View metadata, citation and similar papers at core.ac.uk
brought to you by CORE
provided by Waseda University Repository

講　　演

Lay Judges in the German Criminal Justice System: A Critical Review

Thomas Rönnau

I　Introduction

The general topic of the Transnational Program, which took place in March 2016 at the Waseda Law School, Tokyo, is "Lay Participation and Criminal Justice: Its Significance and Challenges". I will elaborate on the subject "Lay Participation and Criminal Justice". For an in-depth understanding of this topic, it is essential to retrace the historical origins and development of lay participation in Germany, which will be the focus of the beginning of my presentation. Subsequently, I will provide an overview of the current lay judge system in Germany. In this context, I will briefly examine the statutory framework governing lay participation in criminal trials and address controversial scenarios concerning the current model. In the final stage of this presentation, we will turn to questions of a more fundamental nature: Should lay judges participate in criminal trials? What are the advantages of their influence? Before I state my opinion, I will introduce you to the lively debate concerning the purpose and advantages of lay participation.

II　Historical Background: Lay Participation in the German Criminal Justice System

1. Early Stages of Lay Participation until the Age of Enlightenment

Lay participation in German criminal proceedings can be traced back to the first century before Christ, when free men gathered at the old Germanic Thing, a public assembly that also served as an ordinary court, to decide on criminal conflicts.(1) Until the High Middle Ages in the 12th century, mainly legally untrained people decided cases pursuant to the old German law. However, the stabilization of governance structures in the 5th century changed the legal system, since it initially enabled kings and later on other sovereigns to influence jurisprudence. This development culminated in the Age of Absolutism. The absolutist monarchies of the 17th and 18th centuries with their idea of a regent being at the top of all three governmental powers completely abolished lay participation in criminal proceedings. At that time, only professional judges, materially and personally dependent civil servants, occupied the courts. Even in the 19th century, the absolutistic monarchs decided cases by themselves or at least influenced the courts ("Kabinettsjustiz").

2. The Participation of Lay Judges after the French Revolution

The French Revolution in 1789 heralded the downfall of the absolutistic era. One of its most important aims was to separate the three governmental powers; a goal that Montesquieu, a prominent and important philosopher of

(1) See for details and more information concerning the history of lay judges: *Benz*, Zur Rolle der Laienrichter im Strafprozess, Lübeck 1982, pp. 15–60, *Lundmark/Winter*, ZfRV 2010, pp. 173 et seqq. and *Lieber*, Schöffengericht und Trial by Jury, Berlin 2010, pp. 107–192; most recently *Jänicke/Peters*, JR 2016, pp. 17 et seqq. and (concise) *Rönnau*, JuS 2016, pp. 500 et seq.

the Enlightenment era, already postulated during the first half of the 18th century. For this purpose, the judiciary had to be separated from the executive branch of public powers. As a means to ensure and to control the independence of the courts, lay judges were to be involved in criminal proceedings again. Based on the example of the English „trial by jury", which also prevailed in North-American colonies, in 1791 France implemented a jury in criminal proceedings. This jury was empowered to decide on the indictment and on the verdict. In the aftermath, similar demands in Germany started to emerge. It was believed that lay participation could increase transparency and acceptance of judicial decisions. Politically, the introduction of "civilian judges" was an expression of democracy and liberalism. Further, the idea was linked to cutting back governmental influence over the judicial branch. Beginning in 1798, so-called "Schwurgerichte" were established in French-occupied parts of Germany. This form of lay participation empowered citizens to decide on the conviction, while matters of law and sentencing were left to professional judges. The liberal idea of citizens participating in the judiciary branch premiered in German legislation when the National Assembly met in St. Paul's Church ("Paulskirche") in 1848/49. Although most of the numerous German States did not accept the Paulskirche Constitution, nearly all of them changed their statutes governing criminal procedure and codified a reformed inquisitorial process as demanded by the National Assembly. This way the majority of all German states integrated lay participation in criminal proceedings. Based on the example of France many preferred the so-called "Schwurgericht". Other states established a so-called "Schöffengericht", in which citizens and professional judges render a judgment side by side.

3. Lay Participation under the German Judicature Act of 1.10.1879: a dualistic approach

The debate about the best form of lay participation in criminal proceedings, in particular about the abolition of the “Schwurgericht” in favor of the “Schöffengericht”, culminated after the German Empire was founded in 1871 and a uniform legal framework for the entire German Empire had to be drafted. In January 1877 the Judicature Act, which is still applicable today, was promulgated and came into force in October 1897. Regarding lay participation, the act codified a compromise by acknowledging both forms of lay participation, “Schwurgericht” and “Schöffengericht”. This dualistic approach integrated “Schöffengerichte” at local courts. They were competent for minor offences and composed of a judge and two “Schöffen”. In contrast, “Schwurgerichte” dealt with serious crimes in quarterly sessions. Twelve jurors, sitting on a separate bench apart from the judges, decided on the conviction and mitigating circumstances, while three professional judges were responsible for sentencing and procedural issues. When it came to crimes of medium gravity or to an appeal against a judgment of a „Schöffengericht“, no lay participation was codified, since the criminal divisions of the regional courts, which were competent for these cases, were comprised of five professional judges.

4. Reform of Criminal Procedure and Lay Participation

With the downfall of the German Empire at the end of the First World War in 1918 and shortly after the Weimar Republic was founded, the debate about lay judges regained momentum. In 1924 the so-called Emminger’sche Reform, named after the former Minister of Justice Erich Emminger, came into force. The act substantially altered the way lay judges participated in criminal trials: An emergency decree of the Government of the German

Reich dated 1924, abolished “Schwurgerichte” in their known form. Although the act still referred to the newly created panel as „Schwurgericht“, it de facto created an enlarged “Schöffengericht” with three judges and only six jurors. In quarterly sessions, all members decided on the conviction and on the degree of punishment for serious crimes. Moreover, the reform added lay judges to the criminal divisions at the regional courts. However, this step did not increase lay participation, since most cases were decided by single judges at local courts, who — which was also a part of the reform — were entitled to deal with minor offenses without lay participation.

During the years of National Socialism in Germany, lay participation did not aim to foster transparency and democratic legitimacy of jurisprudence. It rather ensured a judiciary aligned to the ideas of the Nazi regime; except for the People ́s Court (Volksgerichtshof) all elements of lay participation under the Nazi regime were abandoned during the Second World War.

After the war ended in May 1945, a free and democratic state governed by the rule of law emerged. Under these circumstances, the concept of lay judges, understood as democratic participation of citizens in the judiciary, saw a revival. In terms of lay participation, the relevant statutes solely acknowledged “Schöffengerichte” as introduced by the Emminger'sche Reform in 1924; as part of this reform the grand criminal chamber at the district court became a court of first instance again. It was only in 1975 when the „Schwurgerichte“, which had previously been special courts, were transformed into a special criminal division at the district courts. This division was occupied with three professional judges and the number of additional lay judges was reduced from six to two. Even today, the term “Schwurgericht” is commonly used.

Reviewing the more recent history of reforms in criminal procedure, many debates discussing the purpose and the objectives of citizens participating in

criminal trials can be found. Despite the concerns that critics raised, the legislator never abolished lay participation. Therefore, today, the influence of lay judges is an integral part of criminal proceedings in Germany.

III　The Current Lay Judge System in Germany

After this brief historical summary of the German lay judge system, an analysis of the statutes currently governing this system is essential. I will begin by outlining lay participation in various branches of the judiciary.(2)

1. Areas of Lay Judge Service

Lay judges provide services in each of the specialized branches of the German judiciary, which comprise the Ordinary, including civil as well as criminal, labour, administrative, social and fiscal jurisdictions. They exist side by side, and each has its own Federal Court. The Federal Constitutional Court or the Constitutional Courts of the individual states [Bundesländer] are not included in the following analysis.

