

FROM COMMON SENSE TO SPECIAL KNOWLEDGE? – THE ROLE OF LAY JUDGES IN GERMANY

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I. Introduction

What is the role of lay judges today? Can they still be legitimized in modern democracies, in which the independence of judges and the principles of due process and fair trial are established values, guaranteed by Constitutions? In which legal problems become more and more complex and where the judiciary has to deal with shrinking budgets?

The origins of lay participation in Germany¹ go back to the period of monarchy, when the rulers installed and dominated the judiciary. In order to prevent arbitrary confinements, citizens strived to implement control over the executive branch. This was to be achieved by providing the judiciary with ideas of common sense by the general public.

Today, lay judges are faced with the allegation that their current function does not meet their great costs.² Often they are criticized for not being sufficiently competent to actively participate in court hearings, for not making significant contributions to them or for being responsible for protracted trials. However, a system of lay judges whose involvement is enriching the hearings and facilitating the finding of a verdict due to their expert knowledge still seems to be widely accepted. The question that needs to be addressed today is whether common sense as a main reason for introducing a system of lay judges in the past has given way to the criterion of special knowledge. Or on the other hand, are there arguments in favour of having the ordinary ‘man in the street’ playing a role in the judiciary?

This article begins with an analysis of legal provisions, both of the *Grundgesetz* (Basic Law – GG) and the constitutions of the *Bundesländer*. Subsequently, the general provisions applying

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¹ Lundmark/Winter, in: ZfRV 2010, pp. 173-175.

² See e.g. Perron, in: Revue internationale de droit pénal Vol. 27 (2001), p. 181 at 195.

to all kinds of non-professional judges will be presented, followed by a short overview of the participation of non-professional judges in different areas of the German legal system. A fourth part deals with the criticism put forward against the involvement of lay judges in the judicial authority. The article will conclude with recommendations concerning a reform of the German judicial system.

II. Non-professional judges and constitutional law

Art. 92 GG simply states that “*the judicial power shall be vested in the judges (...)*”. The missing reference to non-professional judges does not entail a constitutional prohibition of their involvement in the judicial branch. The *pouvoir constituant* adopted a tradition dating back to the 19th century which can be conceived as an emanation from the principle of democracy.³ Today, by invoking the ideas of self-autonomy and honorary office underlying the German tradition of non-professional judges, some legal scholars try to make a connection to what is referred to as “civil society”.⁴

According to the *Bundesverfassungsgericht* (Federal Constitutional Court), a detailed regulation of the regime of lay judges is left to the discretion of the legislator.⁵ The arguments in favor of the participation of non-professional judges are wide-ranging. Firstly, such participation is claimed to be the expression of longstanding traditions in certain branches of the judiciary. Secondly, non-professional judges may supply special expertise, e.g. for labour⁶ and commercial, social and fiscal courts. Furthermore, the involvement of lay judges serves to strengthen the acceptance of judicial decisions within the population (“*Volksnähe*”), especially in terms of trials that are of a higher interest to the public, e.g. in criminal proceedings or in administrative proceedings.⁷

³ Köhler, in: ZFSH/SGB 2009, p. 269 at 270.

⁴ Heintzen, in: Nihon University Comparative Law 2009, p. 71 at 78.

⁵ BVerfGE 42, 206 at 208-209.

⁶ Wolmerath, in: Lieber/Sens (eds.), Ehrenamtliche Richter. Demokratie oder Dekoration am Richtertisch?, Wiesbaden 1999, p. 129.

⁷ Hillgruber, in: Maunz/Dürig (eds.), Grundgesetz, art. 92, para. 73.

In some of the constitutions of the *Bundesländer*, the participation of non-professional judges in the administration of justice is being explicitly guaranteed.⁸ In others the constitution even allows the involvement of non-professional judges in constitutional jurisdiction.⁹ The authors of the German Basic Law, however, refrained from especially emphasizing their position within the judicial branch.¹⁰ Nevertheless, they are considered to be judges according to art. 92 GG and thus part of the jurisdiction.¹¹ This does not imply that a chamber could be composed of only non-professional judges. Some legal scholars argued for the requirement of a majority of professional judges within the deciding chamber, at least for certain branches of the judiciary. Others asserted that a legal decision taken without the participation of a judge who does not dispose of a legal degree would contradict art. 33 para. 4 GG.¹² This provision stipulates that “*the exercise of sovereign authority on a regular basis shall, as a rule, be entrusted to members of the public service who stand in a relationship of service and loyalty defined by public law.*” In one of its decisions the Federal Constitutional Court eventually declared the composition of courts of honour for advocates (Ehrengerichte für Rechtsanwälte) without a single professional judge as conform to the constitutional. According to the Court there is no constitutional provision requiring courts to be at least composed of professionals and non-professionals. By tradition, advocates participated in these courts of first instance exclusively.¹³ However, appeals to a higher court characterized by a majority of professional judges may be made against all decisions taken by courts that are predominated by non-professional judges.¹⁴

⁸ Compare *inter alia* art. 123 para. 1 of the Constitution of *Rheinland-Pfalz*, art. 88 s. 1 of the *Bavarian Constitution*, art. 79 para. 3 of the Constitution of *Berlin*, art. 62 s. 2 of the Constitution of *Hamburg*, art. 86 para. 3 of the Constitution of *Thüringen*, art. 135 para. 2 s. 1 of the Constitution of the city of *Bremen* and art. 76 para. 2 of the Constitution of the Land *Mecklenburg-Vorpommern*.

