.html> [Accessed 11 May 2016].
- Mironova, T., 2008. Trebuiutsia prisiazhnye. *Zavtra* [online], 2 (737), Jan 9. Available from: <http://zavtra.ru/content/view/2008-01-0952/> [Accessed 11 May 2016].
- Mittermaier, K., 1869. *Evropeiskie i Amerikanskie Sudy Prisiazhnykh*. Perevod s nemets. na russkii V. Molchanova. Moskva: Tipographiia A.I. Mamontova.
- Munday, R., 1993. Jury trial, continental style. *Legal Studies*, 13 (2), 204-224.
- Ní Aoláin, F., and Gross, O., eds., 2013. *Guantanamo and beyond: exceptional courts and military commissions in comparative perspective*. Cambridge University Press.
- Nikitinskii, L., 2004. Bunt prisiazhnykh: reportazh iz soveshchatel'noi komnaty. *Novaia gazeta* [online], 82, 4 November. Available from: <http://2004.novayagazeta.ru/nomer/2004/82n/n82n-s11.shtml> [Accessed 17 May 2016].
- Nikitinskii, L., 2005. Pokushenie na prisiazhnykh: prokuratura presleduet sudei za opravdatel'nyi verdict. *Novaia gazeta* [online], 15, 28 February. Available

- from: <http://2005.novayagazeta.ru/nomer/2005/15n/n15n-s25.shtml> [Accessed 17 May 2016].
- Nikitinskii, L., 2006. Businessmen kotoryi trizhdy ne vinovat. *Novaia gazeta* [online], 15, 2 March. Available from: <http://2006.novayagazeta.ru/nomer/2006/15n/n15n-s12.shtml> [Accessed 17 May 2016].
- Ogloff, J., et al., 2006. *The jury project 1 – A survey of Australian and New Zealand Judges*. Canberra: Australian Institute of Judicial Administration.
- Pasechnik, N., 2004. Ubiitsa militsionera vynes sebe prigovor. *Komsomol'skaia Pravda* [online], 4 May. Available from: <http://www.kp.ru/daily/23269/28578/> [Accessed 16 May 2016].
- Pashin, S., and Levinson, L., 2004. *Sud prisiashnykh: problemy i tendentsii*. Moskva: Mezhdunarodnaia Khel'sinskaia federatsiia po pravam cheloveka.
- Quinn, C.M., 2004. Jury bias and the European Convention on Human Rights: a well kept secret. *Criminal Law Review*, 998-1014.
- Redmayne, M., 2006. Theorising jury reform. In: A. Duff, et al., eds. *The Trial on Trial (2): Judgment and Calling to Account*. Oxford: Hart, 99-116.
- Roach, K., 2011. *The 9/11 effect: comparative counter-terrorism*. New York: Cambridge University Press.
- Roberts, P., 2011. Does Article 6 of the European Convention on Human Rights require reasoned verdicts in criminal trials? *Human Rights Law Review*, 11 (2), 213-235.
- Sikich, K.W., 2013. *Explaining the presence of the criminal jury in democratic political systems* [online]. Thesis (PhD). American University. Available from: <http://aladinrc.wrlc.org/handle/1961/15241> [Accessed 11 May 2016].
- Skoibeda, U., 2004. Ty menta ubil? Molotok... Chto zh vtorogo-to ne zavallil? *Komsomol'skaia Pravda* [online], 22 March. Available from: <http://www.kp.ru/daily/23240/27508/> [Accessed 16 May 2016].
- Solomon, P., 2004. The Sutyagin case doesn't indict all Russian justice. *The Globe and Mail* [online], 14 April. Available from: <http://www.theglobeandmail.com/opinion/the-sutyagin-case-doesnt-indict-all-russian-justice/article743060/> [Accessed 11 March 2016].
- Spencer, H., 1851. *Social statics*. London: John Chapman.
- Stenin, A., 2006. Nam kazhetsia, chto vse bylo podstroeno, *Gazeta.ru*, 1 December.
- Svetova, Z., 2005. Pichugina khoteli opravdat', *Russkii kur'er* [online], 11, 16 February. Available from: <http://www.newsru.com/russia/16feb2005/sud2.html> [Accessed 11 May 2016].
- Taylor, G., 2011. Jury trial in Austria. *New Criminal Law Review*, 14 (2), 281-325.
- Thaman, S.C., 1995. The resurrection of trial by jury in Russia. *Stanford Journal of International Law* [online], 31, 61-274. Available from: <http://ssrn.com/abstract=2573899> [Accessed 11 May 2016].
- Thaman, S., 2000. Europe's new jury systems: the cases of Spain and Russia. In: N. Vidmar, ed. *World Jury Systems*. Oxford University Press, 319-351.
- Thaman, S.C., 2007. The nullification of the Russian jury: lessons for jury-inspired reform in Eurasia and beyond. *Cornell International Law Journal*, 40 (2), 355-428.

