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# Understanding the German Mixed Tribunal<sup>1</sup>

## Gemischte Gerichte in Deutschland

*Stefan Machura*

### *Abstract*

Germany employs mixed tribunals in a number of its courts, including the criminal, administrative and labour courts. They are markedly different from courts with juries, which separate the professional judge from the lay jury. In a mixed tribunal a professional judge presides over the hearing and deliberation. Side judges, usually the lay assessors, sometimes supplemented by further professional judges, have equal rights when it comes to selecting the legal rules to be applied, making procedural decisions during the hearing, and deciding on the case outcome. Lay members of a mixed court serve for several years, and hear a multitude of cases: they build up experience. Compared to jury courts, mixed courts are much cheaper, and able to deal with a larger number of cases.

Mixed courts vary as regards the qualifications required by lay judges. Some courts (e.g. labour and – sometimes – youth criminal courts) employ expert lay judges. Depending on their personality, presiding judges – in whatever kind of tribunal – may dominate their professional colleagues and also lay judges. This is one of the factors endangering the effective participation of lay assessors. Another factor is the drive to settle cases quickly, which tends to curtail or prevent deliberation. While there are deeply engaged honorary judges, others with different personality traits prefer to keep a low profile. This said, empirical research indicates that lay judges are more engaged, if their concern for procedural fairness and justice is aroused in the course of a trial.

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### *Zusammenfassung*

Gemischte Gerichte mit Berufs- und ehrenamtlichen Richtern sind ein typisches Element der deutschen Justiz, unter anderem in Strafverfahren, an Verwaltungs- und Arbeitsgerichten. Ihre Funktionsweise unterscheidet sich sehr von der klassischer Geschworenengerichte. Dieser Beitrag zielt darauf ab, Lesern, insbesondere ausländischen, die keine Kenntnis der gemischten Gerichte besitzen, die deutsche Form der Laienpartizipation an der Rechtsprechung zu erklären.

Bemerkenswert im internationalen Vergleich ist das Ausmaß der Teilnahme ehrenamtlicher Richter, die sich etwa bei Strafverfahren auch auf die zweite Instanz erstreckt. Im Gegensatz zu Geschworenen sammeln ehrenamtliche Richter durchaus Erfahrung, von sachkundigen Ehrenamtlichen wird viel Gebrauch gemacht und in der Strafjustiz, z.B., wirken Schöffen auch an der Festlegung des Strafmaßes mit. Da gemischte Gerichte wesentlich weniger Kosten verursachen, können sie für ein breiteres Fallspektrum als Geschworenengerichte eingesetzt werden. Zu den Problemen gehört eine mögliche unzulässige Dominanz der Berufsrichter, die Ausschaltung der Laien durch Deals im Verfahren und die gelegentlich zu schwache Persönlichkeit von ehrenamtlichen Richtern. Dennoch engagieren sich die meisten recht wohl, besonders wenn ihr Sinn für Fairness und Urteilsgerechtigkeit angesprochen ist.

Key words: Court procedure; German legal system, judges; lay judges; mixed court

The study of mixed courts gives a unique perspective on the German justice system. The contribution of lay people to court proceedings and decision-making brings to light elements which might otherwise be missed. These include the way German judges resolve cases in a group setting, and the impact on lay people of taking part in trials. Also of interest are the circumstances in which lay participation tends to be most effective.

‘Well over 100,000’ Germans serve as lay judges in mixed tribunals, about 60,000 of them in criminal courts (DVS 2016a). Mixed courts are characterized by the combination of professional judges with a lay element. They are widely used in Germany, and in many other countries in Europe and elsewhere (Hans 2008; Jackson & Kovalev 2016; Machura 2016). Mixed courts typically hear cases that are not considered ‘minor’ – those are usually heard by a single judge. The typical composition of a mixed court is one presiding professional judge and two lay judges. In the main hearing lay judges have (almost) the same rights as professional judges. In Germany mixed tribunals are used in criminal courts, administrative courts, labour and commercial courts, and more.

The purpose of this article is to explain the German mixed court to readers not familiar with it. There is abundant literature on juries as a form of lay participation, particularly on U.S. juries and their role in the U.S. legal system. The following discussion starts with the reasons commonly given for lay participation. The next section compares the U.S. criminal jury and the German court of lay assessors. The author then introduces empirical studies on German mixed courts, particularly those he conducted himself. After an examination of the framework of the German legal culture and legal system in which lay judges operate, attention is focused on the importance of the co-operation between those involved in the work of the courts. The next

sections describe the participation of German lay judges in the pre-trial, trial and deliberation phases. The concept of power distance orientation is employed to characterize the different personalities of lay assessors, and the way these differences affect their work. The penultimate section demonstrates that lay judges are generally satisfied with their overall experience, and prepared to serve for another period. The conclusion deals with areas requiring reform and emphasizes the need to consider such legal institutions as lay participation in their empirical context.

### **Why should there be lay participation?**

A variety of reasons have been given for the use of a lay element in the courts (e.g. Wassermann 1982; Struck 2011: 103–113; Machura 2016). The core arguments can be summarized as follows:

#### *Lay judges allow a group decision*

Adjudication requires not only an interpretation of legal codes, but also an understanding of the social situation at the heart of the conflict and of the people involved. Deciding cases includes an element of value judgement. The German word *Schöffengericht* for the mixed tribunal in lower criminal courts involves the verb *schaffen*, meaning ‘to make’. Law is made when cases are decided. Unfortunately, but inevitably, individuals have to be relied upon when legal conflicts are resolved, no matter how good the rules and the organization. In ‘nontrivial’ cases, therefore, more than one person is involved in the final decision-making. Once there is a group of judges a discussion can be had, in which reasons have to be given for a decision, alternative views can be heard, and assumptions can be tested. The inclusion of a lay element results in a greater chance of this happening (e.g. Rennig 1993: 589; Baderschneider 2010: 270 f.). The state cannot afford

to have several professional judges in all such cases, so lay assessors are a workable alternative (Rennig 1993: 589).

There are three principle types of lay judges: those representing society, those who can contribute specific expertise, and those who represent certain interests recognized by the legislator as key to the development of an area of law.

