

THE FUNCTION OF HONORARY JUDGES IN CRIMINAL PROCEEDINGS IN GERMANY

*Eberhard Siegismund**

I. INTRODUCTION

In the following I shall attempt to give you an overview of the law relating to honorary judges in criminal jurisdiction in Germany and to explain the role played by lay judges in criminal proceedings. The participation of laymen and laywomen in criminal jurisdiction is one of those controversial topics in criminal law where opinions part ways. Whereas one group sees the participation of laymen and women as a guarantee of the democratic process in court¹, others are fundamentally sceptical about lay participation² or want to further curtail lay influence³. I will start by outlining the activities performed by lay judges, thereafter I will set out the requirements for appointing lay judges, describe their rights and duties and the course of deliberations in the court deliberations room. Finally, I will go into the question of whether lay judges should be dispensed with.

II. FIELD OF ACTIVITY OF LAY JUDGES IN GERMANY

Participation of lay judges in the criminal justice system is based on reform ideas and demands during the last century, parallel to the desire for popular participation in legislation and administration⁴. The original rule, for which provision was made in the Code of Criminal Procedure and the Law Concerning the Constitution of the Courts, which entered into force on 1 October 1879, assigned the decision on serious crimes of

a severe and of a most severe nature to the jury court, which was characterised by the division of the bench into a judicial bench and a jurors' bench: the 12 jurors were assigned the decision on culpability and the 3 professional judges the decision on punishment, i.e. sentence. Other serious crimes and most less serious crimes were dealt with by the criminal chamber, composed solely of professional judges; less serious crimes of a minor nature fell within the jurisdiction of the jury court, where the 2 lay judges decided on culpability and sentence together with the professional judge⁵.

Partly following the wide-ranging amendments to the law on lay judges - particularly during the thirties - the use of honorary judges in criminal jurisdiction today is as follows. Since the importance of the office of lay judge is governed, on the one hand, by their use in the various court instances and, on the other, by their differing numerical proportion to the professional judges, it would seem expedient to subdivide according to the various instances.

A. Courts of First Instance

Courts composed of several judges with jurisdiction at first instance are the Jury Court at the Local Court and the Grand Criminal Chamber at the Regional Court.

¹ cf. Wassermann, RuP 1982, p.117, p.120.

² cf. Kühne, ZAP 1985, p.237.

³ cf. Michaelsen, Kriminalistik 1983, p.445.

⁴ cf. LR Schäfer, 24th ed., introduction chapter 15 margin reference 2.

⁵ cf. LR Schäfer, *ibid*.

* Deputy Director General, Judicial System Division, Bonn, Germany.

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The Jury Court, which used to be the first instance for very serious crimes, is now only a criminal chamber with special jurisdiction, but has retained its old name. The Higher Regional Court, which functions as a court of first instance in regard to crimes against the state, is composed of professional judges only.

At the Local Court, the jury court decides in criminal proceedings relating to serious and less serious crimes in cases where the criminal judge does not have jurisdiction; the sentencing range of the Jury Court extends to a maximum of 4 years imprisonment.

The Jury Court is composed on principle of one professional judge as presiding judge and two lay judges (section 29 subsection 1, Courts Constitution Law - CCL). Where the scope of the matter so requires, the Jury Court may also - upon application by the public prosecutor - function in the composition of 2 professional judges and 2 lay judges (section 29 subsection 2, CCL).

The Jury Court for youth matters is composed of one professional judge, as presiding judge, and 2 lay judges for youth matters. Criminal offences are prosecuted in this court if youth imprisonment, which is enforced in a youth prison, may be imposed as the sentence. If the anticipated sentence is less severe, as for instance in the case of youth detention, the prosecution is brought before a judge sitting alone with jurisdiction over youth matters. By the way, youth courts decide in criminal proceedings against juveniles and young adults, i.e., delinquents who were aged between 14 and 18, and between 18 and 20 years respectively, at the time the crime was committed.