⁹ E.g. art. 84 para. 1 s. 1 of the Constitution of Berlin: „*A Constitutional Court shall be formed consisting of nine members (one President, one Vice President and seven Constitutional Court judges) three of whom must be professional judges at the time of their election, and three others of whom must be qualified to hold the office of judge.*”; see also *Eschen*, in: Lieber/Sens (eds.), *Ehrenamtliche Richter. Demokratie oder Dekoration am Richtertisch?*, Wiesbaden 1999, pp. 56-59.

¹⁰ *Schulze-Fielitz*, in: Dreier (ed.), *Grundgesetz Kommentar*, 2nd ed. Tübingen 2008, art. 97, para. 8.

¹¹ *Hillgruber*, in: Maunz/Dürig (eds.), *Grundgesetz*, art. 92, para. 72.

¹² *Classen*, in: v. Mangoldt/Klein/Starck, *Grundgesetz Kommentar III*, 5th ed. München 2005, art. 92, para. 29.

¹³ BVerfGE 48, 300 at 317.

¹⁴ *Groß*, in: KritJ 2000, p. 209 at 226-228.

III. General provisions applying to non-professional judges

Similar to professional judges, non-professional judges shall be independent and subjected only to the law, see art. 97 GG and sec. 25 *Deutsches Richtergesetz* (Law concerning the German judges – DRiG). Sec. 45 para. 1 s. 1 of the latter explicitly underlines that no difference shall be made between the two groups in this regard. Additionally, sec. 45 para. 1a DRiG states that non-professional judges shall not be discriminated for having accepted this honorary office. No one shall underlie restrictions when assuming or exercising it. Moreover, employers of non-professional judges are bound to exempt them from their obligation to work when in office. Dismissals due to the assumption or the exercise of the office of a non-professional judge are inadmissible.¹⁵ A recall from this office against the will of the non-professional judge is only possible by decision of a court and must be based on legal provisions, see sec. 44 para. 2 DRiG.

Lay judges in Germany need to speak and understand German sufficiently to perform their office. Persons lacking these skills shall not be appointed.¹⁶ Their participation as lay assessor violates the principle of immediacy, as laid down in sec. 261 *Strafprozessordnung* (Code of Criminal Procedure – StPO), according to a recent judgment by the *Bundesgerichtshof* (Federal High Court of Justice).¹⁷ The Court held that with the participation of a person not understanding German, the adjudicating court was not composed in the prescribed form and hence a ground for appeal in the application of law was established. In another decision, the Federal Constitutional Court ruled that the deletion of a blind lay judge from the list of lay judges in criminal jurisdiction does not violate the constitutional prohibition to discriminate disabled persons, again due to the principle of immediacy.¹⁸

Regarding the compensation of non-professional judges, the German law requires – *inter alia* – a reimbursement of travel costs, an expense allowance as well as compensation for time spent and loss of remuneration.¹⁹

¹⁵ Schmidt-Ränsch, in: NVwZ 2005, pp. 166-168.

¹⁶ Sec. 33 no. 5 *Gerichtsverfassungsgesetz* (Courts Constitution Act - GVG).

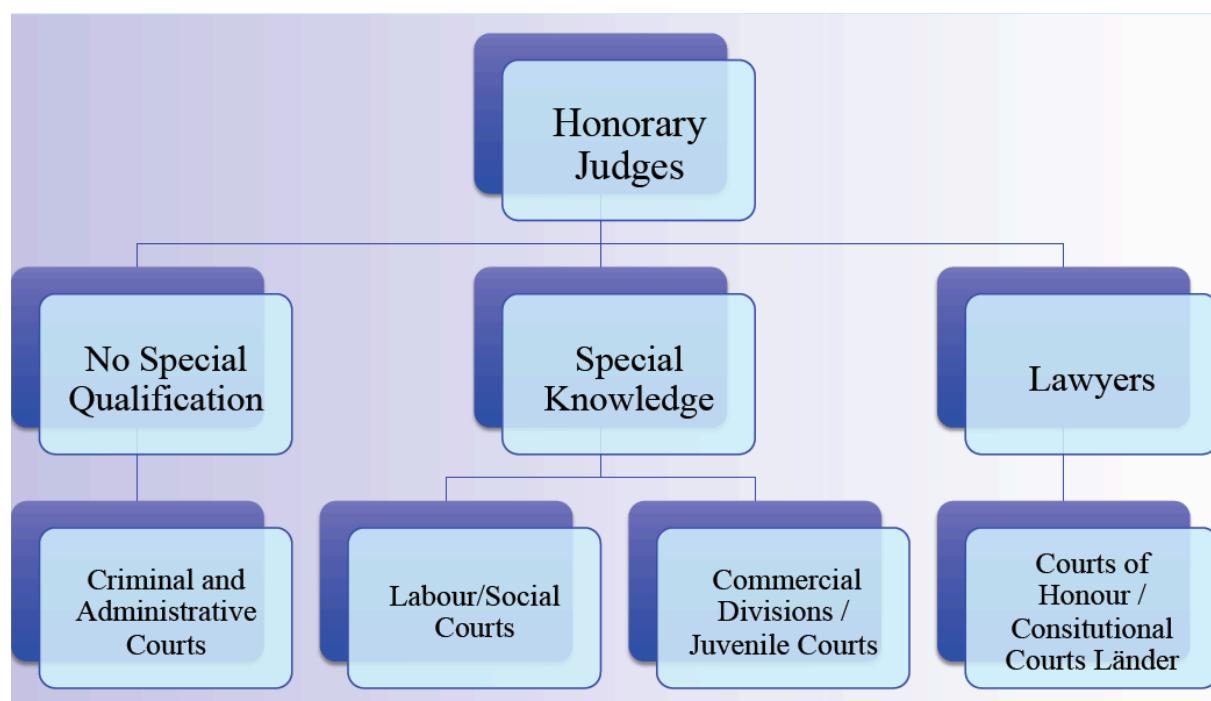
¹⁷ Judgment from January 26, 2011 - 2 StR 338/10.