#### *Lay judges as representatives of society*

The first category of lay judges is selected from the general population. From a liberal perspective court actions constitute state interference triggering a need for democratic legitimation, and hence democratic participation. Court rulings also involve value judgments. The participation of ‘genuine’ lay people, as in the German criminal and administrative courts, means that professional judges are confronted with a wider spectrum of opinion (S. Walter 2005: 37). A traditional argument in favour of lay judges selected from the whole population has been mentioned by Franz-Rudolph Kronenberger (1989: 189): Social change is better taken into account through the inclusion of lay judges. Importantly, according to findings of the *Richterssoziologie*, judges are at least partially socialized by their institution, and moulded through its discipline (Machura 2001a: 28 f.; Struck 2011: 96–98, 105 f.). This is the essential meaning of the term “‘lay judges’: they are independent from the institution. Many see judges as conservative, bound by their bureaucratic routines and out of touch with the life of large parts of society. Some would dispute this, but still welcome the fresh views contributed by ordinary citizens.

Support for genuine ‘lay judges’ among German professional judges is not unequivocal, although it seems most judges actually presiding over mixed courts tend to favour the institution (Rennig 1993: 487 judges and prosecutors positive). Opposition is strong among professors of

dogmatic law, who argue – against the current law – on principle, without any reference to empirical studies<sup>2</sup>. On the other hand, political support for the democratic element in the courts remains strong. There is a relation between lay judges and the active citizenship engaging in local politics (Kronenberger 1989: 187-189; Machura 2006: 31 f.). Although politicians occasionally advocate abolishing lay participation for some categories of cases, or having more rulings made by (usually single) professional judges (Köhler 2010: 132; Lieber 2016), the institution has clearly been upheld in principle (e.g. Baderschneider 2010: 19). The German public seem in favour of lay participation (Kaupen 1972: 561; Kaupen 1973: 44; Smaus 1985: 171; Villmow et al. 1986: 344-359).

#### *Lay judges with special expertise*

The second category of lay judges is characterized by special expertise and professional experience. In Germany, lay judges in juvenile criminal courts (*Jugendschöffen*) and honorary commercial court judges (*Handelsrichter*) are most often discussed. The former contribute educational experience, the latter experience of business practice. Justice is based on expert knowledge and on familiarity with the social situations underlying cases. More appropriate decisions are thus made.

Expert lay judges tend to be more highly respected by their professional colleagues than are other lay judges (Machura 2001a: 243 on *Jugendschöffen*; Lindloh 2012: 60–66 on honorary

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2 Against lay judges e.g. Windel 1999. One debate around mixed courts is only relevant in an international context. Advocates of the jury find flaws in the mixed courts (e.g. Lempert 2015: 858 f.). But in Germany, given the political realities, there is no chance whatsoever to see a return of a system abolished in 1924 (Hadding 1974: 84–86), which is associated by German power elites with perceived ‘excesses’ of the U.S. legal system (Neumann & Köcher 1997). The conflict in Germany is about keeping the mixed courts for criminal and administrative courts. Expert lay judges in other branches of the court system would be much harder to abolish.

commercial judges). Even some opponents of lay participation see expert lay judges positively (e.g. Görlitz 1970: 306). Status difference theory, advanced for mixed courts by Kutnjak Ivkovich (1999), offers a sociological explanation for the higher esteem in which expert lay judges are held by professional judges: they are credited with the ability to make a task-related contribution. Conversely, even expert lay judges might sometimes see professional judges as superior experts (for labour courts Brandstätter et al. 1984: 154). There are calls for the remit of expert lay judges to be widened.

#### *Lay judges representing special interests*

Lay judges may represent certain interests in the development of an area of law and the adjudication of cases. In Germany this is most noticeable as regards lay judges in labour courts. Half of the lay element represents the workers and the other half the employers. The development of German labour law is largely led by these two sides and the courts. The legislator recognizes their competence.

The third category of lay judges overlaps the second, as labour court lay judges are also sometimes said to provide special expertise that professional judges do not have, that is, actual experience of labour issues.

#### *Other political functions*

As has been mentioned, one line of argument in favour of lay participation emphasises its democratic benefit in providing an opportunity for citizens to take part directly in legal decisions, rather than being restricted to influencing the law indirectly via general elections (Kulscár 1972: 491) or plebiscites. Ideally, lay judges would also speak about their experiences in court, and thus help influence public opinion and legal policy-making. In Germany (Machura 2011b), however, there is no such feedback loop. Many lay judges shy away from talking about their

experiences in court, partly because they are confronted with prejudice created by sensationalized media reports. Another political function of lay judges is to legitimize the institution of the courts through their presence and influence. How far this occurs remains unclear, but as noted above, the German public has formerly been found to be supportive of the idea of lay judges. Do lay people in mixed tribunals increase trust in the courts? In one study, at least, juvenile prisoners' evaluations of the justice of their trial correlated with the perceptions of the lay assessors (Haller et al. 1995: 132). It is also argued that the presence of lay judges ensures that judicial language becomes more accessible, and more understandable to the parties in the trial. The same applies to the 'plausibility' of decisions (Klausa 1972: 110; Schiffmann 1974: 228).

So then, in political and academic debate a number of reasons are brought forward for lay participation in the administration of justice. It is totally opposed only by those who believe that under no circumstances can a lay person make a meaningful contribution to decisions taken by professional judges. Indeed, one experienced judge has said that *Schöffen* are no less qualified than professional judges to understand what happened in a case, and to decide punishment, within the boundaries set by the law. Only when it comes to subsuming the case under the letter of the law, is the legally trained professional judge superior (Rasehorn 2016: 17, similarly Baderschneider 2010: 156, 221). Here, however, we are talking about mixed courts, so both professional and lay elements are always present. How then is lay participation organized and put into practice, and how is lay participation experienced?

### **Forms of lay participation: jury and mixed court**

Forms of lay participation may vary even within one country (Jackson & Kovalev 2016: 374 f.;

Machura 2016). In Germany not all provinces (*Länder*) offer the same amount of lay participation. Brandenburg, for example, has lay judges even in its Constitutional Court. Some provinces do not involve lay judges in higher administrative courts (Baderschneider 2010: 29). Voting rules are another consideration that is discussed in a later section on the deliberations of a mixed court.