When talking about lay participation in specialized courts, a distinction has to be made between lay persons, who are recruited from the general public and are thus considered as its representatives, and those who are selected due to specific professional or social characteristics. Lay judges participating in administrative or fiscal proceedings are belonging to the first group of lay participants. In contrast, lay judges in labour and social courts are selected on the grounds of which interests they represent. In proceedings before a Labour court, two lay judges are appointed, of whom one is affiliated to the employee side and the other is an employer representative. This principle is

---

（2）　See for an overview *Rönnau*, JuS 2016, pp. 500, 501 et seqq.

also reflected in the selection for social courts in the sense that the lay judges are recruited from groups representing distinct interests. This form of "lay participation with equal representation" is exercised up to the highest social and labour courts on the federal level, namely the Federal Labour Court and the Federal Social Court. However, with the exception of some panels dealing with cases concerning professional conduct, the highest federal court of the ordinary jurisdiction (Federal Court of Justice), the administrative jurisdiction (Federal Administrative Court) and the fiscal jurisdiction (Federal Fiscal Court) have no lay participation.

As mentioned above, the ordinary jurisdiction comprises the criminal and the civil jurisdiction. Before dealing with the issue of lay judges in criminal proceedings, I would like to introduce you to a form of lay participation, which is unique to civil proceedings in Germany: the "commercial judge". He works for the Commercial Divisions at Civil Courts. Since the law provides that only citizens with a certain professional background are eligible for this position — for example a merchant, a board member, a manager of a legal person or an authorized officer —, these legally untrained professionals can be seen as lay judges with expert knowledge. In the ordinary jurisdiction "commercial judges" are the only lay judges wearing a black robe during the court hearing.

2. Participation of „Schöffen" in Criminal Proceedings

Given the various forms of lay participation and the different judicial branches, it is no surprise that there is no unified set of statutes governing lay participation. The four following Acts primarily regulate lay participation in criminal proceedings: the Judicature Act, the Code of Criminal Procedure, the Juvenile Court Act and the Judiciary Act.

(1) Criminal Proceedings with „Schöffen“

A. Different Types and Different Tasks

The term „Schöffe“ refers to legally untrained citizens participating in criminal proceedings as lay judges. The selection requirements for this honorary post differ depending on whether criminal proceedings are initiated against an adult or against a juvenile. When dealing with a juvenile defendant, “Schöffen” must have special characteristics. To be eligible, candidates must be “qualified and experienced in educating juveniles”. In an ordinary criminal trial, lay judges are not allowed to have any legal qualifications or particular specialisation.

With regard to their function in a criminal trial, the German legal system codified three different types of “Schöffen”. The basic form of a lay judge, taking part in all court sessions of a criminal trial, is called principle lay judge. On January 1, 2014 some 37,000 principle lay judges were registered in Germany.(3) Additionally, there are auxiliary lay judges, who replace principle lay judges, if these are not available for their post, for example due to a change of residence or serious illness. Thirdly, at the beginning of larger criminal proceedings, a presiding judge can appoint additional lay judges. They can replace principle lay judges in ongoing criminal proceedings and thereby prevent an ongoing criminal trial — that has lasted for weeks or even months — from it having to be terminated.

B. Lay Judges and their Actual Area of Service

To correctly assess the importance of lay judges in criminal proceedings, it is necessary to define their actual area of service. In general, lay participation in Germany — as shown in the brief overview of its history — has decreased over the years. Today, the legally envisaged sphere of lay participation in

---

（３） Lay judge statistics of the Bundesamt für Justiz (Federal Office of Justice) available at http://tinyurl.com/gpmrzr6; last access date of website: 5 April 2017.

criminal trials can be outlined as follows:

Neither the criminal divisions of Higher Regional Courts, which serve as courts of first instance in cases of crimes against the state, nor criminal panels at the Federal Court of Justice are staffed with lay judges. Furthermore, "Schöffen" are not involved in criminal proceedings where the investigation proceedings do not lead to a main trial because (i) the proceedings were suspended (ii) they ended with an order of summary punishment or (iii) they deal with a complaint, on which only professional judges decide. Finally — and notably — single judges at a local court decide on minor offenses without lay participation; according to statistics for 2014 this applies to roughly 70% of all cases, brought to court. To give you a number for lay participation: Statistical findings for 2014 show that "Schöffen" only participated in approximately 20% of all criminal trials, which lead to a main trial.(4) As regards the quality of the offences, lay judges mostly deal with serious crimes and those of medium gravity.

C. Competence and Composition of Criminal Courts

For most cases, either Local Courts or Regional Courts serve as the courts of first instance in criminal proceedings. If the prosecution brings a criminal case before a local court, the so-called "Schöffengericht" is competent for proceedings concerning crimes of medium gravity (including white-collar crime). In this context, if a crime is defined as being of "medium gravity", the

(4) In 2014 669.123 criminal proceedings have been settled by German „Amtsgerichte" (Local Courts). In total, i.e. adding the proceedings at the German „Landgerichte" (Regional Courts) and „Oberlandesgerichte" (Higher Regional Court) in the first or appeal instance, 730.956 criminal proceedings have been settled in that year (Fachserie 10, Reihe 2.3, 2014 of the Statistisches Bundesamt [Federal Statistical Office], Strafgerichte [criminal courts], pp. 12 et seq., 50 et seq. and 100 et seq.). Lay judges were involved in 137.615 of those proceedings. That is a quote of 20%. Proceedings at the "BGH" (Federal Court of Justice) are not considered in this statistic.

prosecution expects a custodial sentence of two to four years. Normally, a "Schöffengericht" at a local court consists of a professional judge and two "Schöffen". In exceptional cases of a very complex nature an additional professional judge participates, forming an "erweitertes Schöffengericht" (Extended Bench).

If a regional court serves as the court of first instance, each All division is staffed with lay judges and lay persons are always involved. The Große Strafkammer (Grand Criminal Chamber) is responsible for serious crimes, (i) for which the prosecution expects a custodial sentence of more than four years or (ii) for which the defendant is at risk of being admitted to a psychiatric hospital. The Grand Criminal Chamber — even when operating as a "Schwurgericht" — is comprised of three professional judges and two "Schöffen". In some situations, the number of professional judges is reduced to two.

Unlike in Japan, "Schöffen" also participate in appellate instances: the Kleine Strafkammer (Small Criminal Chamber) at the Regional Court hears appeals on fact and law against decisions handed down by single judges or the "Schöffengericht". Usually this Chamber consists of a single judge and two citizens. If a decision of the "erweitertes Schöffengericht" is appealed on facts and law, an additional judge assists.

(2) Selection and Appointment of „Schöffen“

With regard to recruitment and appointment of „Schöffen“, I will just outline a few facts: In general, all German citizens are subject to the legal duty to participate in a criminal trial. The election process has multiple stages, on which I will not elaborate for reasons of time. Afterwards, the selected citizens are appointed to a specific criminal trial. Their period of office is five years. Until they reach the statutory retirement age, citizens can be appointed several times.

(3) The Procedural Role of "Schöffen"

In the following, I will outline the procedural role of "Schöffen" in criminal proceedings. Let us first look at the rights.

A. Rights

Lay participation is limited to the main trial, which begins with the calling of the case and ends with the pronouncement of the judgment. In forming an opinion on the case and rendering judgment, "Schöffen" — just as professional judges — are independent and only bound by the law. It is noteworthy that lay judges do not draft or sign the judgment. During the main trial, lay judges have almost the same procedural position and the same voting rights; together with the professional judges they decide on the conviction and on the sentence. In addition, lay judges participate in court decisions and orders, which are unrelated to the final judgment (for example the use of coercive measures against defendants, witnesses or expert witnesses or preventive measures in court). Usually, a court's decision requires an absolute majority of all votes. However, a two-thirds majority has to support any decision, which is detrimental to the defendant and concerns the conviction or other legal consequences. Therefore, in proceedings before a "Schöffengericht" or before a small criminal chamber at a regional court, two lay judges can overrule the presiding judge.

