

## COMPARATIVE ANALYSIS OF ANGLO-AMERICAN AND CONTINENTAL MODELS OF JUDICIAL INVESTIGATION INVOLVING THE JURY

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**Abstract:** The article is devoted to the analysis of experience of Anglo-American and continental legal system countries as to including the public into administration of justice as jurors. The studied form of criminal legal procedure is one of the most disputable, as it is dependent not only and not as much on the criminal-procedural legislation development, as on the condition of judicial system, its efficiency, democratization and humanization of criminal justice. Besides, the jury trial institution has not only legal but also social significance, because it is a form of the public control over observance of criminal law serving as a guarantee against abuse on the part of the state. The research objective is to comprehensively

analyze the features of judicial investigation with participation of jurors in the Anglo-American and continental legal system countries, to reveal the positive experience, and to evaluate the possibility of its implementation in the Russian legal framework taking into account the dynamics of criminal-procedural legislation development. The leading research method is comparative-legal method used for studying the foreign legislation regulating the order of judicial investigation with participation of jurors. Analysis of the data on complicated form of judicial investigation is based on statistical method, and analyzing 32 criminal cases investigated by jury trial. It was concluded that the Russian model of

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judicial investigation with the jurors significantly differs from the foreign analogs; given the significant differences of the subject and structure, it can be defined as a composite one, combining the features of Anglo-American and continental law models. The article materials may serve as a basis for constructive academic discussion, for further insights into the issues of implementation of the citizens' constitutional right for administering justice, and for elaboration of practical recommendations on implementation of Article 42 of the Russian Criminal-Procedural Code and clarification of certain normative provisions.

**Keywords:** jury trial; judge; investigative actions; judicial investigation; criminal case; legal procedure; jurors.

## 1. Introduction

The institution of jurors is not new for the Russian criminal procedure. Historically, its formation and development demonstrates distinct interconnection between radical reforming of the judicial system, judicial structure and procedure, on the one hand, and introduction or abrogation of the jury

524

trial, on the other hand (in 1864, 1917, 1991, and 2001). The demand for jury trial institution at a certain stage of the Russian state development was determined by general reasons, including: the crisis of criminal justice, the necessity to enhance the authority of judicial system by involving rather great masses of population to administration of justice, which increases the level of trust to court decisions [1, p. 14]. From the viewpoint of general shaping principles of criminal legal procedure, introduction or abrogation of the jury trial were determined by transition from its investigative to adversary model, or vice versa. For a long time, the functioning of the jury trial in Russia has been accompanied by permanent discussions of its efficiency and appropriateness [2, p. 135]. In our opinion, given the complicated form of judicial investigation, temporal, material and other costs associated with jury trials, the analysis of the mechanism of involving citizens to administration of justice in this form is of indisputable interest, as well as the change of the jury trial jurisdiction, the legal status of a juror, and the competence and procedural features of the jury



functioning as a single body authorized for return proceedings in a criminal case.

Analysis of the jury trials of criminal cases shows an urgent necessity to search for the form and order of administering justice by this body. Some legal norms are contradictory; the limits of competence of the jurors do not fully correspond to the social request; the procedure of forming the jury requires optimization, as does the procedure of judicial investigation involving the jury members [3, p. 32]. In this respect, rather revealing is the historical experience of the jury trial functioning in Great Britain, which is the most long-term of all (it dates back to the middle of the 11<sup>th</sup> century) [4, p. 17-29]. Further this model was implemented in the American legal system with minor changes determined by the specific features of the general law, judicial structure, and public, social and other features of its functioning in the USA [5, p. 1259]. Currently, the unified structure of jury trials exists in some European countries (Switzerland, Norway, Belgium), as well as Australia, Canada, and New Zealand. Considering the disputable issues of jury trial in the context of comparative analysis of the Russian and foreign experience is rather topical. This is due to the current trend of

525

the decreased number of crimes within the jurisdiction of a jury trial, which is apparent in the recent changes of criminal-procedural law. The crimes, for which life imprisonment or death penalty can be prescribed, were withdrawn from their jurisdiction. Moreover, the legislator outlined the prospects of the jury trial development in Russia up to 2018, which is related to the introduction of the above cases into the courts of first instance, the reduction of the number of jurors to 6 people, and further changing of their jurisdiction.