In the administration of justice lay participation comes in different shapes and forms (Jackson & Kovalev 2016; Machura 2016). Some countries employ single lay judges, mainly in minor cases, but in order to understand the German mixed court it is helpful to concentrate on collegial courts. The best known of these are the U.S.-style jury courts and the courts of lay assessors common in Continental Europe. It is important to grasp the difference between them. The key feature of the jury court is the division between jurors and professional judges. They cannot deliberate together. As a consequence, this is not a channel through which professional judges can exert their influence. The jury usually only decides on the question of guilt: in a civil court it judges the merits of the plaintiff's case. Jurors in practice have little or no opportunity to influence the taking of evidence. This is the preserve of the opposing lawyers, and perhaps of professional judges who influence – indeed, try to control – the jury in this way. The expression ‘trial by judge and jury’ correctly points out the separation of the elements. In the court of lay assessors, by contrast, professional and lay judges decide together on questions of law (this is why mixed tribunals can work in courts of appeal) as well as on procedural matters. They can confer with one another throughout and together determine the final case outcome. The procedure has practical advantages, and widens the competence of lay judges, but it also provides opportunities for professional judges to influence – sometimes unduly – their lay colleagues, should they wish so.

Table 1: Forms of lay participation in criminal courts: German mixed court and U.S. jury court

<b>Court of lay assessors</b>	<b>Jury court</b>
<i>German Amtsgericht</i>	<i>U.S.</i>
Mixed court, closely working together 1 professional judge, 2 lay assessors	Trial by judge and jury, with separate roles 1 presiding professional judge, up to 12 jurors, 2 alternates
In at least all medium criminal cases	All criminal cases involving incarceration
Mandatory	Defendant's right, usually waived
Only professional judge reads file	Neither presiding judge nor jurors read file
Presiding judge takes evidence	Prosecution and defence bring evidence
At the trial, lay and professional judges decide on law, procedure and facts	Jurors decide on fact, presiding judge decides on law and procedure
Lay judges: typically serving 4 to 8 days per year	Jurors called for one specific case

Table 1 shows how different courts can be designed, using the example of criminal courts: the German court of lay assessors and the U.S. jury court. In the *Schöffengericht*, the presiding professional judge has the advantage of knowing the file, having worked on it before the main hearing. German lay judges are usually scheduled to sit on certain days and in the criminal courts do not normally get to see the files. U.S. jury courts deal only with a very small proportion of criminal cases (and of other cases, Thomas 2016). Generally jury trials take longer and are more expensive than bench trials (Lempert 2015: 851). The U.S. criminal courts get through their workload only because the majority of cases are siphoned off to other disposal mechanisms. They are most often dealt with by plea bargaining (Orem et al. 1999: 16; Thomas 2016: 4–6): the defendant agrees to confess, the prosecution brings a lesser charge and a professional judge seals the deal. If the main problem of the mixed court is the influence exerted by professionals over lay judges, this can be seen as counterbalanced by the fact that the court of lay assessors is more

economical than the jury court and thus can be used as the regular court for a much wider range of cases.

For example, in German administrative courts of first instance, mixed tribunals hear about a quarter of all cases (Kipp & Lieber 2010: 49). In criminal cases in Germany, courts of lay assessors deal with:

- 11% of all criminal cases in the *Amtsgericht*, the county court (Sens 2013)
- and in the regional court (*Landgericht*) they hear
  - o all cases of first instance
  - o all the appeals against cases dealt with by courts of lay assessors and by single professional youth judges in the county courts (Sens 2013).
- Almost all cases of first instance in the provincial high court (*Oberlandesgericht*).

The court of lay assessors at the county court (*Schöffengericht*) handles criminal cases in which a penalty of between two and four years in prison is expected. Appeals against judgments by the *Schöffengericht* are dealt with by the Small Criminal Chamber (*Kleine Strafkammer*) in the regional court. The composition is the same as that of the *Schöffengericht*: one presiding professional and two lay judges.<sup>3</sup>

There are different regulations for juvenile court cases, but as regards medium to high levels of crime, there is a youth court of lay assessors (in the county court, the *Jugendschöffengericht*).

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3 Occasionally in the county court, if the public prosecutor asks for it, the *Schöffengericht* has one additional professional judge (*Erweitertes Schöffengericht*, extended court of lay assessors). This is sometimes said to happen if the prosecutor is afraid of the *Schöffens'* influence.

So mixed courts allow a wide range of cases to involve lay participation. It is ironic, though, that efforts to ‘rationalize’ court proceedings<sup>4</sup> have reduced the amount of cases heard in the presence of lay judges. Thus, the potential of lay participation is not used fully even in Germany.

### **Studies on the German Mixed Courts**

There are a number of empirical studies on mixed courts in Germany. They tend to draw a similar picture when it comes to the activities and experiences of the lay judges themselves<sup>5</sup>. Key features have not changed since the earliest studies. This is probably explained by the fact that the mixed courts have not been reorganized in recent decades. Both the organizational regulations, and those defining the roles of lay and professional judges, put in place in the mid-1970s largely still apply.

In a ground-breaking study of the American jury, Harry Kalven and Hans Zeisel (1966) asked professional judges if they would have decided criminal cases differently from juries. Subsequently Casper and Zeisel (1972) surveyed German presiding judges about their experiences of lay judges in criminal courts. Casper (cited in McCauliff 1980: 696) summarized their findings as follows:

*‘Our study clearly indicates that German lay judges exercise independent judgment in criminal cases, and do serve a societal purpose comparable to that of American juries – namely, injecting the values, experiences, and judgments of the lay community into the adjudication process.’*

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4 At the level of individual judges (Lindloh 2012: 40, 49), as well as savings intended by law-makers (Machura 2001a: 33 f.; Lieber 2015: 108) when small amounts are spent on lay judges (Baderschneider 2010: 80 f.).

5 Overview in Machura 2001a: 119–135. The more recent study by Malsch (2009: 135–152) is based on a small number of respondents for the part relating to Germany, while Glöckner and Landsberg (2011) concentrated on decision-making experiments with 67 *Schöffen*. Baderschneider’s dissertation (2010) in its empirical part is based on interviews with 24 professional and lay judges in administrative courts, as well as with lawyers.

Ekkehard Klauska questioned professional and lay judges in different branches of the German court system. He found that it is only possible for lay judges to make a 'positive contribution' if they are accepted as partners by professional judges (Klauska 1972: 213). In a survey of lay and professional judges in German administrative courts, which also included lawyers and litigants, Gerfried Schiffmann (1974: 225) emphasized the point that professional judges have to respect and support lay judges and be open to criticism. Lay judges, for their part, have to be able and willing to actively collaborate, and engage with the proposals of the professional judges.

Drawing on the works mentioned above, among others, the author has conducted two studies designed to find out about the experiences of lay judges.