¹⁸ Judgment from March 10, 2004, 2 BvR 577/01 = NJW 2004, pp. 2150-2151.

¹⁹ Compare secs. 5, 6, 15, 16, 18 *Justizvergütungs- und -entschädigungsgesetz* (JVEG).

IV. Non-professional judges in different fields of German law

According to *Sodan*, three different kinds of lay judges can be distinguished.²⁰ a first group does not dispose of a special qualification or a special expertise but shall represent the general public at court. Lay judges at criminal courts as well as honorary judges at administrative courts fall into this category. Honorary judges of the second category, by contrast, are characterized by expert knowledge or an affinity to one of the involved parties, e.g. non-professional judges at labour and social courts, and honorary judges at commercial divisions at regional courts (Kammern für Handelssachen bei den Landgerichten). Finally, the members of a third group of non-professional judges fulfill all the requirements to be elected as professional judges, as it is the case with members of courts of honour and most of the members of the constitutional courts of the *Bundesländer*. This paper will focus on the lay judges in the first two groups.



²⁰ *Sodan*, in: Isensee/Kirchhof (eds.), *Handbuch des Staatsrechts*, 3rd ed. Heidelberg 2007, § 113, paras. 40-43.

1. Labour courts

According to sec. 6 para. 1 *Arbeitsgerichtsgesetz* (Labour Court Law – ArbGG), labour courts are composed of professional as well as non-professional judges, the latter being representatives of the group of employers and the group of employees. In 1972 they were officially named *honorary judges*.²¹

At the Labour Court of first instance and at the Higher Labour Court, each division is composed of one professional judge and two honorary judges,²² in the Federal Labour Court of three professional and again two honorary judges.²³ In several cases the Federal Constitutional Court held that provisions stipulating a majority of non-professional judges in a chamber are complying with constitutional provisions.²⁴

German labor courts look back on a long history of participation of the two major interest groups in the labour jurisdiction as an expression of social self-administration.²⁵ By ensuring that employees and employers are always represented in equal numbers, lawmakers intended to foster the public acceptance of labour jurisdiction. Given their experience, honorary judges are particularly competent to understand the conflicts behind the cases submitted to the labour courts.²⁶ After having been appointed, these judges cannot be recalled by their respective interest group, a rule which is meant to ensure their independence from any influence.²⁷ Honorary judges are appointed for a five-year-term by the competent authority of the respective *Bundesland*,²⁸ except for those honorary judges appointed to the Federal Labour Court, that are picked by the Federal Minister of Labour and Social Affairs.²⁹ The candidates are chosen from a list compiled by the interest groups.³⁰ According to spirit and purpose of the law, in

²¹ Prütting, in: Germelmann et al. (eds.), *Arbeitsgerichtsgesetz*, sec. 6, para. 3.

²² See sec. 16 para. 2 and sec. 35 para. 2 ArbGG.

²³ Sec. 41 para. 2 ArbGG.

²⁴ BVerfGE 4, 74 at 93; BVerfGE 26, 186 at 200; BVerfGE 42, 206 at 210.

²⁵ Prütting, in: Germelmann et al. (eds.), *Arbeitsgerichtsgesetz*, sec. 6, paras. 3, 4.

²⁶ Richter, in: Lieber/Sens (eds.), *Ehrenamtliche Richter. Demokratie oder Dekoration am Richtertisch?*, Wiesbaden 1999, p. 136 at 140.

²⁷ Prütting, in: Germelmann et al. (eds.), *Arbeitsgerichtsgesetz*, sec. 6, para. 14.

²⁸ See sec. 20 para. 1 s. 1 ArbGG.

²⁹ Sec. 43 para. 1 s. 1 ArbGG

³⁰ Sec. 20 para. 2 ArbGG.

their decision the responsible authority is bound by a list's order of candidates.³¹ Furthermore, they must appropriately consider the lists of every interest group to also allow for a sufficient representation of minorities.

2. *Social Courts*

In social jurisdiction, the participation of non-professional judges dates back to the end of the 19th century and is closely linked to the passage of laws introducing accident and old age insurances.³² In all three instances of social jurisdiction, the involvement of honorary judges is obligatory since it reflects the idea of social autonomy.³³ Corresponding to labour jurisdiction, lay judges in social jurisdiction are providing special expertise and are representing different interest groups in the field of social law³⁴. Similarly, the principle of equal representation of the different interest groups is being observed in all instances.

