

**Der laienrichter – überlebtes Symbol oder Garabt
der Wahrheitsfindung? Eine rechtsgeschichtliche Untersuchung
über das “moderne” Volksgericht in Deutschland
seit Beginn des 19. Jahrhunderts**

Peter Lang GmbH, Frankfurt am Main 2014 (pp. 241)

1. General comments

The issue of community participation in sentencing has already been discussed in numerous monographic studies in German literature¹. What is more, guide-books or manuals for lay judges sentencing in criminal cases are published in Germany, among others by German Association of Lay Judges (*Deutsche Vereinigung der Schöffinnen und Schöffen*)².

A provocatively formulated main thesis of the monograph, which is limited to the question whether community participation (of a lay judge) in sentencing is an outdated element of a trial or a guarantee to discover the objective truth, evokes reflection itself. A tool used by the Author to achieve this objective was to be, above all,

1 G. Andoor, *Laien in der Strafrechtsprechung. Eine vergleichende Betrachtung der Laienbeteiligung an deutschen und englischen Strafgerichten*, Berlin 2013; H. Lieber, U. Sens (ed.), *Ehrenamtliche Richter. Demokratie oder Dekoration am Richtertisch?*, Wiesbaden 1999; F.Ch. Grube, *Richter ohne Robe. Laienrichter in Strafsachen im deutschen und anglo-amerikanischen Rechtskreis*, Frankfurt am Main 2004, p. 35-59; B. Linkenhein, *Laienbeteiligung an der Strafjustiz. Relikt des bürgerlichen Emanzipationsprozessen oder Legitimation einer Rechtsprechung “Im Namen des Volkes”?*, Berlin 2003; W. Grikschat, A. Luthke, F.-W. Dopatka, I. Müller, *Gesellschaft, Recht und Strafverfahren. Eine Einführung in die Strafjustiz für Schöffen und andere Interessierte*, Opladen 1975; Ch. Renning, *Die Entscheidungsfindung durch Schöffen und Berufsrichter in rechtlicher und psychologischer Sicht*, Marburg 1993; I. Nassif, *Das erweiterte Schöffengericht Regensburg 2009*.

2 H. Lieber, U. Sens, *Fit fürs Schöffen und andere Interessierte*, Opladen 1975; Ch. Renning, *Die Entscheidungsfindung durch Deutscher Schöffentamt*, Berlin 2013; *Mehr Demokratie am Richtertisch. Dokumentation*, Bonn 1992.

a historical and law-comparative method, including valid German criminal procedure legislation.

I have assumed to review the above monograph since in the Polish criminal procedure legislation and ensuing court case law as well as opinions held by the doctrine tendencies to eliminate (or limit) manifestations of community participation in sentencing have emerged too.

2. Monograph's structure

The monograph is divided into introduction, seven chapters and summary. The introduction emphasizes constitutional foundations of the rule of community participation in sentencing whilst indicating problems ensuing, among others, from the juxtaposition of this principles with the defendant's right to defence (p. 1-7). It is underlined that the institution of community courts in Germany is rooted at the turn of the 18th and 19th centuries, and at that time took the form of juries, named so following the example of the English "jury". This part of the monograph focuses on the problem which is over 200 years old, i.e. the question whether a fate or fortune of the defendant subject to the principle of assumed innocence can be entrusted with jurors, who are not experts in law?

The first chapter of the monograph depicts historical development of the institution of a juror/community judge and systematizes terms and notions applied later in the legal and historical analysis. This chapter is an attempt at defining such terms as a community court (*Volksgericht*) (p. 9-13), which has been juxtaposed with the term of lay judges courts (*Laiengericht*) (p. 13-14). Furthermore, the term of community courts has been compared to the institution of juries and jurors (p. 14-17), to be followed by a lay judge and lay judges courts (p. 17-19).

The second chapter of the monograph discusses functions of community courts and expectations they were to satisfy at the beginning of the 19th century. Originally, the German Code of Criminal Procedure (StPO) envisaged participation of two types of community judges in a criminal trial: lay judges (*Schöffen*) and jurors (*Geschworenen*). Lay judges, the same as now honorary judges (*ehrenamtlichen Richtern*), sat in the bench together with professional judges and enjoyed equal rights (except access to case files). Whereas with regard to juries, which were competent to resolve cases of the most serious crimes, their tasks were initially (similar to the English and French system) divided between professional judges and lay judges: the jury composed of twelve jurors decided about guilt themselves while three professional judges decided about punishment³. Since juries were not able to handle complicated issues of facts and law and due to other defects of this institution (including financial reasons), their previous form was significantly modified in 1924 under the Regulation of Minister of

3 C. Roxin, B. Schünemann, *Strafverfahrensrecht*, München 2009, p. 32-33 and literature cited therein.

Justice (the so called *Emminger Reform*). Presently, they do not differ from lay judges courts (even though judges of such courts are still customarily called “jurors”). According to the Author, just this reform led to the abolishment of the institution of juries in Germany (p. 29-41).