## 2. Methodological Framework

The methodological framework of the research is general scientific methods: analysis, synthesis, induction, deduction, etc. The reliability of the conclusions and recommendations presented in the paper is provided by comprehensive implementation of general and specific scientific methods: logical, comparative-legal, statistical, sociological and others. Thus, the method of structural-logical analysis was used to study the essence and content of the citizens' right for administering justice, as well as its detailization in the criminal-procedural legislation of Russia, European continental countries,



and the USA. The inductive-deductive approach was used to determine the mechanism of the abovementioned right implementation. Specific methods of historical-legal and comparative-legal analysis were applied to study the issues of forming and developing the institution of jurors and comparing its models with the continental and Anglo-Saxon analogs. The empirical part of the research was performed with applied scientific methods – statistical, sociological and others. They served for summarizing the results of studying 32 criminal cases investigated by jury trial, for analyzing the available court statistics, and for reviewing the judicial practice in Great Britain and the USA.

### 3. Results

Comparative analysis of the order of court investigation with participation of jurors, regulated by the Russian and foreign criminal-procedural legislation, allowed making several general conclusions concerning the attributive features of criminal-procedural form of investigating the criminal case circumstances.

Court investigation is a structurally detached part of the court procedure, during which the court, under

526

the conditions of adversarial nature of judicial process and most fully implementing the criminal procedure principles, investigates the evidences presented by the parties and called for, to ascertain the actual circumstances of the criminal case and to make a legal and well-grounded decision.

The specificity of this stage of jury trial is due to the characteristic features of this form of legal procedure, including: 1) sharing competence between a professional judge and a jury; 2) organizational detachment of the jurors and their independence when delivering a verdict; 3) forming the jury of people without special knowledge of law and having no experience of judicial activities; 4) limited access to information, which is reflected in the lack of information about the criminal case circumstances before the trial and delivering a verdict only basing on the data obtained during the judicial investigation.

The subject and limits of proving during the judicial investigation with participation of jurors are, in our opinion, restricted by two circumstances: 1) the jurors' competence stipulated by legislation implying the investigation of only those circumstances of the criminal

case which enable to answer the posed questions and do not require any juridical knowledge; 2) the necessity to deliver an objective and unbiased verdict. In this regard, the criminal-procedural legislations of Russia and the continental law countries stipulate the three groups of circumstance are not subject to investigation by jurors. First, these are actual circumstances of a criminal case, which are beyond the limits of the jurors' competence, limited by three questions: whether the occurrence of the deed has been proved; whether the deed was executed by the accused; and whether the accused is guilty in executing this deed. Second, the issues of admissibility of evidence are not subject to investigation by jurors. Third, the information about the personality of the accused, which may cause the jurors' bias against the accused, is not subject to investigation by jurors. We believe that the latter rule should be extended to the investigation of the information about the personality of the victim (witness) by jurors, as unbiased attitude to these persons is also necessary for delivering an objective verdict.

#### **4. Discussion**

527

Scientific research of the jury institution in the Russian juridical reality accompanied each stage of its development. During the conceptualization of the continental and Anglo-American models accompanying the elaboration of the corresponding provisions of the Charter of Criminal proceedings of 1864, the jury trial as an independent institution of adversary criminal procedure was researched in the works by L. E. Vladimirov, V. Danevskiy, V. D. Deytrikh, M. V. Dukhovskiy, G. Dzhanshiev, A. A. Kvachevskiy, A. F. Koni, K. Mittermayer, N. V. Muravyev, A. Rozenblum, V. K. Sluchevskiy, V. D. Spasovich, D. G. Talberg, I. Ya. Foynitskiy, A. G. Chaykovskiy. Today, under the dynamic reforming of the jury institution, the appropriate scientific works are among the most demanded. Specific aspects of the jury trial of criminal cases are viewed by A. S. Aleksandrov, T. A. Vladykina, V. P. Kashepov, Yu. V. Korenevskiy, E. B. Mizulina, I. B. Mikhailovskaya, S. V. Narutto. In the context of comparative analysis of various jury trial models, of unquestionable interest are the works by W. Bernem, R. Cross, N. S. Marder, F. W. Maitland, Sir Frederick Pollock, E.



G. Stanley. At the same time, insufficiently studied are the issues of correlation between the Russian legislation and the jury trial models existing in the world practice, the features of the subject and limits of judicial investigation, and a number of procedural aspects of the jury participation in the judicial investigation.