The *Sozialgerichtsgesetz* (Social Courts Law – SGG) stipulates that at the Social Court of first instance, divisions are composed of one professional and two honorary judges.³⁵ At the Higher Social Court and the Federal Social Court, three professional judges are supported by again two honorary judges.³⁶ As for the appointment of the non-professional judges, the relevant provisions in the SGG are corresponding with those in the ArbGG.

3. *Commercial divisions at the Regional Court*

Similar to social and labour jurisdiction non-professional judges at commercial divisions are to contribute special expertise.³⁷ Their expertise as merchants is of particular importance in all questions related to their profession or to the existence of commercial practices and applies to the whole commercial division they are part of.³⁸ The honorary judges shall be appointed according to recommendations of the Chambers of Industry and Commerce. This can be re-

³¹ Berger-Delhey, in: RdA 1988, p. 15 at 19 ; Düwell, in: Lieber/Sens (eds.), Ehrenamtliche Richter. Demokratie oder Dekoration am Richtertisch?, Wiesbaden 1999, p. 144 at 145.

³² Behrend, in: Lieber/Sens (eds.), Ehrenamtliche Richter. Demokratie oder Dekoration am Richtertisch?, Wiesbaden 1999, p. 150.

³³ Bader/Hohmann/Klein, Die ehrenamtlichen Richterinnen und Richter beim Arbeits- und Sozialgericht, 11th ed. Heidelberg 2004, pp. 2-3.

³⁴ Köhler, in: ZFSH/SGB 2009, p. 269 at 270.

³⁵ Sec. 12 para. 1 s. 1 SGG.

³⁶ Sec. 33 s. 1 and sec. 40 s. 1 SGG.

ferred to as the corporate element in the appointing procedure of honorary judges to the commercial divisions at the Regional Court.³⁹ A person may be appointed to the office of honorary judge if he is or was registered in the commercial register or the cooperatives register as a merchant, as a member of the board of management or as a managing director of a corporate entity, or as an officer with statutory authority.⁴⁰

In contrast to their colleagues in social and labour jurisdiction, they have the same rights and obligations as professional judges during their tenure,⁴¹ which means that they are *inter alia* entitled to replace a professional judge outside of a hearing. Honorary judges at the Regional Court's commercial divisions are the only ones in civil jurisdiction. These divisions have to be composed of one professional judge who presides over the chamber, and two honorary judges.⁴² The votes of all judges are equal. However, the president is entitled to decide the case before him on his own if both adversarial parties consent to this procedure.⁴³

4. Criminal courts

In contrast to honorary judges in social and labour jurisdiction and at commercial divisions, the involvement of lay judges in criminal jurisdiction is not intended to contribute a special expertise, but to ensure their *Volksnähe* (broad acceptance within the population).⁴⁴ Lay judges need to be distinguished from jurors. There has not been a genuine jury trial in Germany since 1924.⁴⁵ Today's participation of non-professional judges reflects a long legal tradition in Germany that can be traced back to the 18th century. Back then, the involvement of laymen was believed to guarantee a fair trial and to minimize the influence of professional judges subject to directives of the monarch and his authorities.⁴⁶ Today, the German legal system distinguishes between lay assessors and youth lay assessors.

³⁷ Bader/Hohmann/Klein, Die ehrenamtlichen Richterinnen und Richter beim Arbeits- und Sozialgericht, 11th ed. Heidelberg 2004, p. 3.

³⁸ Compare sec. 114 GVG.

³⁹ Groß, in: KritJ 2000, p. 209 at 211.

⁴⁰ Secs. 108, 109 para. 1 no. 3 GVG.

⁴¹ Sec. 112 GVG.

⁴² Sec. 105 para. 1 s. 1 GVG.

⁴³ According to sec. 349 para. 3 *Zivilprozeßordnung* (Code of Civil Procedure - ZPO).

⁴⁴ Classen, in: v. Mangoldt/Klein/Starck, *Grundgesetz Kommentar III*, 5th ed. München 2005, art. 92, para. 33.

⁴⁵ Löhr, *Zur Mitwirkung der Laienrichter im Strafprozess*, Hamburg 2008, pp. 134-138.

⁴⁶ Löhr, *Zur Mitwirkung der Laienrichter im Strafprozess*, Hamburg 2008, pp. 168-172; Harms, in: RuP 2005, p. 224 at 225; Windel, in: ZZP 1999, p. 293 at 295.

a) Lay assessors

In the *Amtsgericht* (Local Court of first instance), jurisdiction is reserved to a single professional judge (*Strafrichter*) in minor offenses with an expected punishment of up to two years (and in cases based on private prosecution). This judge is sitting alone and may not seek the assistance of lay judges⁴⁷. More serious criminal charges are reserved to the *Schöffengericht*, composed of one presiding professional judge and two lay assessors.⁴⁸ Judgments both by the *Strafrichter* and the *Schöffengericht* may be appealed to the *Landgericht* (Regional Court), in which one presiding professional and two lay judges are deciding on the case.⁴⁹ The chambers of the *Landgericht* acting as court of first instance consist of three professional judges and two lay judges (*Große Strafkammern*).⁵⁰ A second appeal from the *Landgericht* that exclusively addresses questions of law is possible to the *Oberlandesgericht* (Higher Regional Court). It does not involve lay assessors in the final decision as the *Oberlandesgericht* is composed of three professional judges only. Regardless whether the *Oberlandesgericht* acts as court of first instance or appellate court, lay assessors are never involved.⁵¹ The same applies to the *Bundesgerichtshof* (Federal Court of Justice).⁵²