As a court of first instance at the Regional Court, the Grand Criminal Chamber decides in the composition of 2

or 3 professional judges and 2 lay judges in all cases of serious crimes that do not fall within the jurisdiction of the Local Court or of the Higher Regional Court; it also has jurisdiction over all criminal offences where the sentencing powers of the Local Court are insufficient.

The so-called Jury Court constitutes a special Criminal Chamber for serious crimes of the greatest gravity, particularly homicide crimes listed in a conclusive catalogue of jurisdiction in section 74 subsection 2 CCL. This Chamber has the same composition as the general Grand Criminal Chamber.

The Youth Chambers of the Regional Court have the same composition as the normal criminal chambers. They decide at first instance on homicide crimes committed by juveniles and young adults. They also have jurisdiction in proceedings where juveniles and young adults are prosecuted together, and where the Local Court's sentencing range is insufficient.

The Youth Chamber of the Regional Court has jurisdiction, at first instance, in youth protection matters as well. These are cases where adults are prosecuted for criminal offences that caused injury to a child or a juvenile (e.g., maltreatment or sexual criminal offences) or where children or juveniles are required as witnesses.

B. Appellate Instance on Fact and Law

Lay judges also participate at the appellate instance at the Regional Court. Given that there is a review of facts and law on appeal, it would certainly seem expedient for lay judges to be brought in.

The Appeal Chamber at the Regional Court reviews Local Court judgements in the composition of one professional judge and 2 lay judges - i.e., with the same

composition as the Local Court.

In proceedings on appeals on facts and law against judgements of the Youth Court sitting with lay judges, the Youth Chamber is composed of 3 professional judges and 2 lay judges, and in proceedings on appeals on facts and law against judgements of a judge sitting alone in youth matters it is composed of the presiding professional judge and 2 lay judges in youth matters.

In Germany, we have about 61,000 lay judges at the courts with jurisdiction over matters relating to young people and over adults. This is an impressive figure when set in relation to the figure of 4,000 judges in criminal jurisdiction.

III. PUBLIC PARTICIPATION

There are basically three arguments supporting the participation of laymen and women in criminal proceedings, i.e. the democracy principle, the quality of jurisprudence and the popular educative effect⁶.

A. Democracy Principle

By acting as a lay judge, the ordinary citizen can take part in the dispensation of justice and obtain experience of what happens in the deliberations room as well as of the difficulties, doubts and even the conflicts of conscience that may arise in coming to a just decision. Co-responsibility for the decision given counteracts the criticism that might otherwise easily arise, namely that judgements are delivered "from an ivory tower"⁷. Nevertheless, when considering this aspect, it must not be forgotten that laymen and women have the same statutory duty as professional judges to uphold the secrecy of judicial deliberations, i.e. to remain silent about the course of deliberations.

⁶ On this see Kühne, ZRP 1985, p.237, p.238

B. Improving the Quality of Jurisprudence

In this connection, one often hears the slogans: popular orientation, present-day relevance, sense of justice, and plausibility control⁸. It is said that the lay judge brings in a popular orientation by their sense of the popular mood, hence preventing the professional judge from sinking into a routine⁹. Through lay participation, the professional judge is forced to measure and clarify the accuracy of their observations and conceptions and the persuasive power of their ideas by being confronted with objections issuing from an untested sense of justice¹⁰. S/he is forced to formulate what s/he wishes to say in a clear and intelligible manner, in other words, in a manner conducive to popular comprehension.

By contrast, the following arguments are used to controvert this. Assuming that legal professionals articulate their ideas in a manner incomprehensible to laymen and women, lay judges would have to rectify this by self-confidently posing further questions. But, so the argument goes, this would be rather unlikely since lay judges are mostly only passive participants and they are overburdened by the task of examining the professional judge's proposal for a decision¹¹, especially as a lay judge does not have a command of specialist legal terminology.