The first study on *Schöffen* involved several stages and took place in the Amtsgericht Bochum, and in the busiest German criminal court, the Amtsgericht Frankfurt on Main. It started in 1996/97 with a questionnaire survey of 151 *Schöffen* und *Jugendschöffen* in the AG Bochum. Fifty-one of these also took part in focused interviews lasting between 30 minutes and two hours. The results were then compared with the questionnaire responses of 417 *Jugendschöffen* and *Schöffen* in the Frankfurt court in 1997.<sup>6</sup>

There were cultural differences between the courts. The Bochum court was very lay-judge-friendly, and had a kind of family atmosphere. The ideals of the labour movement were still strong in a city formerly living on coal and steel, and lay judges tended to see offenders more like prodigal sons in need of reform. Frankfurt, by contrast, is the financial capital of Germany, with a major international airport: offenders tended to be seen as outsiders and lay judges took a

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<sup>6</sup> All results and methods described in Machura 2001a, in English: Machura 2001b, 2001c, 2011b.

more punitive stance. Professional judges in Frankfurt were more likely to be focused on dealing with cases quickly.

The second study, in 2000, addressed the experiences of lay judges in administrative courts. German administrative judges have previously been found to be rather hostile to lay participation (Klausa 1972: 104; Görlitz 1970: 197–198, 230; Schiffmann 1974: 116–117; Schiefer 1999). A total of 301 *ehrenamtliche Verwaltungsrichter* in courts of first instance responded to the author's questionnaire survey.<sup>7</sup> They came from the western province of Hesse and the eastern German province of Saxony-Anhalt. Until 1989 the latter was part of a Soviet-style state which saw no need to have separate administrative courts in which citizens could challenge the authorities (Stelkens 1991: 991; Baderschneider 2010: 16 f.). The professional judges were therefore mostly 'imported' from the West (Remmers 1993: 98) and only the lay judges were familiar with the old system and its legal practices. This was at a time when the courts were flooded with cases relating to the transition to a Western model of society. Even now professional judges in former East German provinces tend to be from West Germany (Locke 2016).

These two studies, and a similar one in Russia, (Machura et al. 2003; Machura 2003), together with information gained from lay and professional judges, and from international researchers have made clear the importance of the institutional and cultural framing of lay participation. To a great extent the latter define the opportunities available to lay judges in one particular country, in one particular area of the courts.

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<sup>7</sup> Method and results of the study have been published in German and English, Machura 2006, 2007b.

### **The framework of German court procedure**

American scholars often judge the European mixed courts by one criterion: how often lay judges disagree with professional judges and outvote them, but this does not take into account the institutional and legal-cultural differences between the U.S. and a country like Germany. For a start, lay participation takes on different meanings depending on the nature of the professions involved in criminal justice. In Germany the careers of judges and public prosecutors are entirely confined to the court system. Candidates enter it in their mid- to late-twenties. If they get a good enough degree, most German law students aspire to such a job. Law firms do not necessarily always attract the best lawyers. The situation is different in the United States, where judges and prosecutors are often elected, or politically appointed (Langbein 1985: 848–855), and ambitious law students look for jobs in law firms. Many Americans see juries as being necessary to correct the shortcomings of judges (Lempert 2015: 838, 857), the police force and the prosecution. The German police are subject to strict hierarchical and legal control, and prosecutors are rarely criticized. German lawyers are defined as ‘organs of justice’ and although they – like their American counterparts – have to serve their clients’ interest, they are framed more clearly as being part of the legal system. They have, after all, gone through the same legal education, which includes apprenticeships in the courts and the office of prosecutors, and a rigorous final examination that qualifies them to work as judges. Only after this do their paths and those of judges and prosecutors divide. Consequently, lay participation in Germany is not intended to correct a system widely perceived as prone to failure or scandal. Germans typically trust the law, its institutions and the legal profession.<sup>8</sup>

The cases appearing before a German court have been filtered and checked several times. The

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<sup>8</sup> E.g. Machura 2011a, 2015. A significant loss of prestige for lawyers in 2016 was noted by Zitka 2016: 11).

police, lawyers and public prosecutors select cases according to their anticipated merits in court, in criminal cases: the likelihood of conviction. A judge then decides, on the merits of the dossier, whether the case should proceed. This procedure ensures that, in the criminal court, only cases likely to end in conviction are heard. In other types of trials, lawyers often discourage parties from taking weak cases to court. As a consequence, lay and professional judges tend to hear cases about which opinion is not likely to be divided. Disagreement between judges is also less likely when the defendant pleads guilty. The U.S. criminal jury does not hear such cases as they would be resolved by plea bargaining. Measuring the German mixed court by the same yardstick as the American jury court is thus problematic: German courts hear a much wider range of cases, and these cases tend to be carefully filtered.

### **The German ideal of co-operation**

There are further cultural and institutional differences: among these is the ideal of cooperation in the courts. (Admittedly, the following characterization is ‘ideal typical’. But this may be necessary to further the understanding of anyone not familiar with the country.) The German criminal court follows the principle of investigation (*Untersuchungsgrundsatz*). The court establishes ‘the truth’ – or a ‘best possible approximation’ (Pfister 2010: 97). All branches of the court system are under an obligation to ensure the fairness of trials, and if necessary judges correct an unacceptable imbalance between the parties – the Constitution speaks of a ‘social state of law’ (*sozialer Rechtsstaat*, article 20(1)), and the court bureaucracy works to put this into practice.

So then, a professional judge reads the dossier in advance and organizes the hearing of evidence in open court. Usually this is the presiding judge, while in Grand Chambers consisting of three

professional and two lay judges, there is a reporting professional judge (*Berichterstatter*). The procedure is seen as the judge forming a theory of the case (or alternative hypotheses) on the basis of the dossier, and then testing it in open court (Lautmann 1973: 111; Rennig & Machura 1999: 69).

The fact that the court is seeking the truth in a public hearing means that judges, the prosecution and the defence (or judges and lawyers), collaborate. In criminal trials confrontation is very rare. Judges, prosecutors and defence lawyers are all engaged in discovering ‘the truth’. It usually does not pay for defendants and their lawyers to be uncooperative. ‘Constructive’ participation by the defence is generally the best approach (Perron 1999: 5 and 10). Courts will often be understanding and lenient. German prosecutors cultivate an image of impartiality that reflects their legal obligation to acknowledge evidence both against and in favour of the defendant.<sup>9</sup> Prosecutors often accept arguments and suggestions from the defence. Lawyers, prosecutors and judges often know each other personally and have developed a sense of what they can expect from each other. Having observed trials in a medium-sized court, the author formed the impression that trials tend to be run cooperatively by a ‘court crew’ composed of seasoned professionals (Machura 2007a).