In all decisions taken during the trial that relate either to the judgment or to a procedural question, lay judges are *pari passu*⁵³ to professional judges and cannot be overruled by them. However, in contrast to professional judges and to honorary judges in social and labour jurisdiction, lay assessors are not granted access to the relevant (investigative) files in order to avoid the danger of a biased decision of the court.⁵⁴ This stance taken by the *Bundesgerichtshof* has been challenged lately, not only by legal scholars⁵⁵, but also by the Court itself, when allowing lay assessors to study protocols of wiretapping operations in order to provide them with a better understanding of the evidence.⁵⁶

⁴⁷ Sec. 25 GVG.

⁴⁸ See secs. 28, 29 GVG.

⁴⁹ Sec. 76 para. 1 s. 1 GVG.

⁵⁰ Sec. 76 para. 1 s. 1 GVG.

⁵¹ Compare sec. 122 GVG.

⁵² Sec. 139 GVG.

⁵³ Sec. 30 para. 1 GVG.

⁵⁴ Perron, in: *Revue internationale de droit pénal* Vol. 27 (2001), p. 181 at 184; BGHSt 5, 261.

⁵⁵ Eisenberg, *Beweisrecht der StPO*, 6th ed. München 2008, para. 75; Löhr, *Zur Mitwirkung der Laienrichter im Strafprozess*, Hamburg 2008, pp. 208-210; Hannich, in: *Karlsruher Kommentar zur Strafprozessordnung*, § 30 GVG, para. 2.

⁵⁶ See e.g. BGHSt 43, 36; BGHSt 43, 360.

At a first glance, particularly when taking into account guaranteed equal rights for lay assessors, one may assume that their position as members of a mixed chamber is quite strong in relation to their professional colleagues. However, when overruled by lay judges, professional judges dispose of means to challenge such decisions. They may supply them with reasons that are likely to lead to an appeal against the verdict.⁵⁷ Additionally, to some extent it lies within the discretion of the prosecutor to decide whether a minor offense shall be tried by a *Strafrichter* or by a *Schöfengericht*. However, this does not lead to a systematic circumvention of chambers with a participation of lay assessors.⁵⁸

When it comes to the electoral procedures applicable for lay judges, every five years the local councils are obligated to compile a list of candidates. Given the fact that a candidate needs a two-thirds majority of attending local councilors to be appointed,⁵⁹ it's mostly up to the represented political parties to propose a list that can meet with approval.⁶⁰ The compilation of these lists has to meet certain requirements of an election. Thus, the *Bundesgerichtshof* rejected an electoral procedure applied in a borough of Berlin that involved a random selection of candidates which was later simply confirmed by the competent borough Assembly.⁶¹

In a second step a committee comprised of one professional judge, one administrative official and seven upstanding individuals as associate members elected by the county or city council chooses the lay judges from the list.⁶² It deserves mentioning that according to the law the list shall adequately represent all sections of the population.⁶³ In one of his decisions on lay assessors the *Bundesgerichtshof* held that these committees, too, have to observe a specific electoral procedure, and therefore for example cannot choose the lay assessors by lottery drawing.⁶⁴

⁵⁷ *Rennig*, in: *Revue internationale de droit pénal* Vol. 27 (2001), p. 481 at 491.

⁵⁸ *Perron*, in: *Revue internationale de droit pénal* Vol. 27 (2001), p. 181 at 182, 188.

⁵⁹ Sec. 36 para. 1 s. 2 GVG

⁶⁰ *Perron*, in: *Revue internationale de droit pénal* Vol. 27 (2001), p. 181 at 190.

⁶¹ BGH NJW 1991, pp. 3043-3044.

⁶² *Hannich*, in: *Karlsruher Kommentar zur Strafprozessordnung*, § 40 GVG, paras. 2, 2a.

⁶³ Sec. 36 para. 2 s. 1 GVG.

⁶⁴ BGH NJW 1984, p. 2839.

b) Youth lay assessors

There is an important difference between lay assessors and youth lay assessors: the latter need to have a special qualification, as sec. 35 para. 2 s. 2 *Jugendgerichtsgesetz* (Youth Courts Law – JGG) states: “*The individuals proposed should have appropriate education and training as well as experience in the education and upbringing of youths.*” Youth lay assessors participate in two different courts: In lay youth assessors' courts, two youth lay assessors (always a man and a woman) sit next to one presiding and professional youth court judge.⁶⁵ Youth panels shall be composed of three professional judges including the presiding judge (a professional judge) as well as two lay youth assessors (grand youth panel); in appeal proceedings concerning the facts and law against decisions of the youth court judge the panel is composed of the presiding judge and two lay youth assessors (small youth panel).⁶⁶ As for the electoral procedure, youth lay assessors are elected by the same committee that is choosing the lay assessors, however, due to the fact that youth lay assessors are required to have special training and experience, the proposing list of candidates is made up by a youth assistance committee.