Against this backdrop, there is a need for more intensive discussion of the question of whether the sense of justice that the lay judge brings to bear and their sense of plausibility are suited to improving the

⁷ cf. LR Schäfer, *ibid.*, margin reference 8.

⁸ cf. Kühne, *ibid.*, p.238.

⁹ cf. LR Schäfer, *ibid.*

¹⁰ cf. LR Schäfer, *ibid.*

¹¹ cf. Volk in: Festschrift für Dünnebier, 1982, p.373, p.377; Casper-Zeisel, Der Laienrichter im Strafprozeß, 1979, p.84.

quality of jurisprudence.

C. Popular Educative Effect

Finally, the use of lay judges is also linked to the expectation that these judges will increase people's acceptance of court decisions, that they will improve popular legal knowledge, hence contributing to inner appreciation of criminal law norms and, at the same time, that they will have a general preventive impact¹².

But critics opposed to this notion say that this effect could only be achieved if lay judges were to be active in effective instruction of the public outside their court activity; however, this is said to be not normally the case¹³. Judging from my professional observations over a period of more than 10 years, this is negated by the fact that lay judges consistently perform their duties with great eagerness and pride so that we can assume that there is feedback in the lay judge's family and in their circle of friends and acquaintances. Whether, however, lay judges enjoy more credibility and have greater power of persuasion than professional judges - who are similarly in a position to report on their experience - must remain an open question.

IV. WHO CAN BECOME A LAY JUDGE?

A. General Prerequisites

Section 31, second sentence, CCL stipulates that a lay judge must possess German nationality. If a non-German lay judge takes part in criminal proceedings, the bench will not have been properly constituted with the result that this will present an absolute ground for an appeal on law¹⁴.

Seen against the background of the large number of foreigners whose lives have been centred in Germany for a considerable length of time, and who are largely integrated in German life, but who shy away from acquiring German nationality for a variety of reasons, the question is being discussed as to whether non-Germans are to be admitted to the office of lay judge as well¹⁵. Hence it has currently been suggested that where a foreigner has lived in the country for a specified length of time, has the necessary linguistic competence and fulfils the personal prerequisites, s/he should be admitted as an honorary judge¹⁶. Grounds for admitting foreigners as honorary judges are said to be: integration of the foreign population and greater acceptance of court jurisprudence.

Admittedly, the fact that a certain integrative effect may follow from such a measure must not be overlooked. But it seems clear that an integrative effect would probably only arise in relation to those on whom the office of honorary judge had been conferred.

However, there are misgivings about the assumption that court jurisprudence would enjoy greater acceptance as a result of participation on the part of foreigners. This would only be possible if, in individual cases, special lay judges from a specific region could be chosen for a particular defendant, i.e. Turkish lay judges for Turkish defendants and so on. Apart from the fact that this would be linked to the risk of abuse and manipulation - which would hardly be conducive to acceptance of court jurisprudence - choosing lay judges for specific individual cases is not feasible

¹² cf. Kühne, *ibid.* with numerous references.

¹³ cf. Kühne, *ibid.*, p.239.

¹⁴ cf. Section 338 no. 1 StPO; cf. LR Schäfer, 24th ed., Section 31 margin reference 4.

¹⁵ cf. Röper, DriZ 1998, p.195; Jutzi, DriZ 1997, p.377.

¹⁶ cf. Röper, *ibid.*

seeing that only about 30% of the suspected criminal offenders found by the police in 1997 did not have German nationality. In the end, it is likely that in the future too there will be no criminal courts composed of non-German lay judges¹⁷.

The question of whether a lay judge should be male or female does not arise because equality for women is already anchored in the constitution (Article 3 of the Basic Law). More than 70 years ago, however, a speaker at the German Congress of Lawyers in Leipzig (in 1921) expressed his emphatic opposition to women acting as lay judges as follows:

*“The reputation of the courts calls for judges for whom the defendant has respect. In the light of the actual conditions still pertaining here ... men often do not yet have the necessary respect for a woman. So admitting women would mean lowering respect for the court and therefore respect for the law. But this must be avoided particularly at the present time...”*¹⁸.