In a trial before a grand criminal chamber at a regional court, the influence of lay participation is smaller, since this division is composed of three professional judges and two lay judges. The two lay judges are only able to form a blocking minority, as for a quorum of two-thirds one of them has to support a judgment ordering a conviction. In the event of a tied vote, lay judges cannot prevent an acquittal. In this scenario, the vote of the presiding judge tips the scale. To reduce the influence exerted by the professional judge to a minimum, the lay judges vote first. If only one professional judge is

on the panel, or if one of the professional judges functions as a reporting judge, this judge initially makes a proposal, after which the lay judges cast their votes, followed by the presiding judge in the final position.

„Schöffen“ are, in the same way as associate judges, equally entitled to address questions to defendants, witnesses or expert witnesses. However, the presiding judge has the authority to reject their questions if they are inappropriate or unrelated to the case at hand. In practice, it is very common that the presiding judge introduces lay judges to the relevant issues of a court hearing and informs about the expected duration. The issue as to whether lay judges, just as their professional counterparts, are to be granted access to the court records or case files, or may even be entitled to do so, is a subject of great controversy. This issue will be briefly addressed at a later point. I will now proceed with the overview of the rights and duties of "Schöffen".

Being appointed to participate in a criminal trial as a "Schöffe" is an honorary post, which the recruited citizen cannot normally refuse. To protect employed citizens from a conflict of interests, employers are legally bound to release them in order to meet this legal obligation. In addition, the relevant law provides that this leave may not entail any professional disadvantage. With regard to money, "Schöffen" receive (one has to say, a rather small) compensation for their expenses and for their loss of earnings.

B. Duties

In a nutshell, the duties of „Schöffen“ consist of the following: Citizens are only eligible if they speak and understand German. Prior to taking up their duties in a public court session, "Schöffen" have to take an oath. Moreover, "Schöffen" are obliged to schedule their professional and private commitments in a way that allows them to attend all court sessions. On average, a lay judge has to attend twelve court sessions per year. However, complex criminal

proceedings are far more time-consuming. In particular, this applies to proceedings brought before the grand criminal chambers of regional courts. To account for serious conflicts of interest, the presiding judge can release "Schöffen" from their obligation to attend certain court sessions. However, it must be noted that this is only the case if substantial obstacles prevent him from being present. If "Schöffen" miss a court session without being excused, the presiding judge is authorised to impose an administrative fine. After the pronouncement of the judgment, "Schöffen" — just as professional judges — are legally bound to maintain confidentiality about the deliberations of the court and the voting. A violation of this duty does not merely constitute a disciplinary offence. It is a criminal act.

(4) Controversial Issues of Lay Participation in Criminal Trials

After this brief overview of the legal framework governing lay participation in Germany, I must emphasize that not each legal provision is put into practice. In particular, with regard to the rights of lay judges and their practical application, many critics have detected a major discrepancy between law on paper and law in action.(5) In the following section, I will address in detail some specific problematic areas apparent in the recent history of lay participation in German criminal proceedings. Subsequently, we will look at fundamental issues of the current model.

A. Practical Difficulties — Compatibility of the Duties of „Schöffen" with professional occupation

First, I would like to address a practical issue. Persons, who are appointed as "Schöffen", often face difficulties to comply with the duties of this position

---

(5) In contradiction to many others *Hillenkamp*, in: FS Kaiser, Berlin 1998, pp. 1437 et seqq. (who criticises the deficient participation of lay judges in comparison to professional judges); for further problem areas see *Lilie*, in: FS Riess, Berlin et al. 2002, pp. 303, 306 et seqq.

and those of their vocation. Employers often react displeased when their employees take frequent leave to attend court sessions; note that a larger criminal trial with two court sessions per week can take weeks, months or even years. In some cases, employers even react with dismissal of their employees. As I have previously mentioned, the law provides that the appointment as "Schöffe" may not be the cause for any professional disadvantage. That is why a dismissal based on this cause is illegal (§ 45 para. 1a DRiG).(6) Nevertheless, stressful situations of this kind and other conflicts of interest — for example caring for younger children or elderly family members — can quickly become an insupportable burden under these circumstances.(7) Under the current statutes governing lay judges, there are — if any — two possible ways to avoid these conflicts: first, the presiding judge can make a flexible use of his authority to release "Schöffen" from their obligation to attend certain court sessions. Secondly, in some cases it can also be an option to interrupt the main trial.

B. Necessity of Additional Requirements for the Eligibility?

Academics and legal practitioners have increasingly demanded stricter requirements concerning the eligibility of lay judges. A judgment of the Federal Constitutional Court in a labour-law case kickstarted a debate on whether lay judges must be loyal to the Constitution. The court ruled that they must be allegiant and emphasized that they — just as professional judges — are serving the state's judiciary.(8) However, applying this ruling to lay judges in criminal proceedings is not convincing, as it is not possible to

---

(6) For scenarios and relevant case law see SK-StPO/*Degener*, 4th ed. 2013, § 54 GVG recitals 6 et seq.; LR/*Gittermann*, 26th ed. 2010, § 54 GVG recitals 8 et seq.

(7) See for an overview SK-StPO/*Degener*, § 31 GVG recitals 6 et seqq.

(8) BVerfG NJW 2008, p. 2568; approving: LR/*Gittermann*, § 31 GVG recital 17; *Anger*, NJW 2008, pp. 3041, 3043 et seq. (demanding that § 32 GVG should be amended).

add further criteria to the set that defines inability or incapacity for service. Nevertheless, if a lay judge's conduct is of a nature, which merits protection of specifically affected parties, the situation can be remedied by applying partiality regulations.(9) Furthermore, if illegal symbols are displayed in court the judge may order police measures (§ 176 GVG) as a remedy.(10)

On several occasions, controversy erupted regarding the question as to whether restrictions should be applied to their outward appearance, for example a headscarf as a religious item of clothing.(11) The regulations governing potential exceptions for admissibility (§§ 32 ff. GVG) are of no assistance in cases, which fall within the scope of constitutionally protected rights such as personal or religious freedom (Art. 2 para. 1, para. 2, 4 para. 1, para. 2 GG). Only the previously mentioned general instruments are of help.(12)

Where lay judges are to participate in complex and difficult cases of white-collar crime, the particular issue of whether these persons require additional

(9) Convincing SK-StPO/*Degener*, § 31 GVG recitals 7 et seq. (pointing out that the legislative materials of § 51 GVG [removal from office], which has been added in 2011, name the lack of loyalty to the constitution an example for a "gröbliche Verletzung von Schöffenpflichten" (gross violation of duties), see BR-Drs. 539/10, p. 21); similarly *Mayer*, in: Kissel/Mayer, GVG, 8th ed. 2015, § 31 recital 13, § 51 recital 3.

(10) See *Bader*, NJW 2007, p. 2964, 2965 with further references.

(11) *For* a suspension of a female lay judge wearing a headscarf LG Dortmund NJW 2007, p. 3013 (relevant: §§ 32, 52, 176 GVG); *against* it LG Bielefeld NJW 2007, pp. 3014 et seq.; KG StraFo 2013, pp. 164 et seq.; *Bader*, NJW 2007, pp. 2964 et seqq.; *Buggert*, StrRR 2008, pp. 44, 47 et seqq.; *Groh*, NVwZ 2006, p. 1023, 1026. If wearing a full-body veil makes the lay judge unrecognisable, the presiding judge is obliged to intervene, see only *Bader* (l.c.), p. 2965; *Schmitt*, in: Meyer-Goßner/Schmitt, StPO, 59th ed. 2016, § 52 GVG recital 1.