5. Administrative courts

Historically, in administrative courts, the involvement of non-professional judges was meant to guarantee the independence of the courts from administration and therefore to achieve and maintain political self-autonomy.⁶⁷ Today, the focus is rather on the *Volksnähe* of administrative jurisdiction – just as lay judges in criminal courts or honorary judges in fiscal courts.⁶⁸ They are supposed to provide a non-legal perspective to the hearings and to counterbalance purely legal reasoning of professional judges.⁶⁹ Especially in administrative courts the democratic element of the involvement of non-professional judges is important as it is their very duty to control and restrict the executive branch when infringing on fundamental rights of citizens or others.

⁶⁵ Sec. 33a para. 1 JGG.

⁶⁶ Sec. 33b para. 1 JGG.

⁶⁷ *Windel*, in: ZZP 1999, p. 293 at 296.

⁶⁸ As this article does not intend to provide an exhaustive overview of non-professional judges in all areas of the German legal system, the author renounces to describe and comment on the role of honorary judges in fiscal courts. For more details on their regime compare secs. 16-30 *Finanzgerichtsordnung* (Fiscal Court Law - FGO)

⁶⁹ *Sodan*, in: Isensee/Kirchhof (eds.), *Handbuch des Staatsrechts*, 3rd ed. Heidelberg 2007, § 113, para. 40.

Divisions of the Administrative Court shall rule composed of three judges and two honorary judges unless jurisdiction is reserved to a single professional judge. The honorary judges shall not be involved in orders outside the oral hearing and with summary decisions.⁷⁰ All sections of the *Verwaltungsgerichtsordnung* (German Code of Administrative Procedure – VwGO) concerning honorary judges at administrative courts shall apply *mutatis mutandis* to the honorary judges at the Higher Administrative Court if the legislature of a *Bundesland* has determined that honorary judges are involved at this court.⁷¹ Furthermore, sec. 16 VwGO stipulates that at the Higher Administrative Court and at the Administrative Courts, judges of other courts who have been appointed for life as well as full professors of law may be appointed as judges in subsidiary office. However, this section plays a minor role, as only a few *Länder* have exercised this competence.⁷²

The role of the honorary judge in administrative courts was strikingly diminished due to a reform in 1993. To begin with, honorary judges have never been involved in issuing interim injunctions. In 1993, the single judge's competences were largely extended, *inter alia* in the field of asylum law.⁷³ Sec. 6 VwGO now states as follows: “*The chamber should as a rule assign the legal dispute to one of its members as an individual judge for a ruling if 1. the case does not show any particular factual or legal difficulties, and 2. the case has no fundamental significance.*” In practice, this reform led to a substantial weakening of the role of honorary judges in administrative courts.⁷⁴

The process of electing honorary judges in the system of administrative courts is almost identical to that for lay judges in criminal jurisdiction.⁷⁵ Likewise the law guarantees that honorary judges have the same rights as their professional colleagues for the hearings and when finding a decision.⁷⁶

⁷⁰ Sec. 5 para. 3 *Verwaltungsgerichtsordnung* (Code of Administrative Procedure – VwGO).

⁷¹ Sec. 34 VwGO.

⁷² E.g. the Higher Administrative Court of Berlin and Brandenburg.

⁷³ *Schiefer*, in: Lieber/Sens (eds.), *Ehrenamtliche Richter. Demokratie oder Dekoration am Richtertisch?*, Wiesbaden 1999, p. 117 at 121; *Stelkens/Clausing*, in: Schoch et al. (eds.), *Verwaltungsgerichtsordnung*, § 6 VwGO, para. 3.

⁷⁴ *Stelkens/Clausing*, in: Schoch et al. (eds.), *Verwaltungsgerichtsordnung*, § 6 VwGO, para. 12.

⁷⁵ Compare secs. 25-29 VwGO.

⁷⁶ Sec. 19 VwGO.

V. Critical Assessment

Given the differences between all kinds of non-professional judges regarding electoral procedure, scope of granted rights and (historical) explanations for their involvement, a fundamental criticism of non-professionals serving as judges needs to be addressed. However, there are also arguments in favor of a general maintenance of the existing system.

1. General arguments in favor of non-professional judges in German courts

When faced with the argument that lay judges lack sufficient legal training to be able to actually influence a hearing or the outcome of a trial, proponents of the involvement of non-professional judges claim that their presence might force professional judges to better reflect on their own reasoning when faced with new, non-legal issues.⁷⁷ Thus, their involvement may lead to a plausibility assessment of a professional judges' reasoning, especially in criminal trials with the principle of free evaluation of evidence⁷⁸. The involvement of honorary judges in labour courts and in social courts, as well as in commercial divisions at the Regional Court reduces the need to resort to external expert witnesses and thus helps to cut down expenses and to save time.⁷⁹ It is arguable whether the participation of honorary judges does foster the democratization of the judiciary; in any event their special qualification contributes to the legitimization of a judicial decision.⁸⁰

2. Arguments opposing non-professional judges in German courts

Many legal scholars criticize the significant costs of lay judges who, according to the law, have a right to compensation. Additionally, the involvement of non-professionals may result in a prolongation of trials, since they are entitled to actively take part in the hearings and in rendering a decision.⁸¹ Furthermore, lay judges might be overwhelmed by the complexity of the cases they are confronted with and of the legal basis underlying these cases. Historical reasons, especially for the participation of lay judges in criminal jurisdiction and honorary

⁷⁷ Köhler, in: ZFSH/SGB 2009, p. 269 at 279.