Another question to look at is the question of whether women actually make up 50% of lay judges. Here we find interesting results when we compare benches handling matters relating to adults with those handling youth matters. Whereas women at courts handling adult matters were under-represented (compared with their share of the population), accounting for a figure of about 30% in 1975, of about 20% in 1981, of about 10% in 1989 and, in 1997, of just 3%. The result is quite different in respect of lay judges at youth courts: here women are a little over-represented - in 1975 by about 6% and in 1997 by about 1%.

¹⁷ cf. Wassermann, NJW 1996, 1253, 1254, Jutzi, DriZ 1997, p.377.

¹⁸ cf. von Hasseln, DriZ 1984, p.12, p.14.

The almost equal composition of the Jury Court for youth matters is based on the Youth Courts Law; there section 33 provides that a man and a woman should be brought in as lay judges at every main proceeding conducted by a bench. Parliament assumed that women, in their role as mothers and rearers of the young, would generally be able to understand young criminal offenders better and would be more likely to choose the appropriate sanction for the wrong committed. In actual fact, there are female lay judges particularly at the youth courts who are strongly committed in the educative sense as teachers, social workers or persons responsible for training others.

So as to ensure that lay judges have the necessary experience of life, the Law prescribes a minimum age limit of 25 years (section 33 no. 1 CCL). Since most citizens are already pursuing an occupation at this age, they will usually have a general understanding of the life situations to be adjudicated in criminal proceedings. On the other hand, the maximum age limit of 70 years is designed to ensure that people who are no longer capable of matching up to the physical and mental rigours of the office of lay judge are not appointed to that office¹⁹.

Familiarity with local conditions (section 33 no. 3), as required by the law, allows regional views regarding the importance and circumstances of a criminal offence to have some influence on the judgement²⁰.

It seems obvious that that a prospective lay judge must be in full possession of their civil rights and must be eligible to hold public office, if s/he is to be appointed to the office of lay judge (cf. section 32 no. 1).

¹⁹ cf. Schäfer, *ibid.*, Section 33 margin reference 1.

²⁰ cf. Benz, Zur Rolle der Laienrichter im Strafprozeß, 1982, p.67.

B. Grounds for Exclusion

To prevent incompetent or unsuitable people from holding the office of lay judge, the Law makes provision for a number of grounds for exclusion. People who have been sentenced to a term of imprisonment of more than 6 months' duration for commission of an offence with intent are excluded, and so are those in respect of whom investigation proceedings are pending for an offence that might lead to loss of eligibility to hold public office (section 32 nos. 1 and 2).

Section 33 no. 3 (restriction of disposition by virtue of a court order) refers to all cases of restricted disposition in connection with property as a whole, as with all persons deprived of legal capacity on account of mental illness, mental deficiency, prodigality, alcoholism or drug addiction, or with those placed under temporary guardianship²¹.

Finally, the cases of unsuitability on the ground of a person's occupation (section 32 nos. 1 to 6) are also of interest. This is designed to avoid taking people performing functions that are important in public life away from their full-time work, as well as to avoid tensions between defendants and lay judges which might lead to mutual prejudices as far as people working in the administration of justice are concerned²².

C. Grounds for Refusal

The office of lay judge is admittedly an honorary one (section 31, first sentence, CCL) but selection for this office is nevertheless a duty from which the person concerned can obtain an exemption only on the strict conditions laid down in section 35 CCL. The following persons can refuse appointment to the office of lay judge:

- Members of the German Federal Parliament and Federal Council, of a Land Parliament or of a second chamber;
- People who, in the preceding term of office, performed the duties of honorary judge for 40 days or who are already performing the duties of honorary judge;
- Members of the medical professions;
- People who have reached the age of 65 years or who will have done so at the end of the term of office.