**Determinative features of the judicial investigation with participation of jurors in the criminal legislation of Anglo-Saxon law countries**

Traditionally, the main principle of the jury trial activity is considered to be separating competence between a professional judge and the jurors, expressed in the formula: “Ad quaestionem facti respondent juratores, ad quaestionem juris respondent iudices” (“The questions of facts are answered by the jurors, the questions of law are answered by the judges”). This is because the jurors, possessing the knowledge of life and common sense, are able to more profoundly comprehend the intricate circumstances of the case than the professional judge, basing on their inner convictions and conscience. Supposedly, it is this crucial provision that explains the developed culture of

528

behavior of the jurors and the way the professional participants of the criminal trial communicate with them. The direct consequence of the above rule of the jury functioning is the rigid limits of evidences investigation. In the presence of the jury, the parties only investigate the issues of guilt of the accused, leaving beyond the limits of investigation the circumstances of the civil case aggravating and extenuating the liability of the accused, as well as the issues of evidences admissibility. Investigation of circumstances characterizing the personality of the accused is not categorically prohibited, as adversary character and completeness of judicial investigation in each particular case are taken into account. It is allowed to broaden the subject of judicial investigation by including the above circumstances, provided they:

1) have cause-and-effect relations with the guilt of the accused. In the USA this exception is not applicable if the evidential value of the obtained personal information is significantly outweighed by the risk of unjust bias of the jurors [6];

2) are divulged by the accused or their lawyer to prove their innocence,

which gives the prosecution the right to refute this information;

3) are used by the prosecution to refute the information of the defense impeaching the victims and witnesses.

The judges are to evaluate the balance between the value of personal information and the probability of the jurors' bias. Based on this evaluation, the information is divided into the following categories.

First, the circumstances of previous conviction, which are most risky from the viewpoint of shaping the jurors' bias against the accused. In this respect, in Great Britain divulgence of these data is strictly forbidden [7]. In the USA, as was already mentioned, divulgence of these data is allowed in some cases, but the judge must inform the jury that the information about previous conviction per se do not testify to the guilt of the accused, but are aimed at verification his/her evidence of good reputation [6].

Second, the circumstances characterizing the person's reputation, understood as "the opinion of moral inclinations of the person, formed in people who had a chance of being more or less closely acquainted with revelation of these inclinations" [8, p. 195]. In the

studied model of jury trial, the principle "good reputation of the accused" is in action, when the relevant circumstances are always relate and can be ascertained by evidence, but the prosecution may refute the presumption of respectability.

Third, the circumstances characterizing the particular facts of the accused, which are life episodes illustrating the personality. The Anglo-American model of jury trial does not consider these admissible, considering them to be collateral facts not directly related to the case investigated by the jury.

All the above circumstances are subject to investigation by court after the jury has delivered a verdict; this is rather postponed in time and enables to reach compromise between the completeness of judicial investigation, adversary character of the trial, and the need for unbiased attitude of the jurors to the accused. In the absence of the jurors, all legal issues are solved, including the issues of admissibility of evidence and objections to them. Moreover, the procedure of presenting such objections is rather rigidly regulated; it has to comply with the requirement of timely presentation, i.e., the time before the disputed evidence is disclosed to the jury

is limited. Also, it must meet the requirements of correct form and brief content (hearsay rule), which are determined by the necessity to solve the problem immediately “in front of the court” but outside the jurors’ hearing.

The judicial investigation procedure is subject to the principle of adversarial trial, which equates the procedural capabilities of the parties in influencing the inner conviction of the jurors. A similar principle can be traced in executing the investigative actions. We illustrate this thesis by the example of a witness examination consisting of three parts: direct examination, cross examination, and redirect examination. Such system is due to the rigid distinction between the defense witnesses and the prosecuting witnesses, when each kind of examination pursuits a strictly specific goal and complies with the tactics of the party conducting it. The aim of direct examination is to obtain information supporting the version of the party which has called the witness. At that, not the narrative method but a “question–answer” formula is used; suggestive questions, as well as those discrediting the witness, are not asked [9, p. 118]. Cross examination pursuits a different goal, which is rather distinctly

530  
described in The Criminal Justice and Courts Bill: “1) to select information favorable for the party conducting the examination; 2) to cast doubt on reliability of information given during direct examination” [7]. In the USA, cross examination is limited to the facts established during direct examination, and the questions, including suggestive ones, which refute the veracity of the witness. During redirect examination, a witness is only asked about contradictions and inconsistencies revealed during cross examination. Thus, it is obvious that using all three kinds of examination allows the parties to have equal influence on the jury.