(12) See SK-StPO/*Degener*, § 32 GVG recital 9; more detailed *Bader*, NJW 2007, p. 2964, 2965; *Buggert*, StRR 2008, pp. 44, 47 et seqq.; *Groh*, NVwZ 2006, p. 1023, 1026; in-depth *B. Kretschmer*, Schöffin mit Kopftuch: Persona non grata?, Berlin et al. 2007.

abilities in order to be eligible for service gains particular relevance. Here, the question arises if, as a prerequisite for their participatory role as an informed agent of the state's judiciary with equal voting rights to a professional judge, additional skills or experience in economics might be necessary. The German legal system provides many examples of "lay judges with expertise", take, for example, the "commercial judge" (§ 109 GVG), the special form of lay participation in juvenile criminal proceedings (§ 35 JGG) or the honorary judge in the chamber of agriculture (§ 3 LwVG). There is a widespread belief that inexperienced lay judges feel overwhelmed by the complexity of the subject matter addressed in white-collar crime cases, in particular with regard to tax offences.(13) Thus, they often tend to react blindly and merely concur with the professional judges reasoning. This issue could be resolved in two ways: First, the rules granting Higher Regional Courts to serve as the first instance and without lay judges, could be extended to complex cases of white-collar crime.(14) This is justifiable given the greater importance typically attributed to these cases, but also due to the fact that the criminal justice system is required to demonstrate the necessary extent of tact when dealing with (economically, politically and socially) sensitive issues. In awarding the Higher Regional Court to act as the first instance (see § 120 GVG), the legislator considered this line of reasoning for trials investigating corruption committed by elected representatives. One could also argue that the parliament willfully set a rather high threshold for bringing charges against one of its members.

As a second approach to tackle this issue, the legislature could introduce

(13) *Többens*, NStZ 2000, p. 505, 512; LR/*Gittermann*, § 31 GVG recital 14; SK-StPO/*Degener*, § 31 GVG recital 10; *Groschupf*, DRiZ 2013, p. 314, 315.

(14) Discussed and discarded by *Katholnigg*, wistra 1982, pp. 91, 93 et seq., who lists important reservations about waiving lay judges in white-collar cases (§ 74c GVG) on pp. 94 et seq.

the requirement that only "lay judges with expertise pertaining to the white-collar crime at hand" are eligible. Implementing this would mean, for example, that only people with professional experience such as accountants or tax advisers would serve as lay judges in such cases.(15) However, under the current statutes governing the compensation of lay judges, this solution would impose a serious and in some cases unbearable burden on these specialists, since these proceedings are generally very time-consuming.(16)

C. Are „Schöffen" allowed to inspect the court records?

The question whether "Schöffen" are allowed to inspect the court records has been a subject of controversy for many years,(17) with judges denying this

(15) Demanded by *Rüping*, JR 1976, p. 269, 274; *Benz* (above, footnote 1), pp. 217 et seq.; *Többens*, NStZ 2000, p. 505, 512; *Takayama/Tröster*, ZJapanR 2002, p. 195, 207; *Zwiehoff*, in: H.P. Marutschke (editor), Laienrichter in Japan, Deutschland und Europa, 2006, pp. 32, 42 et seq.; SK-StPO/*Degener*, § 31 GVG recital 10; LR/*Gittermann*, § 31 GVG recital 14. The „Europäische Charta der ehrenamtlichen Richter" (European Charta for lay judges) has been signed by 17 European professional associations in 2012 with the aim to strengthen the expertise of lay judges, see http://www.lto.de/recht/hintergruende/h/europaeische-charta-der-ehrenamtlichen-richter-unterzeichnet/; last access date of website: 5 April 2017.

(16) The use of specialised lay judges cannot be justified by pointing out that in civil procedures commercial judges are used because the importance of orality is very different between both types of procedures. In the few oral proceedings taking place before the chamber of commerce, most of the arguments are read out loud from typesets. For more arguments against the use of specialised commercial lay judges — i.e. overlong trials, distrust, no representation of the people, expert witnesses working *in* instead of *for* the court — *Katholnigg*, wistra 1982, pp. 91, 93 et seq., *Linkenheil*, Laienbeteiligung an der Strafjustiz, 2003, pp. 219 et seq., *Volk*, in: FS Dünnebier, p. 373, 386; *Jäger*, in: Leblois-Happe/Stuckenberg (editor), Was wird aus der Hauptverhandlung?, 4. Deutsch-Französische Strafrechtstagung, 2014, p. 251, 261; *Baur*, in: FS Kern, 1968, p. 49, 58.

(17) For an outline of the discussion see for example *Hillenkamp*, in: FS Kaiser, pp. 1437, 1443 et seqq., LR/*Gittermann*, § 30 recitals 4 et seqq., *Nowak*, JR 2006, pp. 459 et seqq., *Spona*, Laienbeteiligung im Strafverfahren, Frankfurt a.M. et al. 2000, pp. 101 et seqq. and *Lieber* (above, footnote 1), pp. 269 et seqq.

right for equally long. They did so by invoking that if lay judges viewed the court records before or during the trial, it is more likely that they would find the defendant guilty. This would be the case as the documentation of investigations was written from a one-sided perspective and could thus create preconceptions which participation in the trial would fail to alter. This effect would constitute a violation of the principle that a judge should primarily arrive at a conclusion on the basis of the trial and on the oral testimony given in court sessions. Pursuant to Section 261 of the Code of Criminal Procedure, the judgment must only be based on the subject matter of the main trial.(18) As long as certain information, especially incriminating evidence, was not admitted to the criminal proceedings, "Schöffen" are not allowed to include it in their deliberations.(19) Thus, it could be inferred that this reasoning would also apply to professional judges. However, two main arguments are used to justify their right to fully access the records: First, professional judges — in particular, presiding judges — have to prepare and manage the main trial.(20) Second, it is argued that their legal education as well as their professional experience would allow them to differentiate between information, which they gathered from their study of the court records, and information derived from their participation in the main trial(21). Lay judges, however, are not trusted with this challenging task. It is feared

---

(18)　Fundamentally RGSt 69, p. 120, 122.

(19)　See for the development of the jurisdiction as well as arguments LR/*Gittermann*, § 30 GVG recitals 4, 6; SK-StPO/*Degener*, § 30 GVG recitals 7 et seqq.; *Ellbogen*, DRiZ 2010, pp. 136 et seq.; *Krüger*, in: FS Schünemann, Berlin et al. 2014, pp. 915, 916 et seq.

(20)　See for details concerning the duty of professional judges to know the case files for the main trial RGSt 40, pp. 155, 156 et seq.; RG GA 62 (1916), pp. 154, 155 et seq.; also BGHSt 21, pp. 285, 286 et seq.; furthermore *Benz* (above, footnote 1), p. 79; *Linkenheil* (above, footnote 16), p. 147.

(21)　See RGSt 69, p. 120, 124; BGHSt 5, p. 261, 262; 13, pp. 73, 74 et seq.

that an untrained person would confuse the different sources of information — namely court records, introduction to the case by the presiding judge and participation in the main trial — and thereby gain a wrong impression of the defendant and/or the body of evidence, which could prejudice his judgment.(22)

At an early stage, many scholars expressed criticism against this argumentation.(23) Nowadays, criticism of the unequal treatment of lay judges and their professional counterparts has largely prevailed and is characterized as patronizing and demeaning towards lay judges in criminal proceedings.(24) They emphasize that lay judges exercise the position of a judge to its full extent and enjoy the same voting rights (see § 30 para. 1 GVG). Without insight into the court records lay judges were not able to entirely live up to their procedural role.(25) Especially in complex proceedings, this knowledge would help them understand and evaluate the issue of the main trial, and thereby allow them to responsibly use their right to ask questions.(26) As of yet, lay judges most often functioned as court witnesses. Therefore, critics claim: the equality in deciding on the issue of guilt should extend to the equality regarding rights to information.(27)

(22) RGSt 69, p. 120, 124; for further proof see KK-StPO/*Barthe*, 7th ed. 2013, § 30 GVG recital 2.

(23) With criticism LR/*Gittermann*, § 30 GVG recital 5.