An additional case for exemption has recently been introduced: it covers those cases where acting as a lay judge would seriously endanger the economic existence of the person concerned or of a third person.

It is true to say that cases of exemption are usually already taken into account when the list of candidates and lay judges is being drawn up; they are otherwise only recognised if the lay judge concerned asserts them within one week after s/he has been informed of their assignment. Where such grounds arose or become known later, the time limit shall start to run from that time (section 53 subsection 1 CCL).

D. Selection of Lay Judges

Lay judges are selected every four years. The Regional or Local Court director determines the required number of principal and assistant lay judges (substitute lay judges) for the Jury Courts and Criminal Chambers on the presumption that principal lay judges will not be brought in more than 12 times on sitting days every year, and s/he will inform the municipalities of the figures allocated to them. Pursuant to section 36 subsection 1 CCL, the municipalities draw up uniform lists of lay judge candidates for the Local

²¹ cf. LR Schäfer, *ibid.*, Section 32 margin reference 11.

²² cf. Benz, *ibid.*, p.70.

Court and the Regional Court. Candidates can be nominated by parties and charitable associations, although any interested citizen can indicate this to their municipal administration. In spite of the obligation under section 36 subsection 2 CCL to take representative account of all population groups, this means that predominantly politically active members of the municipality - i.e, mainly middle-class people - are proposed for selection in line with the ratio of party representation in the municipal bodies²³. If there are not enough candidates, municipalities occasionally take their candidates for the list from the register of residents in accordance with the principle of random selection²⁴.

The municipal council approves by 2/3 majority the list of lay judge candidates from the preliminary lists of candidates. The list should contain at least twice as many names as the number of persons determined by the President of the Regional Court or of the Local Court (section 36 subsection 4 CCL). Since it seems wholly impossible in cities with lists of candidates containing about 2,5000 names to "select" individual persons in the sense of weighing up the personal characteristics of individual candidates, candidates for the office of lay judge are occasionally selected by mere counting or at random, and are then approved by 2/3 majority²⁵.

After the list has been displayed in public for one week (section 36, 37, 38 CCL) the lay judge selection committee, set up at the Local Court, will select the lay judges for the next term of office from this list. The same applies to lay judges for the

Criminal Chambers (section 77 CCL).

There is special selection procedure for lay judges at the Youth Courts. In order to obtain citizens who have a special educational aptitude or who have had long experience in the education of young people, the lists of candidates for the office of lay judge are drawn up by the youth welfare committees, bodies set up at the municipality whose members are experts on matters of child and juvenile education. The Youth Court judge will take the place of the Local Court judge at the lay judge selection committee.

V. RIGHTS AND OBLIGATIONS OF LAY JUDGES

As mentioned above, every citizen who has been appointed as a lay judge must perform the duties of this office properly, even where it is considered burdensome in the circumstances of the individual case. Pursuant to section 56 CCL, the judge is entitled to impose a regulatory fine on a lay judge who, without sufficient excuse, fails to appear at sittings on time or who seeks to evade their responsibilities in some other way, e.g. by refusing to participate in a vote²⁶.

This provision is not without its problems, considering that section 30 CCL provides that during the main proceedings the lay judge exercises judicial office and enjoys the same voting rights as the professional judge. The equality of lay judge and professional judge established under the aforementioned provision is definitely restricted by granting the professional judge explicit rights over lay judges.

A. Participation of Lay Judge in the Main Proceeding

In accordance with the aforementioned

²³ cf. Kühne, ZRP 1985, p.237, p.238

²⁴ cf. Lieber, Der praktische Ratgeber für Schöffen, 1st ed., p.86.

²⁵ cf. Jasper, MDR 1985, p.110, p.111.

²⁶ cf. Schäfer, *ibid.*, Section 56 margin reference 3.

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provision of section 30 subsection 1 CCL, during the main proceedings the lay judges fully exercise judicial office and enjoy the same voting rights as the professional judges and, as a matter of principle, they also participate in decisions to be taken during the main proceeding.