⁷⁸ Sec. 261 StPO.

⁷⁹ Köhler, in: ZFSH/SGB 2009, p. 269 at 280.

⁸⁰ Voßkuhle/Sydow, in: JZ 2002, p. 673 at 681.

⁸¹ Köhler, in: ZFSH/SGB 2009, p. 269 at 278.

judges at administrative courts may be of less relevance these days. The Basic Law guarantees judicial independence (art. 97 para. 1 GG) and the principles of due process and fair trial (embodied in Art. 103 GG). Consequently there may be no need to specifically ensure an efficient control over the executive branch or over professional judges by having citizens participate in trials. Some opponents assert that conversely their involvement may even lead to a loss of judicial independence as they are more likely to be influenced by the media or non-governmental organizations, particularly in highly contested cases.⁸² Putting an emphasis on the benefits of expert knowledge of honorary judges disregards the fact that judges also need to keep a holistic view of all the parts of the legal system that is to be considered in the specific case.⁸³

3. Criticism regarding specific types of lay judges

The critical assessment regarding specific types of non-professional judges within the German legal system is divergent and highly depends on the respective area of law. When a critical stance is taken on honorary judges at labour and social courts, it mostly focuses on questions of details. In labour courts there is no such thing as “in-service education”, neither for future honorary judges nor for acting honorary judges. The state passes the responsibility for this training to the respective interest group.⁸⁴ This may lead to the result that the qualification of an honorary judge depends on the financial means of this group and thus could lead to an endangerment of the quality of the respective labour court’s jurisdiction. Moreover, honorary judges often receive information on the facts of the matter by the professional judge(s) only imminently before a hearing. Preferably, they should be provided with all the relevant files beforehand to be at best prepared.⁸⁵ Honorary judges should be given sufficient time to learn about the details of each case in order to guarantee an adequate preparation. A further danger to judicial independence is seen in the influence of the interest groups on the electoral procedure and beyond, applying both to labour courts and social courts.⁸⁶

⁸² *Windel*, in: ZZP 1999, p. 293 at 296.

⁸³ *Windel*, in: ZZP 1999, p. 293 at 299-300.

⁸⁴ *Wolmerath*, in: Lieber/Sens (eds.), *Ehrenamtliche Richter. Demokratie oder Dekoration am Richtertisch?*, Wiesbaden 1999, p. 129 at 131.

⁸⁵ *Wolmerath*, in: Lieber/Sens (eds.), *Ehrenamtliche Richter. Demokratie oder Dekoration am Richtertisch?*, Wiesbaden 1999, p. 129 at 132.

⁸⁶ *Windel*, in: ZZP 1999, p. 293 at 306-310.

Only few legal scholars are seriously challenging the involvement of lay assessors in German criminal trials.⁸⁷ This might be based on the fact that in most cases they do not seem to play a decisive role.⁸⁸ However, opponents complain about the high costs of the current system and the length of trials.⁸⁹ Moreover, also for criminal proceedings historical reasons for the involvement of lay judges in courts have nowadays lost their relevance. In the hearings lay assessors may possibly be overwhelmed by the complexity of legal questions raised in court and hence unable to make a relevant contribution. This situation clashes with the demand that lay judges are meant to provide an external ‘non-legal’ point of view. Of those who argue in favour of the existing system – still representing the majority of scholars – many are pleading for a right of lay assessors to have access to all relevant records of the case, arguing that the law explicitly states that they are fully equal to professional judges during the trial.

Finally, the most criticized non-professionals in German jurisdiction are honorary judges in administrative courts. The reform of the Code of Administrative Court Procedure in 1993 led to a considerable loss of importance for honorary judges, without the legislator even bearing this in mind.⁹⁰ This reform was exclusively aimed at accelerating procedures and reducing the workload of the judiciary. Since then, the question has been raised whether one should adhere to the involvement of honorary judges at all.⁹¹ Great costs and the complexity of legal problems in administrative law that non-professionals are not able to deal with adequately⁹² are key arguments for those who call for abolishment of the system of honorary judges. Those few scholars who still argue in favour of their involvement stress the plausibility assessment argument mentioned before that their involvement might provide to professional judges.⁹³

4. Election of non-professional judges

The electoral process for non-professional judges has often been criticized for either not being a proper ‘election’ or for not adequately representing all groups within society, as sec. 42 para. 2 GVG requires. Concerning criminal proceedings, most lay assessors chosen by the

⁸⁷ Duttge, in: JR 2006, pp. 358-363; Harms, in: RuP 2005, pp. 224-230.

⁸⁸ Perron, in: Revue internationale de droit pénal Vol. 27 (2001), p. 181 at 195.

⁸⁹ Perron, in: Revue internationale de droit pénal Vol. 27 (2001), p. 181 at 195.