Implementation of the adversary principle lodges special authority to a professional judge. On the one hand, the judge acts as an independent arbiter providing the conditions of the parties’ procedural counteraction; on the other hand, he/she acquires unlimited authorities for investigation of the case circumstances if the prosecution and the defense failed to reveal them. Specifically, on court’s own motion additional witnesses can be called for, any expertise can be performed, other evidences can be requested. Besides, a judge is entitled to





instruct the jurors about delivering an obligatorily acquittal if, after all evidences of the prosecution are presented, they are recognized as “undeserving a response” [9, p. 60].

A peculiar structural feature of the judicial investigation with participation of the jury, in the Anglo-American model, is its combining with the hearing of arguments [10, p. 40]. Such approach gives the jury the opportunity not only to evaluate the presented set of evidences but also to immediately hear the conclusion of the defense and prosecution concerning the investigation results, i.e. the proof of the accusation brought.

### **Features of the continental model of the judicial investigation with participation of jurors**

The continental model of the jury trial is considered to be derivative from the English one [11, p. 93], however, it has significant differences which enable to distinguish it from the precedent analogs. In Europe, the jury trial first appeared in the end of the 16<sup>th</sup> century in France, then it became widely spread in Belgium, Italy, Spain, and Germany. Today, the studied model is

531  
stipulated by the criminal-procedural legislation of Austria.

The judicial investigation is central in the trial under continental form of legal procedure, but, unlike in the Anglo-American model, it is rather aimed at ascertaining the material truth, which, in our opinion, determines the specific features of this particular form of legal procedure. The most significant differences are related to ascertaining the subject and limits of judicial investigation. One should note the lack of clear distinction of the circumstances subject to ascertaining into those investigated with and without participation of the jury. In special literature, this form is identified as “joint procedure” [12, p. 111], as the civil case circumstances are fully subject to investigating with participation of the jury, while a civil claimant is a full-fledged participant of the judicial investigation on the part of prosecution. Besides, ascertaining the material truth, which is the ultimate objective of probation, determined the necessity to verify the relevancy of the evidence presented by the parties during the judicial investigation with participation of the jury. This is equally true for investigating the information about the

personality of the accused, which is not prohibited by the criminal-procedural laws of France [13] and Austria [14]. The information about the personality of the accused becomes available to the jury as early as during reading the accusation at the beginning of judicial investigation, as Article 214 of the Criminal-Procedural Code of France and Article 245 of the Criminal-Procedural Code of Austria do not prohibit inclusion of these data into the above procedural document. Moreover, the list of witnesses in a criminal case must include “witnesses of reputation of the accused” [15, p. 391], whose evidences are devoted exclusively to evaluation of the morals of the accused.

The broad investigation of the information about the personality of the accused is explained by the fact that, unlike the Anglo-American model posing just one question before the jury (guilty or not guilty), the continental model allows for posing the questions on actual circumstances, which at the stage of sentencing may be regarded as aggravating or mitigating penalty. For example, Article 316 of the Criminal-Procedural Code of Austria allows for posing the so called “transfer” or

additional questions, including the one stated above.

The continental model of judicial investigation with participation of the jury also has its particular structural features. It is not divided into two parts depending on the circumstances subject to ascertainment; besides, there are specific features of the order of procedural actions. The judicial investigation starts with reading an accusation by the trial secretary or a court member. Procedural literature regards such action as a significant deviation from the adversary principle, as reading an accusation is performed by a representative of judicial power, which is interpreted as confusion of criminal-procedural functions [16, p. 211].

Reading of an accusation is followed by introductory speech of a prosecutor (expose), then the speech of a defendant; the judge notifies the latter about the obligation not to say anything contradicting conscience and law. This provision is also considered to be a deviation from the principle of equality of the parties. In particular, K. Mitternayer stated that “everything is conferred to the prosecutor’s arbitrariness... court of review does not prohibit to read the evidences given at



preliminary investigation, it does not prohibit to read only what one wishes... it is even allowed to worsen the behavior of the accused. Hearing the expose of a smart, intricately planning prosecutor, the jurors involuntarily form the impression of the guilt of the accused” [15, p. 318].

After the expose, investigation of evidences starts. First, the court interrogates the accused. In compliance with Article 245 of the Criminal-Procedural Code of Austria, if the accused does not wish to give evidence, the chairperson explains that giving evidence will help the jury to find out the circumstances of the case. If the accused refuses again, then all evidences of the accused given during the pre-trial procedure are read. The procedural inequality of the parties is also manifested in the fact that, unlike the prosecutor and the jury, the defendant may only interrogate the accused via the chairperson.