(24) *Schreiber*, in: FS Welzel, 1974, pp. 941, 949 et seqq.; LR/*Gittermann*, § 30 GVG recital 8; *Satzger*, Jura 2011, pp. 518, 523 et seq.; for further references see *Lieber* (above, footnote 1), p. 269 with footnote 406.

(25) „Equal and even participation" in the process of establishing the truth and reaching a verdict is inconceivable without equal knowledge according to *Kemmer*, Befangenheit von Schöffen durch Aktenkenntnis?, Frankfurt a.M. et al. 1989, pp. 165 et seqq., 169; *Hillenkamp*, in: FS Kaiser, p. 1437, 1456.

(26) It is considered fairly risky if the right to ask questions is not filtered by the presiding judge, because a lay judge could thoughtlessly ask a question that ends the whole trial due to partiality (e. g.: "Can you tell us why you punched the old lady?"); on this practice see *Groschupf*, DRiZ 2013, p. 314, 315.

(27) *Hillenkamp*, in: FS Kaiser, pp. 1437, 1443 et seqq. For further pro-arguments

Partly, the recent jurisprudence has reacted to this criticism. For example it grants “Schöffen” access to the files — yet with clearly defined limitations. Now, it is accepted that after the accusation is presented in court, “Schöffen” are allowed to read the first part of the court records, namely the accusation and the main facts supporting it; but not the entire court records. Due to the fact that this part does not contain an assessment of evidence, it would not constitute knowledge of the files gained in advance to the trial.(28)

However, the courts did not — and should not! — entirely adopt the opinion prevalent among academics. There are several arguments for imposing restrictions on the lay judges' right to view the court records. It is indisputable that professional judges, who are experienced in court disputes, have a larger extent of structural influence than lay judges do. In addition, the status quo augments this inequality, since it only grants professional judges access to the files.(29) However, any attempt to eliminate this imbalance by granting lay judges this right would expose them to what is referred to as the “inertia and perseverance effect”.(30) To put it simple: Prior to a main trial,

---

see LR/*Gittermann*, § 30 GVG recital 8; *Lieber* (above, footnote 1), pp. 270 et seqq.

(28)　See BGHSt — G5 — 56, p. 109, 118 recital 28 (with further references): It is not considered a problem if the indictment is given to the lay judge; the ECtHR (NJW 2009, p. 2871) didn't consider this a violation of the fair-trial principle. Pursuant to Nr. 126 III 2 RiStBV a lay judge can get access to a transcript of the indictment during the main trial. For some pragmatic approaches in the practical application see LR/*Gittermann*, § 30 GVG recital 9.

(29)　In contradiction to many others *Roxin/Schünemann*, Strafverfahrensrecht, 28th ed. 2014, § 6 recital 17; *Hillenkamp*, in: FS Kaiser, pp. 1437, 1456 et seqq.; *Lilie*, in: FS Riess, pp. 303, 310 et seqq.; *Lieber* (above, footnote 1), p. 283. Describing a risk of lay judges becoming mere extras without knowing the court records BGHSt 43, p. 36, 40.

(30)　On the inertia and perseverance effect see e. g. *Schünemann*, StV 2000, pp. 159, 160 et seqq. and *Haisch*, MschrKrim 1979, 157 et seqq. — both with further references.

the judge reads the one-sided description of a case in the files, which mainly reflect the police investigation. Further, he himself initiated the trial, which requires him to be convinced of a strong likelihood of a conviction. Academics argue that psychological effects induce judges to maintain this first, incriminating view. Exposing lay judges to these mechanism, would entail the loss of the biggest advantage of their participation: a view on the case that is (i) neither influenced by legal training (ii) nor by documents written by the police and composed by the prosecution.(31)

In addition, one could argue that the main argument for lay judges is that their perception of the case is limited to the main trial. Hence, lay participation functions as a means to guarantee accordance with the fundamental principles of immediacy and oral testimony that define criminal proceedings in Germany.(32) This guarantee is provided by the fact that lay judges are the only participants in a criminal trial who — precisely within the meaning of Section 261 of the Code of Criminal Procedure — render their judgment on the basis of nothing else than their own attendance of and participation in the trial. When discussing the verdict, their restricted knowledge can function as an important corrective of the views taken by the professional judges.(33) Most proponents advocating an open access policy do not elaborate on the consequences of their view.(34) Their proposal gives rise to organizational

(31) *Schünemann*, StV 2000, p. 159, 164; approving *Börner*, ZStW 122 (2010), p. 157, 158; *Eser*, in: Kroeschell/Cordes (editors), Vom nationalen zum transnationalen Recht, 1995, pp. 161, 176 et seq.; SK-StPO/*Degener*, § 30 GVG recital 17.

(32) Accurately *Börner*, ZStW 122 (2010), pp. 157, 158, 187 et seqq.; *the same*, StraFo 2012, p. 434, 439; *Lundmark/Winter*, ZfRV 2010, p. 173, 183; *Lieber* (above, footnote 1), p. 320; *Burgstaller*, JBl. 2006, p. 69, 71 (concerning Austrian jury courts).

(33) See *Eser* (above, footnote 31), pp. 161, 176 et seq.; SK-StPO/*Degener*, § 30 GVG recital 19.

(34) Correctly *Börner*, ZStW 122 (2010), pp. 157, 181 et seqq.; short *Kemmer*

and procedural questions; for example, access to the files, allocation of time for reading, adjustment of the rules regarding compensation. The importance of these unanswered aspects would increase significantly if "Schöffen" were obliged to immerse themselves in the court records.(35)

D. Are Lay Judges to Review a Detention Order, if the Main Trial is Interrupted?

Finally, I will only mention another critical point concerning the extent of lay participation in the main trial. It is highly controversial whether "Schöffen" should participate in reviewing detention orders for defendants in the event that the main trial had started, but was then interrupted.(36) It is in my view favorable to make such decisions quickly, and thus without lay participation.

IV　Lay Participation in Criminal Trials Put to the Test

Although lay judges in criminal proceedings have a long tradition in Germany and although their participation is enshrined in the current statutes governing criminal proceedings, it has always been and remains to be subject to criticism. The contemporary discussion merges statements emanating from the domains of politics, sociology and law. Ardent supporters(37) as well

---

(above, footnote 25), pp. 215 et seq.; *Ellbogen*, DRiZ 2010, p. 136, 139.

(35)　Even the proponents of a right for lay judges to view the court records do not want that (e. g. *Rüping*, JR 1976, p. 269, 272). But does a lack of interest in the (possible) view of the trial files then implicate partiality? (to that *Börner*, ZStW 122 [2010], p. 157, 185).

(36)　Thereto with further references *Rönnau*, GS Edda Weßlau, Berlin 2016, pp. 293, 301 et seq.

(37)　See e. g. *H. Jung*, in: FS 150 Jahre Landgericht Saarbrücken, Köln et al. 1985, pp. 377 et seqq.; *the same*, in: FS Kühne, Heidelberg et al. 2013, pp. 251 et seqq. and *Eser* (above, footnote 31), pp. 161, 180 et seqq.

as harsh critics demanding the abolition of lay participation(38) engage in the debate on the merits and the use of lay participation in a criminal trial. Most statements on this subject are in favor of lay participation as such, but suggest that certain details of the current model require improvement.(39) Famous historical representatives can be listed for all sides of the argument. Philosophers, sociologists and writers took part in the debate. The interdisciplinary statements reflect the interdisciplinary nature of the topic. To name just a few of the prominent participants in the debate: At the beginning of the 20th century, *Radbruch* supported the use of lay judges with his frequently cited statement "One gram of legal expertise, but a hundredweight of insight into human nature!".(40) In contrast, in 1812 *Feuerbach*, who was referring to the jury trial, was skeptical about lay participation for several reasons. He criticized the risk of manipulating lay judges and highlighted the expertise of a professional and legally trained judge. In addition, *Feuerbach* argued that a strict separation of factual and legal questions would be unfeasible.(41) In 1876, *Binding* completely opposed any

(38) Vehement opponents of the lay judge system are *Volk*, in: FS Dünnebier, 1982, pp. 373 et seqq., 389; *the same*, ZRP 1985, p. 63; *the same/Engländer*, StPO, 8th ed. 2013, § 5 recital 15; *Kühne*, ZRP 1985, pp. 237 et seqq.; LR/*the same*, 26th ed. 2006, Einl. sec. J recitals 29 et seq.; *the same*, in: FS Amelung, Berlin 2009, pp. 657 et seqq., 667; *the same*, StPO, 9th ed. 2015, § 5 recital 117; *Duttge*, JR 2006, pp. 358, 359 et seqq.; *the same*, in: GS Dedes, Athen 2013, pp. 53 et seqq., 72; further references in footnote 56.