⁹⁰ Baderschneider, Der Bürger als Richter, Frankfurt am Main 2010, p. 269.

⁹¹ Kramer, in: NVwZ 2005, pp. 537-539.

⁹² Wagner, in: DRiZ 2005, p. 118 at 120.

⁹³ Baderschneider, Der Bürger als Richter, Frankfurt am Main 2010, pp. 270-271.

political parties are public servants.⁹⁴ The current procedure is not guaranteeing a representation of all groups among the elected lay judges; however, it was approved by the *Bundesgerichtshof*.⁹⁵ Until today, no convincing proposal has been presented to reform the system of electoral procedure which could resolve the disadvantages of the current one. Furthermore, the argument that the latter is influenced too much by political parties⁹⁶ is not a very strong one. Political parties in political bodies are likely to represent at least large parts of the groups within the population. The only alternative would be to replace the current system by a random selection.

VI. Conclusions

In the 1920s an effort was made to end the tradition of jury trials in Germany. Back then, this (successful) attempt sparked criticism all over the country.⁹⁷ Today, there is no discussion on whether the established system with its involvement of lay judges should be replaced by jury trials.⁹⁸ This shows that all things considered the current legal provisions regarding non-professional judges are *still* being widely accepted. Certainly, there is general criticism on the involvement of non-professional judges, but it does not represent a majority view among legal scholars and practitioners.

A specific concern with the involvement of non-professional judges in the legal system of Germany focuses on those fields of law where they shall represent all groups within the population and do not provide expert knowledge to the respective courts. Thus, lay assessors in criminal trials and honorary judges at administrative courts are currently challenged in particular. As for administrative courts, the strengthening of the position of the single judge led to a marginalization of the role of the honorary judge. Taking into account that this was even not the intention of the legislator, raising the question of the future role of honorary judges at administrative courts seems to be justified.

⁹⁴ Compare the figures in BT-Drs. 15/3191, p. 6: <http://dipbt.bundestag.de/doc/btd/15/031/1503191.pdf>.

⁹⁵ BGHSt 33, 261.

⁹⁶ Compare Kramer, in: DRiZ 2002, p. 150 at 155.

⁹⁷ Löhr, Zur Mitwirkung der Laienrichter im Strafprozess, Hamburg 2008, pp. 138-145.

⁹⁸ Heintzen, in: Nihon University Comparative Law 2009, p. 71 at 72.

The general positive attitude towards the participation of lay assessors in criminal trials is on the verge of change as well. This does not apply to youth lay assessors who are characterized by their special training and experience. Yet, even without expert knowledge, ‘ordinary’ lay assessors still play an important role. Their task may not be any longer to control the professional judges and to guarantee a fair trial. However, as criminal trials are of utmost interest to the general public, the element of *Volksnähe* is still highly relevant, e.g. in spectacular cases that end with a verdict of acquittal. The contribution of lay assessors to a trial might not always be visible, but it should not be forgotten that no verdict can be rendered when both lay judges refuse to give their consent. In these cases, it is up to the professional judge to try to convince his colleagues with better arguments or to rethink his own stance. In 2004 the Federal Government considered lay participation as a crucial element of the principle of democracy and stressed the importance of voluntary service for the common good.⁹⁹ Consequently, lay assessors should not only be maintained, but their rights extended: they should be granted access to all relevant records to be able to have more influence on the proceedings. There is no point in claiming that lay judges are principally not able to clearly distinguish legal issues and matters of fact in contrast to their professional colleagues.

By contrast, non-professional judges that are characterized by a special qualification or by their membership of an interest group are largely accepted with justification. Thus, the legislator should not abandon honorary judges in commercial divisions at the Regional Court. Some opponents have stressed that honorary judges at labour courts as well as at social courts are not real experts, but rather stakeholders representing their respective interest group. It should not be forgotten, however, that even in cases of assumed partiality no interest group is able to impose its view on the whole court. It would be hard to prove that the professional or social background does indeed have an impact on the respective honorary judge’s behavior and reasoning during the trial. Their background helps them to better understand the typical interests of members of their respective interest group. With this in mind, they are rather experts with special life experience relevant to resolve social conflicts and help increase the degree of acceptance of the rendered decisions.

⁹⁹ BT-Drs. 15/3191.

Non-professional judges could even play a more important role in the near future, although rather outside than inside the courtroom. For example, they may serve as mediators or in the framework of conciliation proceedings, in which the engagement of a professional judge is either not required by law or might be harmful to an amicable settlement.¹⁰⁰ The Federal Government recently passed a draft code¹⁰¹ aimed at fostering mediation processes by introducing new provisions to several codes (e.g. GVG, ArbGG, SGG, ZPO and VwGO). These new provisions are setting preconditions for ‘internal’ mediation processes which take place during a trial and which are being led by a judge, but also for external ones ‘outside’ the courtroom, during trials as well as mediation processes that are not linked to any trial. It remains to be seen if the new code – assumed that it will be passed by Parliament – will lead to an increased involvement of lay judges in mediation procedures.

¹⁰⁰ For honorary judges at labour courts *Kraushaar*, in: NZA 1987, p. 761 at 764; See also *Kramer*, in: DRIZ 2002, p. 150 at 155.

¹⁰¹ *Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung*.