There have been sustained attempts to get away from the rigidity of old-style trials. In principle parties are seen as being open to reasoned argument, entitled to understand what is happening to them, state their case and be treated fairly and respectfully. Symbolically, the architecture of modern court buildings has discarded the imposing features of 19th century courts. Judges are no longer enthroned high above everyone else.

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<sup>9</sup> Rüter 1998: 3; Machura 2001a: 258, 260-263 found mixed experience among *Schöffen*.

A culture of consensus reigns in German courts. It is assumed that justice, truth, and the law are best served if there is as much agreement as possible. German judges avoid sticking their necks out. There is typically no formal vote in deliberations (Lieber 1997: 118). Instead, there is a great deal of talk until everyone present seems to share one opinion, and support a particular way of dealing with the case (more in a later section).

Another aspect of cooperation has become problematic for the criminal courts. The ‘immediacy principle’ requires evidence and arguments to be heard in open court, especially in criminal trials. The volume of cases however, has resulted in more and more being settled by ‘deals’. Even in an ongoing major hearing, a deal is often struck, and judges often encourage this. The practice has alerted higher courts and the legislative to the need to rein it in. According to critics, the Federal Constitutional Court’s requirement that public prosecutors should fulfil a guardianship role (*Wächteramt*) is not satisfied when judges, and defence and representatives of the prosecution agree (Müller 2014). In a recent survey, one third of prosecutors and professional criminal court judges were critical of deals (Jahn 2014). One problem resulting from deals is that lay judges can easily be cut out of the process. In 2014, however, the Federal High Court started to systematically repeal judgments based on deals, so now trial judges tread more carefully (Bubrowski 2014). As a side effect, this could strengthen lay participation as more is decided during the actual trial.

The next section will examine how lay judges are prepared for their participation in a trial.

### **Lay assessors prior to the hearing**

The courts are supposed to provide inductions for new lay judges at the start of their period of service. However, some courts rely on a brief talk when the lay judge is sworn in

(Baderschneider 2010: 113–118). Even induction seminars tend to be very short and confined to the barest minimum. Sometimes judges are more concerned with possible bias that would disqualify lay judges than with enabling them to become active participants. ‘We hear little about our rights,’ a *Schöffe* (Kohlmannslehner 1991: 75) wrote. Fear of disqualification, however, is quite unnecessary as lay judges do not show their feelings during court hearings (Rottleuthner 1978: 114; Schmohl 1998: 119). There is, however, some good practice – in one example there was a comprehensive initial induction, and then a follow-up, after some initial experience had been gained (A. Walter 1992: 32, 45). Some non-governmental organizations offer seminars for lay judges, often in cooperation with the German Association of Lay Judges.

The provincial justice ministries supply lay judges with information brochures. Books for lay assessors can also be bought covering certain courts (e.g. Lindloh 2012; Lieber & Sens 2013; Lieber 2014). Individuals may join the Association of Lay Judges, receive the journal “Richter ohne Robe” and possibly even attend local meetings and seminars.

German lay assessors currently serve for a period of five years. When they arrive for duty they may have at their disposal useful experience gained while they have been in office. For example in the Frankfurt county court study, *Schöffen* were surveyed early in their period of office. Only 54% were in their first year of service, the rest were more experienced (Machura 2001a: 180).

Lay judges sit for a number of days at different times of the year and deal with several cases (Machura 2001a: 181; Kipp & Lieber 2010: 52; Baderschneider 2010: 118 f.; Lieber 2011: 7). They often hear more than one case per day. Accordingly, most have been through a number of deliberations. Lay assessors will often be acquainted with other tribunal members from previous trials and may be able to put this knowledge to good use. They may know about the idiosyncrasies of panel members, and be prepared to counterbalance them.

Lay judges may have some legal knowledge, and some area-related expertise. As mentioned above, in some types of court, they are selected for their professional background. Occasionally lay assessors possess useful knowledge they just happen to have acquired through their work, or by living in an area connected with the case being tried, or from their private studies. Lawyers are not excluded from becoming lay assessors<sup>10</sup>. Some court employees are barred. It should be borne in mind that legal education is quite widespread in Germany, and many jobs in administration and business require competence in certain areas of law.

Preparation can be important in another way. Information about the case has to be finely balanced to avoid bias. When lay judges arrive to serve on a day a court is sitting, the presiding judge provides a short introduction to the case(s) in his chambers. Practice varies: there may be no explanation at all, some unhelpful words, a neutral outline of the type of case or an attempt by the professional judge to influence them unduly<sup>11</sup>.

In the administrative courts, the professional judges prepare for the hearing in advance and have a preliminary meeting (*Vorberatung*). They then have to explain the case to the lay assessors on the day of the sitting.<sup>12</sup> When lay assessors in administrative courts are informed about the case that is to be heard, longer briefings allow them to ask questions about it and to ask the professional judges to pose certain questions during the hearing (Baderschneider 2010: 138). In administrative courts, lay judges have the right to study the files, and indeed this is often

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10 Some mixed courts routinely have lawyers as lay judges. For example, union lawyers represent employees in the Federal Labour Court of Germany, and law professors represent employers. Administrative courts only exclude certain legal professionals, such as notaries and attorneys of law (*Rechtsanwälte*).

11 Pohl 1987: 69; Lieber & Burchardt 1989: 14; Lieber 1994: 6; Pauli 1999: 4; Machura 2001a: 201 f.

12 Kipp & Lieber 2010: 52. A similar practice was reported to the author by a judge of a finance court.

considered necessary. In one study 23% of the respondents said they had read the dossier before the hearing; 28% had read it during the hearing, and 10% read it before and during the hearing (Machura 2006: 56).

Prior to the hearing, the professional judge also needs to tell the lay judges if any agreements (or deals) have been made with the parties. They have to be explained, in the light of the evidence. The *Schöffen* are entitled to reject them (Pfister 2010: 99). In the criminal courts, there has been considerable criticism of the fact that *Schöffen* may be railroaded by the professional judges at this point (Weigend 1990: 777; Machura 2001a: 204, 262).