Before dealing with the decision-making powers of professional judges and lay judges, it would seem to be indispensable to describe the function of the Criminal Court judge in Germany, which is not comparable to the function of the Criminal Court judge in English-speaking systems.

In the adversarial system, as a matter of principle, the court has to make its decision solely on the basis of the evidence presented to it by the parties. This system is based on the idea that the court proceedings should be structured in the form of a dispute between two equal adversaries before an arbiter who also has to decide the outcome of the duel. If the parties agree to resolve their dispute by the notorious "plea bargaining", or by reducing the charges from a serious crime to a less serious offence, the judge will usually be bound by such an arrangement. In this dispute, the public prosecutor is not an impartial authority, but party to the proceedings. This is the role imposed on them. The judge is, so to speak, only the intermediary or arbiter who sees to it that the parties stick to the rules of the game. Even if the court would want to learn the whole truth, it has no procedural means to take action to this effect, given the dispositive powers of the parties. In fact, the court might have to decide on the basis of insufficient evidence.

The system operated in Germany is different. When the police or the public prosecution office in Germany learn about a criminal offence, they are obliged to ascertain the facts thoroughly, i.e. they also

have to investigate any exonerating circumstances. Where an indictment is preferred, this duty to investigate is all the more incumbent upon the judge (section 244 subsection 2 Code of Criminal Procedure). This provision reads as follows:

"In order to determine the truth, the court shall, upon its own motion, extend the taking of evidence to all facts and evidence which are important for the decision."

The duty to investigate extends to all facts which need to be proven, no matter whether these facts are directly or indirectly relevant to the question of guilt, to the question of legal consequences or to procedural questions. So the duty to investigate applies, in particular, also with respect to the facts which are relevant to the determination of sentence, no matter whether these facts concern the offence or the offender.

The duty to investigate is first of all incumbent upon the court. It extends in every direction, in favor of the defendant and against them, and it is not subject to any motions, suggestions or requests by the participants. So it can happen that the court will proceed to take exonerating evidence even against the defendant's will or to investigate incriminating circumstances, even if the public prosecution office shows no interest. Even where the defendant and the public prosecutor both agree to dispense with the taking of further evidence, the court will not be released from its duty to investigate.

As has been outlined before, during the main proceedings the lay judges perform judicial functions to the full extent and with the same right to vote as the professional judges; this means that when I am speaking of "the court" this includes the lay judges as well. They participate in any

order, decision and voting unless the law expressly assigns certain tasks to the presiding judge or the professional judges. The most important decision is a judgement which consists of a conviction and a sentence, as well as other decisions ending the proceedings, such as termination of proceedings. It is important to note that the conviction and a sentence are pronounced in one single decision, like the following: "The defendant is guilty of theft. He is sentenced to 6 months imprisonment. He is ordered to pay the costs of the proceedings." Orders preceding the judgement, such as a decision on a motion for the admission of evidence, are also made in co-operation with the lay judges.

In order to be sufficiently informed - with regard to the court's official duty to investigate as mentioned before - the lay judge is entitled to question the defendant as well as witnesses and experts (section 240 subsection 2 Code of Criminal Procedure). The lay judges put questions directly; they only have to ask the presiding judge formally to be granted the right to speak. They are not obliged to disclose to the presiding judge the content of the question in advance or to ask for permission to pose questions. In practice, however, lay judges seldom make use of their right to ask questions. Such restraint on the part of lay judges is something that the professional judges do not mind in practice. Awkward, ill-considered or even unfair questions from lay judges may considerably impair the proper course of criminal proceedings. For instance, a lay judge asking the defendant why s/he doesn't finally confess since the evidence available provided sufficient proof might lead to a defence counsel motion of challenge on grounds of bias. If such motion is successful, the lay judge will be excluded from the proceedings, which means that the trial has to be started again

unless a substitute lay judge is available. A similar risk for the course of the trial lies in thoughtless remarks from lay judges concerning the outcome of the proceedings in the presence of defence counsel or public prosecutors. Against this background, it is easily understandable that the professional judges prefer lay judges who do not ask questions in the main proceeding and refrain from making any remarks concerning the proceedings - whether in the main proceeding or outside. It is obvious that this is not compatible with the function of the lay judge to contribute to the decision-making in the same way as a professional judge.