(39) In contradiction to many others *Hillenkamp*, in: FS Kaiser, pp. 1437 et seqq.; *Benz* (above, footnote 1), pp. 1999 et seqq.; *Rennig*, Die Entscheidungsfindung durch Schöffen und Berufsrichter in rechtlicher und psychologischer Sicht, Marburg 1993, pp. 578 et seqq.; *Machura*, Fairneß und Legitimität, Baden-Baden 2001, pp. 299 et seqq.; *Lieber* (above, footnote 1), pp. 266 et seqq., 362 et seqq.; *Linkenheil* (above, footnote 16), pp. 203 et seqq.; *Andoor*, Laien in der Strafrechtsprechung, Berlin 2013, pp. 109 et seqq.

(40) Quote from *Lilie*, in: FS Riess, p. 303.

(41) *Feuerbach*, Betrachtungen über das Geschworenengericht, Landshut 1813, pp.

element of lay participation by saying: "I will not sacrifice anything to this false god of our time!"(42) Finally, *Max Weber*, a famous sociologist and a prominent opponent of lay participation, must be heard. In 1922, he compared the administration of justice by legally untrained citizens to an ancient and irrational oracle.(43)

To sum it up: In the last 200 years, a colorful panorama of views on lay participation in criminal proceedings developed; of course, each facet must be interpreted with respect to its time and origin. Prior to expressing my view on lay participation as such, I would like to introduce you to the key arguments on both sides of the debate.

1. (Key-) Arguments of Proponents

There are three key arguments, which proponents frequently cite in support of the participation of citizens in the judiciary, all of which are interlinked.(44)

The constitution derives lay participation from the principle of democracy. Specifically it does so from the principle of the people's sovereignty, which

---

190 et seqq., 169 et seqq.

(42) *Binding*, Die drei Grundfragen der Organisation des Strafgerichts. Für Juristen und Nichtjuristen gestellt und beantwortet, Leipzig 1876, p. 46

(43) *Max Weber*, Wirtschaft und Gesellschaft, Tübingen 1922, p. 511.

(44) For the classic allocation of the arguments see *H. Jung*, in: FS 150 Jahre Landgericht Saarbrücken, pp. 317, 320 et seq. (in reaction to *Volk*, in: FS Dünnebier, pp. 373 et seqq.); sharpened by *Kühne*, ZRP 1985, p. 237 et seq.; *the same*, StPO, § 5 recital 117; taken up by *Linkenheil* (above, footnote 16), pp. 179 et seqq.; *Takayama/Tröster*, ZJapanR 2002, pp. 195, 202 et seq.; *Duttge*, JR 2006, p. 358, 361; *Andoor* (above, footnote 39), pp. 62 et seqq.; in the same direction *Lieber* (above, footnote 1), pp. 304 et seqq.; see also the answer of the German Bundesregierung (Federal Government) to a minor inquiry by the parliamentary group of the FDP from the year 2004, BT-Drs. 15/3191, 26 May 2004, pp. 1 et seqq. In the following, individual verifications of particular arguments are not made.

basically states: “All State power emanates from the people” (Art. 20 II 1 GG). Viewed historically, the main reason to introduce lay judges was to control professional judges, who were materially and personally dependent civil servants of the state. Further, a new perspective was to influence jurisprudence, mainly shaped by professional judges with a specific social background and status. The integration of ordinary people was to add their view to judicial proceedings. Today, (i) under the reign of a democratic Parliament, (ii) with all the safeguards the German Constitution provides, namely basic rights and procedural requirements, and (iii) with the profession of a judge, being opened to all sectors of the population, lay participation can hardly be justified with distrust towards professional judges or towards the state.(45) However, due to the principle of judiciary independence professional judges are excluded from parliamentary control although the parliament is the only state organ legitimized by the population through general elections. Emphasizing this lack of direct control, some academics argue that it is appropriate that citizens at least participate in the judicial branch and thereby legitimize and control this state power.(46) Others deduct the necessity of lay participation from a general principle of citizen's participation in all governmental powers. Following this line of reasoning, the participation of a lay judge is a special manifestation of this idea, put to practice in the judicature.(47) Only this line of reasoning could justify why — according to the preamble of judgments in criminal cases — all courts judge “in the name of the people”.

Secondly, supporters claim that lay participation increases the quality of a

---

(45) In contradiction to many others *Linkenheil* (above, footnote 16), pp. 179 et seq., 191.

(46) *Andoor* (above, footnote 39), p. 180 with further references.

(47) *Kühne*, ZRP 1985, p. 237, 238; *Linkenheil* (above, footnote 16), p. 181.

judgment regarding its form and its outcome. This statement converges a very broad range of aspects and reasons used in support of lay participation. In keywords: proximity of the judiciary to the people, compliance with present virtues, adding a general legal sense to deliberations as well as quality and plausibility monitors. In particular, that is to say legally untrained citizens enrich deliberations by providing a platform for common sense and life experience.

Thirdly, supporters believe that lay participation has an educational effect for the public: Lay judges will tell their friends and acquaintances of their experience in court. Thereby, they become multipliers, (i) who increase the acceptance of the judiciary in the public, (ii) who improve the legal knowledge of the public and (iii) who contribute to the internalization of criminal statutes, which then, in turn, may have a general preventive deterrent effect.(48)

2. (Key-) Arguments of Opponents

The opponents do not agree with the supposed advantages of lay participation. Rather, they seek to deconstruct the myth of "Schöffen". They argue that when the stated advantages are put to a reality test, the conclusion is very sobering!(49)

Firstly, opponents emphasize that the Federal Constitutional Court never concluded that the constitutionally enshrined principle of democracy would force the state to integrate lay participation in the judiciary(50). Moreover, a

---

(48) See only *Andoor* (above, footnote 39), p. 64 with further references.

(49) Thereto in principle *Volk*, in: FS Dünnebier, pp. 373 et seqq.; *Kühne*, ZRP 1985, pp. 237 et seqq. and *Duttge*, JR 2006, pp. 358 et seqq. See for a list of contra-arguments *Linkenheil* (above, footnote 16), pp. 185 et seqq.

(50) See BVerfGE 14, p. 56, 73; 26, p. 186, 200; 27, pp. 312, 319 et seq.; 42, pp. 206, 208 et seq.; 48, p. 300, 317. Different *Grube*, Richter ohne Robe, Frankfurt a.M.

control over judges exercised by citizens was not essential anymore, since nowadays judges are mere citizens, who happen to occupy a post, which is open to everyone with the required education.(51) In addition, other participants and attendants of criminal proceedings would have an eye on the judiciary, namely the prosecution, the defense, appellate instances and the media. Further, it is scientifically proven that the selection of lay judges — mostly recruited from the middle layer of society(52) — does not truly reflect the composition of the population, making it difficult for the population to identify a lay judge as "one of ours".(53)

Secondly, opponents reject the view that it enhances judicial quality. Based on empirical findings, they argue that the influence of lay judges during a trial and the deliberations of the judgment was rather low. Lay judges would rarely ask elaborated questions or develop a view on the case differing from those of the professionals. The lack of legal skills and the discrepancy in knowledge about the case — manifested by the lack of insight into the court records — would hinder lay judges to live up to their endeavored role as a full member on the bench. Legally untrained citizens quickly encountered their limits when confronted with tasks such as sentencing or considering evidence. Furthermore, memories and prejudices would influence a lay judge more likely than a professional judge, since the latter was at least educated to

---

2005, pp. 71 et seqq., 88 et seq., who thinks that the German constitution guarantees lay judge participation in Art. 97 para. 1 GG.