### **Lay assessors in the hearing**

The first paragraph of the German Law on Judges states that lay assessors are judges. As a consequence, they have the same rights as professional judges during the main hearing, the deliberation, and when it comes to voting. However, the presiding judge is the ‘master of the procedure’, allocating time to speak, interrogating witnesses first, and introducing most of the other evidence. The presiding judge also ensures the orderly and uninterrupted conduct of the main hearing. His or her position is meant to be ‘first among equals’. Lay assessors may ask questions, either in person or through the presiding judge. However, the present structure of German trials, the sometimes authoritarian style of the presiding judge, and the filtering process before a case is heard, are among the reasons why lay judges in fact seldom ask questions (e.g. Rennig 1993: 529-531; Baderschneider 2010: 137; Kilian 2016). The same goes, more or less, for junior professional judges. Not knowing what is in the case files disadvantages lay judges in criminal courts, and makes asking questions difficult. Even so, in the end *Schöffen* generally figure out what the trial is about (Lieber & Burchardt 1989: 14; Rennig 1993: 571).

Lay assessors also take part in all decisions regarding court procedure. Breaks during the hearing can be used for strategy discussions among the tribunal of judges, or to ask the professional judges questions.

An ‘authoritarian’ president silences everyone (Klausa 1972: 67), including junior professional judges, who depend on him or her for their future career (Lautmann 1985; Rasehorn 2016: 17)<sup>13</sup>.

In extreme cases, a presiding judge may perceive additional questions as an insult and ignore them, as they could imply that an important point has been overlooked (Vultejus 1999: 61). Lay judges evaluate positively presiding judges who treat them fairly and accept them as equals (Machura 2001a: 207; Machura 2006: 72).

### **The right to read the case files**

In criminal courts the right of lay judges to read the dossier is still not fully put into practice (for details: Machura 2001a: 37–38). However, in commercial, labour, financial, social and administrative courts, the right of lay judges to read files is fully implemented (Kodura-Siepmann 1991: 72–73; Lieber 1994: 6). Lindloh (2012: 57 f.) reports how actively honorary commercial court judges participate in hearings and deliberations, having studied the files. The leading commentary on criminal law favours this right (Meyer-Goßner & Schmitt 2014: 1861),

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13 The dark arts of judging also include tactics like making up reasons to postpone the case if the presiding judges believe they cannot work with the lay judges allocated for the day of sitting (Klausa 1972: 78; Knittel 1970: 28; Lieber 1995: 109). Misrepresenting the voting rules would also count as a major offence. Furthermore, outvoted judges can leak their disagreement to the interested party (even in open court: Rennig 1999: 9–10). Or the presiding judges may vary the usual announcement formula “The court has...” to “Nevertheless, the *Schöffengericht* has” (Klausa 1972: 78). Still another tactic is to make obvious mistakes in the written version of the judgement and so force a cassation in the court of appeal (Wette 1998). This could be made more difficult if the *Schöffen* routinely signed the final written text (Hillenkamp 1998: 1438), or if at least the main line of the judgement is written up directly after the deliberation and co-signed by the lay judges (Lieber 1996: 156).

as did a series of rulings by the higher courts. German judges argue that they need to be familiar with the case files in order to prepare for the main hearing (under an investigatory trial system!). One German school of jurisprudence would like to deny judges this opportunity, as they are perceived as liable to be prejudiced by what is in the files. Consequently, they advise against *Schöffen* having access to the dossier prior to the hearing. Indeed, Bernd Schünemann (1995) argued on the basis of experiments that professional judges tend to follow the opinion of state prosecutors. It would seem logical, then, to deny access to both professional and lay judges. As long as professional judges can read the files, but lay judges can't, the latter will be at a disadvantage. Apart from better preparation of lay judges through training, there may be other ways to address any fear of bias. Malsch (2009: 214) suggests that 'better balanced' case files mitigate against possible bias. Indeed, case files may include, for example, statements by the defence, or a comment by the judge who has prepared the case on aspects that need to be proven in the main hearing. If judicial prejudice is seen as a systematic danger, it seems best to counter it with measures affecting both professional and lay judges. Meanwhile, the German Lay Judge Association does not ask for complete access to criminal dossiers, but for the right to see some key parts that are unlikely to lead to prejudice (DVS 2016b: 15).

### **Lay assessors in the deliberation**

The deliberation is led by the presiding professional judge. Lay judges usually take an active part in the deliberation (Machura 2001a: 228; Machura 2006: 56; Baderschneider 2010: 146–149). In criminal courts, extreme opinions are rarely put forward by lay judges (Rennig 1993: 570). In administrative courts lay members do not vote against the law when it has been explained to them by the professional judges as being unequivocal (Baderschneider 2010: 157). All judges in

criminal court, including lay assessors, generally come to the deliberation with a similar impression of the case, particularly if a defendant pleads guilty (Casper & Zeisel 1979: 84 f.). This may partly be explained by the fact that lay judges tend to come from the middle classes, to be well educated, to be close to the main political parties, and to be in their fifties and sixties (Machura 2001a: 176–179; 2006: 29–32). Their general views and values may thus often be similar to those of the typical professional judge (Gerken 1986: 151 f.; Rennig 1993: 572). It should also be borne in mind that many modern careers require a measure of legal training and competence in at least some area-specific law, which enables people to follow basic legal arguments. As mentioned above, due to the filtering process before the main hearing, courts mostly deal with cases which are more or less uncontentious. Lay judges may put forward a different opinion more often if they think the defendant/a litigant has been treated unfairly in the main hearing, or if the expected outcome appears unjust.<sup>14</sup>

It can be considered proven that the influence of lay judges in mixed tribunals also depends on whether they outnumber the professional judges. They need to be in a clear majority to have maximum influence (e.g. Casper & Zeisel 1979: 80–82, Tables 38 and 39; Rennig 1993: 488 f.). If they are in a minority, the professional judges, who have worked together for years, can override them. In such cases, lay participation is a mere formality: the professional judges actually decide among themselves.

The voting rules in the particular branch of courts are still important. They work in connection with the composition of the tribunal. Sometimes three professional and two honorary judges sit together, and only a simple majority is required, as in the administrative courts. Sometimes, as in

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<sup>14</sup> Machura 2006: 61; Baderschneider 2010: 148; but this effect did not appear in Machura 2001a: 233.

the criminal courts, one, two, or even three professional judges cannot convict the defendant against two determined lay assessors, because a two-thirds majority applies.