The third chapter of the monograph is devoted to the principles of selecting community judges to juries and lay judges courts in the 19th century as well as after the *Emminger* reform of 1924. The chapter depicts these times’ reality, among others deprivation of specific professional and social groups of a possibility to be a candidate for a community judge and actual exclusion of women candidates thereto in the 19th century (p. 43-48).

The fourth chapter of the monograph depicts the problem of jurors’ expertise in law and impact thereof on their choice. The problem of an act (*Tatfrage*) has been extensively described here. Moreover, the issue of the jurors’ verdict (*Wahrspruch*) with regard to the defendant’s guilt and impact of professional judge’s instructions given to the jurors after the closure of litigation on this verdict have been considered. Finally, the principle of free evaluation of evidence as a basis of community judges’ sentencing has been presented (p. 102-118).

The fifth chapter of the monograph discussed jurors’ competence to sentence in cases other than criminal ones, that is in labour and social insurance courts, commercial courts, administrative and financial judiciary and agricultural courts (p. 119-144).

In the sixth chapter the Author analyses the participation of lay judges in sentencing in totalitarian systems, including community courts of the former German Democratic Republic (DDR).

The seventh chapter considers selected problems connected with the functioning of juries in Germany, that is a lack of access to case files and practical fulfilment of the jurors’ right to ask questions during a trial.

3. Summary

From the Polish reader’s perspective, the most important considerations are included in the last – eight chapter of the monograph – which contains conclusions ensuing from the prior historical and legal analyses (p. 233-241). The Author underlines historical importance of community participation in criminal sentencing stressing that it is one of the most crucial aspects of social trust in the system of justice and a guarantee of judicial independence.

Moreover, this part of the monograph focuses on problems connected with the choice of lay judges from a historical perspective and in the currently binding German legislation. It is emphasized that within historical development, the German legislator departed from the requirement of property and education qualification

of community judges endeavouring to recruit them from all representative social groups and environments excluding some categories of civil servants. The Author also discerns the problem of a political character of the institution of lay judges in the former DDR, which was manifested in the party-oriented criteria of their selection (p. 233-234).

Furthermore, the summary considers the quality of sentencing of the courts with the participation of lay judges. The Author believes that the quality of a criminal court's judgment does not depend on the fact whether it was rendered with the participation of jurors (without a professional judge's impact), or by the bench with the participation of lay judges (p. 233-235). He invokes the Volk's thesis: "The only argument for the abolishment of participation of lay judges (in sentencing – ref. by C.K.) are uncertain consequences of such a decision; the only argument for the participation of lay judges is the fact it exists" (p. 235).

Concluding, the Author considers the fact of conveying lay judges basic information about the case files before the launch of a hearing (which are fully known by a presiding judge – a professional justice), yet solely to such an extent they could not be convinced about the defendant's guilt and perpetration due to the above access to case files.

The monograph also emphasized the need to provide lay judges with appropriate training in criminal law and procedure because, contrary to other lay judges courts (sentencing, e.g., in commercial cases, or employment and social security cases), lay judges sentencing in criminal cases are not able to counterbalance unequal competence between them and professional judges by their life experience. A postulate of creating lay judges committees within administrative court structures, which would affect these structures' administration, has been conveyed for a long time now in order to improve communication between lay judges and between lay judges and professional judges (p. 236-237).

Considering arguments for and against community participation in sentencing, the Author claims that in effect of the analyses pursued in the monograph, he is not persuaded by the opinion of professional judges who believe that the advantage of lay judges' participation is presentation of a social and pedagogical point of view (*volkspädagogische Gesichtspunkt*) which enhances social trust in the administration of justice. This advantage is undermined by negative circumstances accompanying community participation in sentencing, i.e. a lack of legal expertise, lack of sufficient knowledge about the case and practical skills to resolve it, or emotionally charged lack of objectivism. Due to prevailing legal expertise and competence of professional judges, lay judges are not able to fulfil a function of a guarantor of proper sentencing too.

Indicating the above, the Author believes a proper place for lay judges is a community court (following the example of previously existing courts in the former DDR), which could sentence in cases completed with opportunistic discontinua-

tion (§ 153, § 153a StPO), or in mediation (*Täter-Opfer-Ausgleich*) as well as during enforcement of punishment the defendant was sentenced to (p. 238-241). The above proposed alternatives for current lay judges courts have one thing in common – depriving lay judges of co-responsibility for a main hearing and rendering a judgment. According to the Author's last sentence of the monograph: "If we approve of this opinion, we will create an opportunity, perhaps the only one, to add a new, future perspective to the above quoted Volk's opinion on "uncertain" consequences of the removal of community participation, which is solely focused on the examination of a criminal case in criminal proceedings" (p. 241).

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