The further course of judicial investigation is not clearly divided into presenting of evidences by the defense and the prosecution. The court ascertains the order of their investigation, and the opinions of the prosecutor and the defendant are not obligatory for the

533

court. Hearing of arguments is not a part of judicial investigation. This significantly influenced the content of speeches of the parties, as it was directly prohibited to use evaluative statements about the investigated evidences in them. According to A. V. Ilyin, the fixed temporal gap between the judicial investigation and the evaluation of evidences to some extent hinders the jury from complete comprehension of the essence of the investigated evidences and positions of the parties [11, p. 139].

The procedure of judicial investigation under the continental model also has its particular features. In our opinion, they are due to the position of the court and the parties in the procedure. The prosecution has the status of “partie principale” (the main party), as the prosecutor not only maintains the accusation but also performs surveillance over legitimacy, which is a peculiar feature of investigative criminal procedure. This procedural dominance over the defense is apparent and can be traced in: the right to expose, the opportunity to ask witnesses directly after the judge, the right to make a statement characterizing evidences at any moment of investigation. Thus, the influence of the defendant on the jury is



significantly restricted. The presiding judge plays a special role in the continental model of the jury trial. During the judicial investigation, the judge is lodged with le pouvoir discretionnaire (discretionary power), which gives the right to apply all ways and means to ascertain the truth in a criminal case (Art. 268 of the Criminal-Procedural Code of France). The chairperson has the right, regardless of the wish of the parties, to perform any investigative action, read evidences of any persons, adduce any real evidence, i.e., take an active position in probation. This provision is ambiguously evaluated in the literature. On the one hand, the unlimited power of the chairperson contradicts to the adversary principle and infringes upon the rights of the parties, and given the “partie principale” principle, predominantly the right of the defense. As stated by K. K. Arsenyev, “discretionary power of the judge becomes a weapon against the accused” [17]. On the other hand, orientation towards searching the truth urges the judge on active explanatory work with the jury, providing the high level of their insight into the case, which is undoubtedly positive phenomenon from the viewpoint of informative

534

accessibility of the judicial investigation. Also, the informative accessibility of the judicial investigation is provided by the lack of complicated regulation of the order and procedure of interrogations. Unlike in the Anglo-American model, a witness has a right to a “free account of events” regarding the circumstances of the case, which the parties cannot interrupt. The witness addresses the account to the court, which is the first to ask questions.

As was stated above, the procedure of examining the evidences in the absence of the jury is not allowed. All arising legal questions are answered by the chairperson immediately, without removing the jury. Besides, the jurors have the right to demand resumption of the judicial investigation, performing redirect examinations, confrontations, etc. (Art. 309 of the Criminal-Procedural Code of Austria). An example an additional guarantee of insight into the case is the rule stipulated by Article 355 of the Criminal-Procedural Code of France, according to which the judge and the jury retire for making a joint decision. In our opinion, the positive experience of implementing this norm and the empirical study of 150 criminal cases allow to conclude that abolition of

the people's court assessors' institution was inappropriate in the Russian criminal-procedural legislation. Discussion of the issues, subject to settlement, by the judges and the assessors in the retiring room not only eliminated the internal ambiguities and doubts in people administering justice on unprofessional basis, but also guaranteed their making a legal and well-grounded decision.

In this context, undoubtedly significant is the procedural rule which allows transferring some materials of judicial investigation to the jury while in a retiring room. Thus, according to the Criminal-Procedural Code of France, when the judges of fact retire "... the chairperson gives the jury written questions accompanied by an indictment, protocols and other documents except for evidences" [13]. According to Article 322 of the Criminal-Procedural Code of Austria, "material evidences and documents investigated in the trial are brought to the retiring room" [12].

### **Comparative analysis of the problems of the jury trial functioning in Russia and abroad**

535

Analysis of the criminal-procedural legislation of the European countries and the USA showed that the jury trial is an indispensable part of judicial systems of many countries, as it is viewed as manifestation of democracy and provides access of the citizens to administration of justice. The arguments of the proponents of functioning and further development of the jury institution in Russia essentially coincide with the positive characteristics of this form of legal procedure in Great Britain and the USA. Thus, in particular, three crucial aspects are marked: 1) a collective disposition decision is made, providing its unbiased character; 2) the public has access to administration of justice; 3) the citizens have an opportunity to control the activities of criminal justice authorities [18].