Despite these key points, most lay assessors find most presiding judges supportive (Klausa 1972: 76; Gerken 1986: 142; Kühne 1989: 180). For example, 80% of the *Schöffen* in the author's study in the lower criminal courts of Bochum and Frankfurt rated cooperation on the previous day of sitting 'very good' or 'good'. This evaluation depended mainly on the perceived fairness of the presiding judge towards the lay judges. Another contributing factor was the perceived justice of the final decision of the tribunal (Machura 2001a: 246–249). On the last day of service, 71% of the honorary administrative court judges in Hesse and Saxony-Anhalt felt 'very fairly' treated by the presiding judge, and 66% of them felt the same way about the professional judges taken together (Machura 2006: 57). But there must have been disappointing experiences too, because, when asked about the fairness of professional judges towards them over the whole period of their service, only 47% of the honorary administrative court judges rated it 'very fair' (Machura 2006: 47).

The professional judges provide their lay colleagues with explanations during the deliberation (and sometimes during breaks in the hearing). Most lay judges are satisfied with the level of explanation given (Großmann 1978: 532; Pauli 1999: 4; Machura 2001a: 206). Lay judges regard professional judges as trustworthy authorities (at least until there is reason for doubt). They have, after all, many years of experience, have studied law, and can bring this to bear (Rennig 1993: 575 f.). In their work on Austrian lay assessors, Frassiné, Piska und Zeisel (1979: 123) mention that the professional judges may invoke the usual practice of courts, only known to the professional judge, to make dissenting *Schöffen* agree. And there is always the powerful

argument that appeals courts will see the case differently (Struck 2011: 108). A lay assessor in the author's criminal court study (Machura 2001a: 212) noted:

*Schöffen as opposed to the presiding judge do not have the level of knowledge and experience of the administration of justice. Thus the judge is often asked how similar cases have been decided. In this way the judge can of course decisively control and influence the decision-making.*

More experienced lay judges may, however, not rely on this.

### *Voting behaviour and advocating different views*

The courts mainly hear cases which are largely uncontentious and the procedural culture favours agreement, so in most trials all the judges have a similar view when they retire to deliberate. The discussion then serves to get things settled and to nuance the final decision. In such a situation it cannot be expected that lay judges will differ much from other members of the tribunal. To this it must be added that there are surprisingly few formal votes.<sup>15</sup> There are some judges, though, who routinely apply the voting rule that stipulates that the lay judges vote first (or after a reporter). Very occasionally the presiding judge is outvoted. Occasionally too, junior professional judges, lay assessors and professional judges are split in various ways. For example, in the Grand Criminal Chamber, the presiding judge, with the votes of the lay assessors, might prevail over one of his professional colleagues, or the professional side judges might join up with the two lay judges, etc. Most lay and professional judges say that there is an open discussion until it is felt that a common position has been reached (e.g. Helber 1998: 8, 10). At the heart of this is the culture of consensus, which is so characteristic of German courts (Rennig 1993: 577; Baderschneider 2010: 154 f.). No-one needs to take up an individual position, the deliberation just flows and in the end many participants leave the room with the impression that the final

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<sup>15</sup> Lieber 1997: 218; Machura 2001a: 241; according to Baderschneider 2010: 226 none.

decision is pretty much what they had in mind (Machura 2001a: 212 f.). As a consequence, asking lay and professional judges about disagreements, and how often someone has been outvoted, may underestimate the dynamics of the discussion.

Occasionally presiding judges are outvoted, or feel that a different outcome would have been better (see also Rennig 2008). The author asked about lay assessors' experiences in the administrative court during their most recent service. They seldom managed to uphold 'a different opinion' against a professional judge (Machura 2006: 56). When answering this question the respondents did not necessarily report serious differences. In the *Schöffen* study in the Bochum and Frankfurt lower criminal and youth courts, lay judges more often reported being successful with an opinion against a professional judge (Machura 2001a: 236). The aforementioned results referred to the last occasion of service. To cover a wider range of experience respondents were also asked about the whole period<sup>16</sup>. Then about one in two administrative court lay judges stated that at least some cases would have been resolved differently if no honorary judges had been participating (Machura 2006: 46). When it comes to the Bochum and Frankfurt county courts, this rating was more than 70% (Machura 2001a: 186). When answering this question, the respondents may also have been thinking of the influence fellow lay judges had, and not just their own.

Using data from the study on lay judges in administrative courts, a multivariate statistical analysis helped explain how respondents could uphold a different opinion from that of a professional judge during the deliberation (Machura 2006: 66 f.). Some factors were unimportant: among these were the number of years spent as a lay assessor, gender and formal education. It was the following factors that were significant:

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<sup>16</sup> The question was taken from Rennig's study. He concluded that the general influence of *Schöffen* on the judgements is perceived as relatively low (Rennig 1993: 488).

- Younger respondents were more often able to get acceptance for an opinion differing from that of a professional judge.
- There was regional variation: in two courts lay assessors were significantly less able to get a dissenting opinion accepted.
- Preparing oneself and reading the case file helped. Respondents who had not read the files were less often successful with a dissenting opinion than colleagues who had at least to some extent studied the file.
- Strongly divergent ideas were less successful: the more respondents said that the courts' decisions met their expectations, the more influence they reported.
- Lay judges who more often voiced a different opinion more often prevailed.
- If the lay assessors indicated they were given 'very much' 'much' or 'enough' opportunity by the court's president to state their view, their dissenting opinion was more likely to prevail.
- Finally, those who felt more accepted by the professional judges also reported more success in getting a dissenting view accepted.

Some of these factors are related to the fairness of the professional judges: accepting lay assessors as partners and allowing them to voice their views. Others relate to the effort made by the respondent: studying the file and taking more part in the deliberation. So personality traits of lay judges must be looked at, too. Are they important here?

### **Power distance orientation**

Lay assessors should be ready to challenge authorities if necessary. Geert Hofstede's (1997) concept of 'power distance orientation' (PDO) has been widely discussed in social psychology. It is useful to theorize lay assessors. The ideal lay judge would have 'low PDO', feeling entitled to have a say in the mixed tribunal and ready to take an active role. A minority, however, are prepared to just accept what is said by the authority (in most cases the presiding judge). Hofstede would frame this as 'high PDO'.