VI. DELIBERATIONS AND VOTING

In the deliberations and in the voting, which usually follow the hearing, lay judges and professional judges have the same vote. The manner in which the deliberations take place is defined by statute in two rules only (section 194 CCL):

- The presiding judge chairs the deliberations, poses questions and collects the votes.
- Differences of opinion concerning the subject, the formulation and the order of questions or concerning the result of the voting are decided by the court, i.e. the professional judges and the lay judges together.

Usually the secret deliberations start with the question as to which facts are proven. At the Local Court, the presiding judge will give their version of the facts and discuss it with the lay judges; at the Regional Court, where two or three professional judges are involved, this function will in most cases be performed by the rapporteur.

Subsequently, the deliberations will deal with the question as to which of the facts constitute the elements of an offence, i.e.

which offence has been committed. Then the court will discuss any mitigating or aggravating circumstances. Finally - and this is more often than not highly controversial - the sentence will be determined.

If consensus cannot be achieved on individual points, formal voting is required. The order of voting is regulated by section 197 CCL: first the youngest lay judge will cast their vote, then the older one. The professional judges vote after them, first the rapporteur, the others in the order of their length of service, the youngest first. The presiding judge is the last one to cast their vote. This is meant to ensure that the lay judges do not feel inhibited before the professional judges, or the younger judges before the older ones.

Any decision to the defendant's disadvantage concerning culpability and the legal consequences of the offence requires a two-thirds majority (section 263 Code of Criminal Procedure). This means that the two lay judges - at least in theory - can take advantage of their power not only at the Local Court but also at the Regional Court against the three professional judges. However, in my experience of more than ten years at various penal chambers, I have never seen lay judges actually take this option. This is certainly due to the fact that the presiding judge, who chairs the deliberations with the lay judges, performs an advisory function concerning legal issues and can skilfully steer the result²⁷. This applies in any case to the Local Court; the situation is different with the chambers of the Regional Court: here it may indeed happen that a "stubborn" professional judge and a lay judge enforce a more lenient decision.

Since the lay judge as well as the professional judge have to preserve secrecy regarding the deliberations - also after the

term of service has ended - (section 44 subsection 1 German Judiciary Act) such processes are hardly ever discussed in public, and for good reason. The secrecy of deliberations ensures open discussion in the administration of justice²⁸, so that no professional or lay judge needs to fear that their opinion might be revealed to the public. Hence, under German law, public announcement of a dissenting vote is not allowed. An exception applies to the Federal Constitutional Court, the highest German court. If a lay judge discloses the secrecy of deliberations, a regulatory fine may be imposed pursuant to section 56 CCL.

VII. SHOULD LAY JUDGES BE DISPENSED WITH?

Meaningful participation of lay judges in the administration of criminal justice is conceivable only if they are capable of assisting the professional judge in the application of the law. Since lay judges are barred from inspecting the files, they can only rely on the result of the oral hearing. But they will not be able to gain an adequate basis for decision-making unless the professional judge directs the proceeding in such a way that it is generally understandable and, if necessary, also uses recesses in order to explain technical terms to the lay judges, comment on expert opinions or recapitulate the taking of evidence step by step²⁹.

As my own experience has shown, it is extremely rare for a lay judge to contribute to the clarification of facts, unless for example when s/he happens to have specific knowledge of the subject or where s/he is able to contribute professional experience or experience of life in the field concerned.

²⁷ cf. Benz, *ibid.*, p.84.