At the same time, the existence of a rather bulky legal procedure mechanism associated with solving a criminal case *ad rem* by the jury poses a lot of procedural and economic questions. Among the arguments for inexpediency of this form of administration of justice in the Russian doctrine of criminal procedure, one can more and more often notice the following: the state is unable to ensure



the jurors' safety, which forces to exclude the group crimes from their competence and to further reduce their jurisdiction *in rem*; there are no compensatory mechanisms to balance the unprofessionalism of the jury and the competence of the presiding judge, which results in theoretical models of "mixed bench" capable of substituting the jury trial in future, according to some scholars of procedural law [19, p. 41]. We believe that each of the above arguments deserves separate research, given the possibility to borrow positive experience of Anglo-American and continental models of the jury trial.

The unified arguments for the social value of the jury trial in Russia do not remove the problems of its functioning, determining the demand for this institution. One of the relevant factors in the context of the issue posed is the competence of the jury. According to the Russian legislation, the court of the first instance tries criminal cases composed of a judge of federal court of general jurisdiction and a board of twelve jurors, in a limited number of *corpus delicti* within the jurisdiction of Supreme Courts of the Russian Federation republics, krai and oblast courts, a court of a federal municipality,

536

autonomous territory or autonomous region. Besides, the issue of the jury participation in trying these criminal cases is solved at discretion of the accused – starting the procedure by the jury trial is only possible on request of the accused. It is also important to consider the novelties of the criminal-procedural law which came into effect on 1 June 2017, as well as those planned for practical implementation since 1 June 2018 [20]. Some scholars of procedural law think that adoption of the Federal Law of 23 June 2016 No. 190-FZ "On amendments in the Criminal-Procedural Code of the Russian Federation related to the broadened implementation of the jury institution" is a new phase in development of this institution, including as to implementation of the positive foreign experience in this sphere [3, p. 32-33]. In our opinion, this is due to the fact that cardinal changes refer to, first of all, jurisdiction and organizational structure of the jury trial. In particular, it is planned: 1) to introduce collective trial of criminal cases with participation of jurors at regional and municipal courts; 2) to refer criminal cases on murders without aggravating circumstances (part 1 of Art. 105 of the Russian Criminal Code), as



well as grave damnification of health entailing death (part 4 of Art. 111 of the Russian Criminal Code) to the jurisdiction of municipal courts with participation of jurors; 3) to refer to the jurisdiction of regional courts with participation of jurors criminal cases on crimes stipulated by part 2 of Art. 105, Arts. 277, 295, 317, 357 of the Russian Criminal Code, committed by women, juvenile delinquents, and men reaching 65 years of age at the moment of the court rendition, i.e., criminal cases on crimes which cannot be punished with life imprisonment or death penalty; 4) to reduce the number of jurors at oblast, territory and Supreme Courts – to eight persons, at regional and municipal courts – to six people, which would accordingly reduce the number of veniremen, who must be present at the beginning of a trial (not less than fourteen in a Supreme Court of a republic, krai and oblast court, a court of a federal municipality, autonomous territory or autonomous region, or a regional (fleet) military court, and not less than twelve in a regional court, or garrison court).

Another problem of a jury trial functioning is the misbalance between the authorities of a professional judge and a jury. In our opinion, this issue is a

537

procedural one and illustrates the fundamental difference between the Russian institution and its Anglo-American and continental analogs. Thus, in accordance with the Russian criminal-procedural code, the functions are strictly divided between the chairman and the jury. The former solves all issues of law, the latter – all issues of fact. The material-legal and procedural bases for making the verdict are beyond the competence of the jurors, as they solve only three questions: whether it is proved that the action took place; whether it is proved that the action was done by the accused; whether the accused is guilty in doing the action. If necessary, the issues are solved of the degree of the criminal intention implementation, the reasons for not completing the criminal action, the degree and character of each of accused complicity in the crime. There may be questions enabling to state the guilt of the accused in committing a less severe crime, if thus the position of the accused is not worsened and their right to defense is not violated. If the accused is found guilty, the question is posed if they are recommended for mercy (Art. 339 of the Criminal-Procedural Code of the Russian Federation).



The procedure of delivering a verdict by the jury, stipulated by the legislations of Great Britain, the USA, France, and Austria, is completely opposite. Unprofessional judges investigate both the issues of fact and the issues of law. Besides, these can be issues of procedure (which information should be accepted as evidence, which questions can be posed, which witnesses can appear in the court and what evidences they can give) or the issues of substantive law, which determine and regulate the rights of the parties. As for the Russian model, it implies a two-level, progressive judicial investigation with two independent decisions on a criminal case – the jury verdict and the judge's sentence, without posing questions to the jury demanding juridical knowledge.