(51) See *Kühne*, ZRP 1985, pp. 237 et seq.; *Duttge*, JR 2006, p. 358, 362; *Machura* (above, footnote 39), pp. 39 et seq. with further references; *Lieber* (above, footnote 1), pp. 332 et seq., 351.

(52) *Machura*, RohR 2000, p. 111, 112: „Mittelschicht ist krass überrepräsentiert" (the middle class is highly overrepresented); in the same direction *Spona* (above, footnote 17), p. 95.

(53) See *Villmow*, in: FS Pongratz, München 1986, p. 306, 318; also *Duttge*, JR 2006, p. 358, 362.

judge objectively.

In addition, the claimed general preventive deterrent effect would be a myth. Firstly, regarding the increasing complexity of legal statutes, legally untrained citizens were not capable to pass on their legal expertise — if they gained any — during the trial.(54) Secondly, due to their fractional knowledge of the law, former lay judges should not act as missionaries. Even if they could, there would be an insufficient numbers of lay judges to effectively heighten the population's legal awareness.(55) Finally, opponents point to the high costs of lay participation deriving from selection, appointment and compensation of lay judges(56) as well as from the higher risk that ongoing proceedings have to be ended or paused because of a lay judge.(57)

3. Position Statement

Now let us turn to the question of what we can learn from this lively debate about lay participation. In any case, opponents reason that there are no convincing arguments for lay participation. Thus, they describe it as "putting lipstick on a pig"(58), "democratic fig leaf"(59) or "social romanticism of the past

---

(54) Interpretations in connection with the results of the study by *Casper/Zeisel*, in: the same (editors), Der Laienrichter im Strafprozeß, 1979, pp. 80 et seqq.; *Rennig* (above, footnote 39), pp. 488 et seqq.; 529 et seqq., 573; *Machura* (above, footnote 39), pp. 228 et seqq., *Spona* (above, footnote 17), p. 125. For a more recent survey see *Glöckner/Dickert/Landsberg/Scholz/Schönfeldt*, Entscheidungsverhalten von Schöffen, Forschungsbericht, 2010, p. 18.

(55) For references see *Linkenheil* (above, footnote 16), pp. 190 et seq.

(56) E. g. *Baur*, in: FS Kern, pp. 49, 63 et seq.; *Duttge*, JR 2006, p. 358, 362; *the same*, in: GS Dedes, p. 53, 66; *Spona* (above, footnote 17), p. 131.

(57) Possible reasons for that are: complaints against the composition of court or about partiality, long-termdisease of a lay judge, drunk or sleeping lay judges (see *Lundmark/Winter*, ZfRV 2010, p. 173, 183; also *Lilie*, in: FS Riess, pp. 303, 307 et seq.).

(58) *Kühne*, ZRP 1985, p. 237, 239; with reference to the participation of jurors *Gerding*, Trial by Jury, Osnabrück 2007, p. 475.

century".(60) To take a stance on this matter is not easy, since opponents of the lay judge system have indeed pointed out many weaknesses in the reasoning of the proponents. Nevertheless, my conclusion regarding an overall evaluation of this concept is that lay judges should not be abandoned. The following are the strongest reasons for my conclusion:

Even if lay judges no longer constitute the bastion against judicial arbitrariness of former times, they do indeed contribute to legitimizing the judiciary in our contemporary democratic state.(61) Lay judges ensure that civil society is on guard when the state brandishes its sharpest sword — namely the imposition of criminal sanctions. The participation of citizens demonstrates that criminal proceedings are not only a state affair, but also a reaction of society, in which a lay judge participates on its behalf. Lay participation thereby strengthens the connection or at least constitutes a hinge between state and citizen. In times where citizens' opportunities to express their commitment to the state are becoming increasingly scarce — for example, the abolition of general military service in Germany(62) —, this could serve as an important symbolic opportunity. In this context, please

(59) *Duttge*, JR 2006, p. 358, 360 (terminologically following *Schreiber*, in: FS Welzel, p. 941, 953).

(60) *Volk/Engländer*, StPO, § 5 recital 15.

(61) The great majority of the proponents of lay judge participation believes it to still have a legitimizing effect for the judiciary, even though the reasoning varies; for more details concerning the realisation of the additional legitimization see *Lieber* (above, footnote 1), pp. 314 et seqq.; *Andoor* (above, footnote 39), pp. 109 et seqq.; *H. Jung*, in: FS Kühne, pp. 251, 256 et seqq.; *Linkenheil* (above, footnote 16), pp. 199 et seqq.; *Börner*, StraFo 2012, pp. 434, 436 et seqq.

(62) See also *Hettinger*, JoJZG 2011, p. 116, 122 (with a view to the abolition of the compulsory military service in Germany in 2011), approximately: the state is being stabilised from the inside if its citizens help to achieve national objectives. Furthermore, the participation of lay persons reduces power in a space where a lot of power is conglomerated.

bear in mind that, according to more recent studies, most of the citizens recruited for this post experience their legal duty as an honor and enrichment.(63) This does not mean to say that the current model of lay participation in criminal proceedings is perfect — there are several points that could be improved; for example, the pre-trial training of "Schöffen". In general, I am convinced that lay participation has the positive effects I have outlined.(64)

Moreover, lay participation has other positive consequences. It forces the professional judges and the appointed citizens to communicate.(65) This collaboration legitimizes the judiciary and prevents a process of alienation between the people and the law. The argument put forward by *Kern* that lay participation introduces public control to the judges' consultation room(66) is still relevant for our current legal system. The control exerted by lay judges reassures the public that even in this "black box", judges conduct themselves correctly and do things "by the book", meaning that a judgment is indeed the result of a fair process of deliberation and voting. Moreover, I am convinced

(63)　See *Machura*, RohR 2000, p. 111, 114. See the results of *Machura* ([above, footnote 39], pp. 209 et seqq., 218 et seqq., 253 et seqq.) who describes the cooperation between lay and professional judges as „fair"; in the same way *Glöckner* et al. (above, footnote 54), pp. 19 et seq., 24.

(64)　For propositions to improve the lay judge system see *Benz* (above, footnote 1), pp. 215 et seqq.; *Rennig* (above, footnote 39), pp. 578 et seqq.; *Linkenheil* (above, footnote 16), pp. 203 et seqq.; *Machura* (above, footnote 39), pp. 299 et seqq.

(65)　Vgl. *R. Kühne*, DRiZ 1975, pp. 390, 395 et seq.; *Linkenheil* (above, footnote 16), pp. 197 et seq.

(66)　*Kern*, Gerichtsverfassungsrecht, 4th ed. 1965, p. 115; consenting *Eb. Schmidt*, Lehrkommentar zur StPO und zum GVG, Teil I, 2nd ed. 1964, p. 316 recital 572 and *Jäger* (above, footnote 16), p. 251, 256. The double role of lay judges, however, is considered a problem: he or she is both a part of the judges and a representative of the people. One function can only be fulfilled at the expense of the other; therefore rather critical *Volk*, in: FS Dünnebier, p. 373, 377; in the same way *Lieber* (above, footnote 1), p. 324.

that lay participation has a disciplinary effect on professional judges: Although this would constitute a crime, professional judges may fear that impartial or unprofessional behavior could become public.(67) Therefore, the participation of lay judges induces them to carry out their duties in a very professional and convincing manner. This effect also prevents senior judges from becoming sloppy and from consistently arriving at judgments after treading the same "beaten track" of reasoning.(68)

Of course, one cannot deny that lay judges are structurally inferior to professional judges in proceedings based on the concept of an inquisitorial process. The latter are legally educated and have read the case files. Even if the lay judges had the same right to view these documents, this imbalance would remain.(69) However, these findings cannot lead to the conclusion that lay participation has no positive effects at all. Lay judges can bring other trial-relevant skills to the table. For example, they can be of great help, when it comes to sentencing. Here, the offender's personality has to be evaluated and factored in. This process is not only determined by questions of law, but is based on a complex consideration, in which lay judges can make use of their social and professional experiences.(70)

At first glance, the argument that the participation of legally untrained

---

(67) In the same direction *Andoor* (above, footnote 39), p. 113; *Hettinger*, JoJZG 2011, p. 116, 122 (lay judges as instruments to control and moderate the professional judges); in principle also *Jäger* (above, footnote 16), pp. 251, 256 et seq.