²⁸ cf. Schmidt-Räntsch, JZ 1958, p.329.

²⁹ cf. Benz, *ibid.*, p. 90.

But it would nevertheless be short-sighted to dispense with the participation of lay judges. An empirical and psychological-theoretical study of existing law concerning lay participation in criminal jurisdiction has shown that lay judges can indeed cope with the tasks assigned to them³⁰.

There is no qualitative difference between the decision-making processes of lay judges and those of professional judges; the process of judging by lay judges is a rational one, too. It is governed roughly by the same factors as the process of judging by legally trained persons and it is not affected, to any major degree, by sympathy for, or dislike of, the defendant. In addition, lay judges do not have any stronger tendencies towards extremely harsh or lenient decisions than the respective presiding judges. The attitude of lay judges, therefore, is not appreciably more repressive or more lenient than that of presiding judges.

Nor is there anything wrong with the ability of lay judges to understand what is going on. As a rule, lay judges are able to follow an average main proceeding easily. Most lay judges are able to understand what is happening in the main proceeding and what it is all about. There are certain problems of comprehension, though, which lay judges may have and which may be understandable in the particular case, but which must not be ignored. Indeed, they occur too often simply to be tolerated. A classical problem, for example, is the participation of lay judges in cases involving economic offences. In such cases, people with no special training will find it difficult, in particular, to comprehend economic processes³¹. Although there are no practical approaches in sight so far to

³⁰ cf. Rennig, Die Entscheidungsfindung durch Schöffen und Berufsrichter in rechtlicher und psychologischer Sicht, 1993, p.570 et seq.

solve this specific problem, the key statement remains true, namely, that acting as a lay judge, in general, is not asking too much of the person concerned. Nevertheless, it seems advisable for lay judges to be given some assistance in the fulfilment of their tasks-whether through specific information to be provided by the professional judge or through regular training³².

For lay judges it is very important that judicial decisions should reflect what the public feels is right or wrong. This is what they regard as the main purpose of their office. During the deliberations, therefore, most lay judges strive to voice popular convictions of what is right or wrong³². As the results of the aforementioned study show, this leads rather frequently to differences of opinion between lay judges and professional judges³³. Surprisingly, however - and this is also what I have experienced - it rather seldom happens that lay judges exert influence with respect to the outcome of proceeding. The question as to the reasons for this must be left open; it would seem possible that a quite substantial number of lay judges endeavour to avoid disagreement with the presiding judges³⁴.

Lay judges are often purported to be highly susceptible to media influence. According to the aforementioned study, which is based on interviews with professional judges, there is no indication that the attitudes of lay judges are influenced by public or published opinion to any extent worth mentioning. It is true,

³¹ cf. Katholnigg, Wistra 1982, p.91; Michaelsen, Kriminalistik 1983, p.445; Wassermann, JVBf. 1970, p.145, p.148.

³² cf. Rennig, *ibid.*, p.572.

³³ cf. Rennig, *ibid.*, p.572.

³³ cf. Rennig, *ibid.*, p.573.

³⁴ cf. Rennig, *ibid.*

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though, that it cannot be ruled out completely that media reports may have some effect on the opinions of lay judges, but for the same good reason this could also be said of professional judges³⁵. In any case it should be noted that the belief that lay judges are highly susceptible to media influence must finally be abandoned³⁶.

In conclusion, it should be pointed out that the participation of lay judges in the administration of criminal justice has more advantages than many of its opponents expect. In addition to increasing popular confidence in the justice system, it ensures, above all, that criminal proceedings - and, in particular, the verdict - remain easily understandable and comprehensible to everybody. This seems to be all the more important as criminal law, after all, is a matter not only for the professionals involved, but for society as a whole.³⁷

³⁵ cf. Rennig, *ibid.*

³⁶ cf. Rennig, *ibid.*

³⁷ cf. Rennig, *ibid.*

³⁸ cf. Geerds, *Schiedsmanntzeitung* 1980, p.86.