- Thaman, S.C., 2011. Should juries give reasons for their verdict? The Spanish experience and the implications of the ECtHR decision in *Taxquet v. Belgium*. *Chicago-Kent Law Review*, 86 (2), 613-668. Available from: <http://scholarship.kentlaw.iit.edu/cklawreview/vol86/iss2/8/> [Accessed 29 April 2016].
- Thomas, C., 2010. *Are juries fair?* London: Ministry of Justice, Research Series 1/10, Feb. 2010.
- Thornton, P., 2004. Trial by jury: 50 years of change. *Criminal Law Review*, 119-137.
- Tocqueville, A., 1994. *Democracy in America*. London: David Campbell.
- Trenina-Strausova, A., 2004. Advokaty Sutiagina nashli 'krota' sredi prisiashnykh, *Izvestiia* [online], 28 October. Available from: <http://www.izvestia.ru/incident/article597137/> [Accessed 11 May 2016].
- Upolnomechennyi po pravam cheloveka v Rossiiskoi Federatsii, 2004. *Problemy sovershenstvovaniia suda prisiashnykh v sovremennoi Rossii. Spetsial'nyi doklad*. Moskva: Iuriks.
- Vidmar, N., 2000. The jury elsewhere in the world. In: N. Vidmar, ed. *World jury systems*. Oxford University Press, 421-447.
- Vidmar, N., 2002. Juries and lay assessors in the Commonwealth: A contemporary survey. *Criminal Law Forum*, 13, 385-407.
- Vladimirov, L.E., 1873. *Sud prisiashnykh*. Kharkov: Tipografiia Kharkovskogo Universiteta.

Case law

ECtHR

- Condrón v. UK* (2001) 31 EHRR 1
- Ferrantelli and Santangelo v. Italy* (1997) 23 EHRR 288
- Gregory v. UK* (1997) 25 EHRR 577
- Hanif and Khan v. UK* (2012) 55 EHRR 15
- Hauschildt v. Denmark* Appl. no. 10486/83, 24 May 1989
- Incal v. Turkey* (2000) 29 EHRR 449
- Judge v. UK* Appl. no. 35863/10, 8 Feb 2011
- Pichugin v. Russia*, Appl. no. 38623/03, 18 Mar 2013
- Remli v. France* (1996) 22 EHRR 253
- Sander v. UK* (2000) 31 EHRR 44
- Saric v. Denmark*, Appl. no. 31913/96, 2 Feb 1999
- Sutyagin v. Russia*, Appl. no. 30024/02, 24 Nov 2011
- Taxquet v. Belgium* Appl. no. 926/05, 13 Jan 2009
- Taxquet v. Belgium* [2012] 54 EHRR 26 [GC]
- Twomey and Cameron and Guthrie v. UK*, Appl. nos. 67318/09 and 22226/12, 28 May 2013

UN Human Rights Committee

TLN v. Norway UN Human Rights Committee, 16 July 2014, Communication No. 1942/2010

England and Wales

R v. Connor; R v. Mirza [2004] 1 All ER 925

R v. Green [2005] EWCA Crim 2513

R v. Thompson [2010] EWCA Crim 1623, [2011] 1 WLR 200

Norway

HR-2009-01192-P, case no. 2009/397, 12 June 2009

HR-2009-02153-A, case no. 2009/841, 13 Nov 2009