(68) In contradiction to many others *Börner*, StraFo 2012, p. 434, 438. On pp. 434 et seqq. the author emphasizes the meaning of the principle of „formality" in criminal proceedings and convincingly classifies lay judge participation as a part of legitimization through procedure. On the social psychological content of that concept *H. Jung*, in: FS Hassemer, Heidelberg 2010, pp. 73 et seqq.

(69) The ambivalence of a right for lay judges to inspect the court records has been pointed out above, see III 2. (4) C.

(70) See *Lieber* (above, footnote 1), p. 251, 256.

citizens enhances the quality of a judgment seems surprising. However, at least two positive effects of lay participation cannot be simply dismissed(71): Lay judges — one could add: are compelled to — put each line of reasoning and each decision to a test of reasonableness and reality due to the fact that professional judges must express their legal grounds for supporting the judgment in a simple and comprehensible manner.(72) If they fail to do so, it gives them a good reason to rephrase or even reconsider their line of argumentation, because otherwise the defendant will most likely also be unable to understand it. Therefore, lay participation ensures that a judgment is understandable and can serve as a general and specific deterrent.(73) The importance of this systematic relation between the judiciary and "real-life" cannot be underestimated.

As a last but no less significant point, the symbolic importance for our legal system must be acknowledged. Opponents describe this effect as a myth, ignoring the importance and influence of symbols for and on our society. For example in the Anglo-American system, lay participation in the form of a jury still represents and is testament to achievements such as freedom or the protection against judicial arbitrariness.(74) The same is true for legal systems such as the one in place in Germany where lay participation was introduced by way of another system: the "Schöffensystem". "Schöffen" symbolize the fact that society as a whole bears a responsibility when criminal sanctions are imposed, and they guarantee that the judiciary

(71) On both aspects *Lieber* (above, footnote 1), pp. 348 et seqq. With further references *Burgstaller*, JBl 2006, p. 69, 71; rather sceptical *Glöckner et al.* (above, footnote 54), p. 23 (approximately: not much potential for causing a problem).

(72) *Eb. Schmidt*, Lehrkommentar zur StPO und zum GVG, Teil I, p. 317 recital 573.

(73) Similar *Jäger* (above, footnote 16), p. 251, 257.

(74) Thereto *Hörnle*, ZStW 117 (2005), p. 801, 821; *Lieber* (above, footnote 1), p. 330, 365; *Andoor* (above, footnote 39), pp. 110 et seq.; *Grube* (above, footnote 50), pp. 131, 173.

renders a judgment "in the name of the people". If the state swings its sharpest sword, this broad legitimacy, comprising civil servants and citizens, is a meaningful symbol(75). Having said this, one also has to keep in mind that most academics refer to the idea of positive general prevention, when talking about the legitimacy of punishment.(76) This theory is based on symbolism, since — in essence — it states, that punishment is justified as it demonstrates to the public that criminal statutes are in force and in practice. Hence, the punishment symbolizes the validity of the law that the perpetrator violated.(77) Supporters of this idea believe that this maintains or increases public confidence in the prevalence of law. Even though it is difficult to empirically prove or to quantify this claim,(78) most academics and legal practitioners are convinced that it is accurate.(79)

Admittedly, the symbolic value of lay participation is only noticeable if there is a perceivable presence of active lay judge involvement in criminal proceedings. Therefore, I am of the opinion that proceedings with lay participation should

(75) Accurately *Andoor* (above, footnote 39), p. 113.

(76) On the fact that positive general prevention is more meaningful today than the (negative) deterrent effect, see only *Roxin*, StrafR AT I, 4th ed. 2006, § 3 recital 26; positive general prevention is considered the most mature contemporary national objective by *Hassemer/Neumann*, in: NK-StGB, 4th ed. 2013, Vor § 1 recital 288 with references for the different models. For more details concerning the symbolic character of criminal law, see *Hassemer*, NStZ 1989, pp. 553 et seqq.

(77) For a concise overview of the approaches of positive general prevention see *Radtke*, in: MK-StGB, 3rd ed. 2016, Vor § 38. recital 35 with further references.; *Jakobs*, StrafR AT, 2nd ed. 1991, 1/15. On the changes within the concept of positive general prevention by *Jakobs* see *Roxin*, StrafR AT I, § 3 recital 31 with further references; a comprehensive presentation of the theory of positive general prevention gives *Müller-Tuckfeld*, Integrationsprävention, Frankfurt a.M. et al. 1998, pp. 19 et seqq. and *passim*.

(78) On some studies and their disputed evaluation see *Radtke*, in: MK-StGB, Vor § 38 recital 39 with further references.

(79) *Roxin* (StrafR AT I, § 3 recital 30) considers the concept of a general preventive effect of punishment scarcely falsifiable.

not be reduced despite the fact that it may sometimes be costly or may decrease the efficiency of criminal proceedings.(80)

V　Conclusion

Finally, I would like to draw the following conclusions:

— Lay participation is deeply rooted in German history. Depending on the political situation, the importance of this topic has varied.

— Nowadays, lay judges are present in all judicial branches. The participation of “Schöffen“ is limited to cases dealing with serious crimes and crimes of medium gravity. These cases take place in “Schöffengerichte“ at the Local Courts and in the Criminal Divisions at the Regional Courts where “Schöffen” also hear appeals on points of fact and law. On paper, judges enjoy the same rights as their professional counterparts in trials. In practice, they rarely make full use of them.

— The following are critical issues: the right to view the case files and the participation in reviewing a detention order, in the event that a trial is interrupted. As previously outlined, the purpose and the practical application of lay participation are controversial issues.

— In view of my evaluation of the different arguments, I am convinced that this liberal idea should not be abolished. In contrast to the German scholar Klaus Volk, who rather mockingly said that the only argument for lay participation was its bare existence,(81) I believe that there are strong arguments for this concept; even extending beyond its strong symbolic value. Lay judges embody a judiciary, which is open to and influenced by the

---

(80)　*Jäger*（[above, footnote 16], p. 251, 261）recommends that lay participation should be expanded to all criminal proceedings.

(81)　*Volk*, in: FS Dünnebier, p. 373, 389.

public. I opine that their influence on criminal proceedings and the dialogue with professional judges may be exceedingly positive for the outcome and for the acceptance of a criminal judgment. However, these advantages require "Schöffen" who actually make use of the rights this honorary post confers, and do so with the required sensitivity.(82) In my view, Japan's introduction of lay judges in criminal trials was an important step in the right direction.(83)

---

(82) For lay judges that use their rights confidently *Salditt*, in: Bemmann/Manoledakis (editors), Der Richter in Strafsachen, 1992, pp. 67, 71 et seq., 77; agreeing *Linkenheil* (above, footnote 16), pp. 219 et seq.

(83) In the words of *Katsuyoshi Kato* (in: Duttge/Tadaki [editors], aktuelle Entwicklungslinien des japanischen Strafrechts im 21. Jahrhundert, 2017, p. 139, 148) the lay judge system, introduced in 2009, has now been „well received in Japan, well ‚japanised'" — although there are „still a lot of problems to be solved".