In our opinion, the difference in legal systems results in a different attitude of the citizens towards executing the jurors' duties. We have to state that in Russia no conditions have been created to motivate citizens to participate in administering justice. There is just a potential opportunity, stipulated by law, to execute an enforcement measure – a fine – for absence at court without a valid reason. In the USA, for example, administrative responsibility is

538

stipulated for absence at court despite notice of appointment to perform the duties of a juror, which is considered to be contempt of court and is subject to not only fine but also imprisonment [8, p. 7]. However, the problem of the lack of social activity is not solved by coercion measures only. In our opinion, the Russian legal sphere should implement the experience of Great Britain where the jury institution is being actively popularized from the viewpoint of both civic duty and acquisition of an important life experience. Notably, the websites of almost all judicial bodies of Austria, France, and the USA contain accessible information on the essence of the jury trial, the significance and role of citizens in its functioning [21].

Another problem is ensuring safety of the jury. It is apparent that the minimalism of the Russian legislator is unjustified in elaborating the mechanism of control over illegal influence on jurors during the trial, as well as the low efficiency of the existing measures. It is considered that the standard safety measures (prohibition to make photos of the jurors, to publish their names and addresses, observance of the retiring room privacy) are sufficient [22, p. 64]. Another approach is implemented in



foreign legislation. Thus, in Great Britain a court may announce, if necessary, “sequestration of the jury” which implies complete isolation of the jury during the period of the trial or sentencing procedure. In the USA, there is Marshals Service responsible for, among other things: protection of witnesses, judges, jurors and defendants; protection of a jury retiring room against penetration of unauthorized persons; accompanying the jurors to their resting places, and in case of a statement of illegal influence – provision of permanent personal protection. Under such conditions, the risk of influence on the jury is negligible; thus, there are no procedural infractions feasible in case of illegal influence on the jury.

Undoubtedly, the above list does not comprise all the existing problems of functioning of the jury trial in the Russian Federation. However, in our opinion, it should be noted that, despite the current difficulties and drawbacks, the legal procedure with participation of jurors is a relevant form of combining the professional and the public elements in justice. Any legal procedure as a social tool of solving legal conflicts is formed under the influence of previous procedures, historical

539

experience, and ideal theoretical models generated by science. The judicial practice helps to understand the drawbacks of legal regulation, while improving the law gives the opportunity to approach a more perfect construction of criminal legal procedures.

Characterizing the Russian model of judicial investigation with participation of the jury, we should note that special literature offers no unified opinion concerning its attribution to a certain historical type. Thus, some authors assert that a legislator, while forming the legal tools of the citizens’ participation in administering justice, “did not display due imagination in choosing the formulations, actually completely repeating the provisions of the Charter of Criminal Legal Procedure of 1864” [23, p. 74]. Others consider the norms of Section XII of the Criminal-Procedural Code of the Russian Federation to be partial implementation of the Anglo-American model of the jury trial [24]. Still others, given the mixed type of the Russian criminal procedure, characterize the current model as an analog of the continental model of the jury trial [25, p. 107]. We suppose that to answer the above question it is first of all necessary to extinguish the essential



features of the Russian judicial investigation with participation of the jury. First, judicial investigation is structurally divided into several stages: designation of the positions of the parties; investigation of evidences with participation of the jury; solving the issues of inadmissibility of evidences; investigation of the data on the personality of the accused. As an independent stage of investigation, a legislator stipulates discussion of legal and other questions, investigation of which with participation of the jury is not allowed (part 3 of Art. 347 of the Criminal-Procedural Code of the Russian Federation). In this regard, one should pay attention to two fundamental aspects. One of them is a rather rigid distinction of competence between a professional judge and the jury, which implies structuring the subject of a judicial investigation according to the Anglo-American model: the circumstances investigated with participation of the jury and the circumstances investigated in the absence of the jury. Another important aspect is the absence of the hearing of arguments performed separately at each stage in the structure of judicial investigation, which rather corresponds

540

to the continental model of the jury trial. Second, there is a special procedure of investigating certain circumstances and evidences at the first stage of judicial investigation without participation of jurors, which, as was stated above, is characteristic for the Anglo-American model of the jury trial. This feature of judicial investigation is due to the fact that the division of the subject of probation does not at all exclude occurrence of various questions of purely legal nature at its first stage (when investigating the circumstances referring to the competence of the jury), as well as legal collisions, which, on the one hand, must be resolved at this very stage of judicial investigation, but, on the other hand, cannot be solved with participation of jurors. Third, implementation of the adversary character of judicial investigation is manifested in clear distinction of the criminal-procedural functions between the court and the parties, as well as in relative “passiveness” of the court when collecting and investigating evidences. In our opinion, the passiveness of the jurors and their initial unawareness of the criminal case circumstances are rather clearly manifested in the current criminal-procedural law. Thus,



investigative and other procedural activities cannot be performed by the initiative of the jurors; the Russian jurors are not entitled to demand repeated investigative action and resumption of the procedure of such (in accordance with part 6 of Art. 344 of the Criminal-Procedural Code of the Russian Federation, the decision is made by the chairperson, taking into account the opinions of the parties); the investigation materials are not transferred to the retiring room for the jury to deliver a verdict. Fourth, following other models of the jury trial, the Russian legislator stipulated the procedure of judicial instruction of the jury about the essence and significance of certain procedural actions and about the content of some provisions of material and procedural law.

## 5. Conclusion

The presented brief comparative analysis of Anglo-American, continental and Russian model of the judicial investigation with participation of jurors enabled us to come to some summarizing conclusions.

The Anglo-American model of the judicial investigation with participation of jurors is based on the

541

following essential features: 1) division of competence between a professional judge and the jury, which determines the two-level structure of the judicial investigation: with and without participation of jurors; 2) establishing the limits of judicial investigation for each of its parts, taking into account the cumulative circumstances of a criminal case which can (cannot) be investigated in the presence of the jury; 3) adversary construction of the judicial investigation, associated with active participation of the defense and prosecution parties and minimal participation of the court in probation; 4) compliance of the procedure of evidences investigation to the criteria of clarity and comprehensibility, i.e., “cognitive accessibility” for the jurors, which is provided by the procedural rules of executing investigative actions, the structure of judicial investigation, and the consultative function of a professional judge; 5) establishing the guarantees providing the impartiality of the jurors when solving the issues under their competence, in particular, the special order of investigating certain types of evidences.

The peculiar features of the continental model of the jury trial are as

follows: 1) there is no clear division of competence between a professional judge and the jury, which excludes the internal structuring of the judicial investigation depending to the circumstances of a criminal case which are to be ascertained; 2) the limits of judicial investigation are much broader than those in the Anglo-American model, as they allow ascertainment of the circumstances of a civil case, as well as investigation of the data about the personality of the accused with participation of jurors; 3) adversary construction of the judicial investigation is significantly limited, which due to the presence of le pouvoir discretionnaire of the court, as well as to the position of a prosecutor as the main party of the procedure; 4) high level of cognitive accessibility of the judicial investigation, provide by a number of guarantees, including: opportunity for the jurors to participate in executing investigative actions, their right to demand resumption of the judicial investigation, high consultative and explanatory activity of the presiding judge; 5) low level of guarantees providing impartiality of the jurors when solving the issues under their competence, which, in our opinion, is associated with the ultimate objective

542

of the probation – establishing the material truth, predetermining the absence of a special order for investigating certain types of evidences having the maximal degree of “negative” influence on the jurors from the viewpoint of forming negative attitude towards the accused.

The Russian model of the judicial investigation, in the part performed with participation of jurors, contains a number of special procedures determined by participation of unprofessional judges. These procedures mediate the characteristic features of the theoretical model of the judicial investigation with participation of jurors, namely: higher degree of adversary principles implementation; the rules ensuring cognitive accessibility of the criminal case circumstances for the jurors; features of the subject of judicial investigation (procedure of solving the issues of law; special order of investigating certain types of evidences; mechanisms of neutralization of the negative influence on the jurors). The structure of judicial investigation includes: designation of the positions of the parties; establishing the order of investigating evidences, investigation of evidences.

## 6. Recommendations

The research materials are valuable for judges, prosecutors, investigators, defendants, lecturers and students of juridical universities. In our opinion, the theoretical conclusions made in the article partly fill in the gaps in the science of criminal procedure, referring to the normative regulation and practical functioning of the jury institution. The article formulates the theoretical-legal principles of the jury participation in probation at the stage of judicial investigation, including analysis of conceptual principles and legislation of Anglo-American, continental and Russian legal systems, which may serve as the basis for constructive scientific discussion and further elaboration of the issue posed.

The practical value of the article materials consists in the possibility to implement its conclusions and propositions for improving the criminal-procedural legislation of the Russian Federation, as well as the law-enforcement practice of the courts. The provisions formulated in the paper may be used in teaching the course of criminal procedure and relevant special courses to the students of juridical

universities, various practical and advanced qualification courses.

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544

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