In the study on *Schöffren* in the Frankfurt lower criminal court, those with high PDO were

significantly less likely to report their experiences to the family, to colleagues and friends (Machura 2001a: 273, 276); they were slightly more inclined to insist they could co-operate well with the presiding judge (ibid.: 248), took part less often in the deliberation (ibid.: 229), and reported more satisfaction with their work on previous occasions (ibid.: 197). Overall, however, PDO was not a key factor. It did not appear significant anywhere for the Bochum subsample. Data from both courts show that most lay assessors did not suffer from it. Similarly, in the administrative court study, PDO did not turn out to be a major influence overall. It was the case, however, that the East German lay assessors were more inclined to be deferential, and lay assessors with this orientation less often voiced a dissenting opinion in the deliberation (Machura 2006: 104).

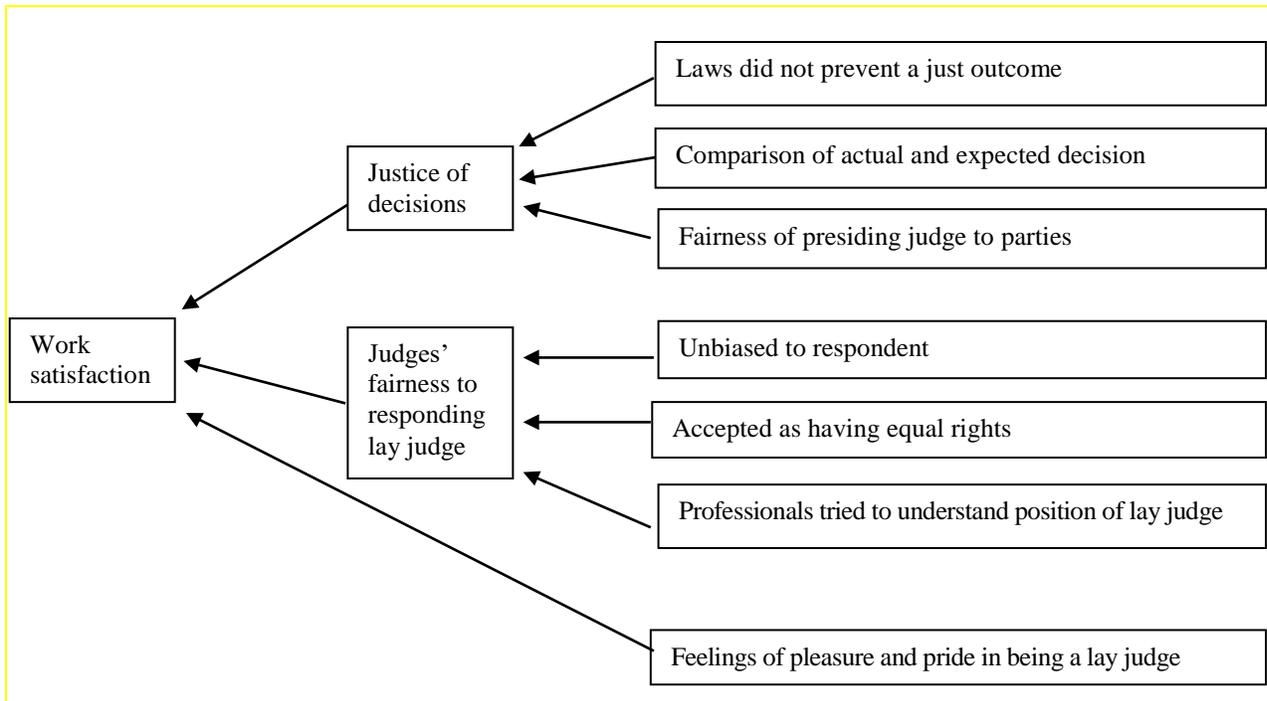
No way has yet been found to avoid lay assessor candidates who are inclined to be too deferential to judicial authority. When organizations such as political parties and NGOs suggest names, they could in theory avoid such people, but they do not. However, a statistic for the East German Province of Saxony shows that parties and organizations play a negligible role in recruiting lay assessors, while literally thousands have applied individually (Lieber 2011: 8).

There are two strategies that might encourage lay assessors to become more active:

- a) Presiding judges should be selected for qualities like openness and fairness. Not only lay judges and junior professional judges, but also litigants would benefit.
- b) Better training would enable lay assessors to play an active role – one that does not concentrate on pointing out the duties rather than the rights of lay judges.

If lay judges are not satisfied with their work, they serve only reluctantly. It would also be a cause for concern if their satisfaction depended on superficial considerations rather than the feeling that they have made a worthwhile contribution.

Figure 1: Work satisfaction of honorary administrative court judges



Reference: most recent day of sitting as lay judge

### A positive experience

There are a number of studies which identify the factors shaping the experience of a lay judge. Evaluations of the fairness of the procedures and of the justice of outcomes, the treatment of lay judges by professional colleagues etc. are part of the experience (e.g. Machura 2001a and 2006; Machura et al. 2003). As an example, Figure 1 illustrates what contributes to the satisfaction of administrative court lay judges with their work on a day of service (Machura 2006: 86–88 with multivariate statistical analysis). Of the respondents, 27.9% were ‘very’ satisfied with the work on the last day, 49.8% ‘quite’, 14.0% ‘somewhat’, 3.7% ‘less’, 0.7% ‘not’ satisfied, while 1.0%

‘did not know’ and 3.0% did not answer. In part, satisfaction with work on one day depended on the lay judge generally feeling honoured and positive about contributing to the work of the courts. Work satisfaction also correlated with the perceived justice of the outcomes and with the fairness of the professional judges’ treatment of the defendant.

- The perceived justice of outcomes itself was influenced by the capacity of administrative law to achieve ‘just’ outcomes and by whether decisions taken by the court corresponded to the expectations of the lay judge. Furthermore, there was a ‘fairness effect’: if the presiding judges treated the parties fairly, the lay judges tended to perceive the outcome as just (Machura 2006: 77).
- Lay judges felt fairly treated if the professional judges appeared unbiased towards them, accepted them as equal partners, and tried to understand the views advocated by the lay judges (Machura 2006: 84).

Lay assessors want to be respected as partners of professional judges. If this is the case they are able to contribute more effectively, and report a better experience. Overall the system seems to allow a positive experience. In the two German studies by the author, about 80% of the lay judges were ‘very’ or ‘quite’ satisfied with their role in the trials they participated in over the whole period of their service (Machura 2001a: 279; 2006: 44).<sup>17</sup>

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<sup>17</sup> *Schöffen* in Glöckner and Landsberg’s (2011: 46–47) study, like those in the author’s, reported a positive experience. They felt well treated by the presiding judge and the majority said they contributed to the deliberation, and offered dissenting opinions. In four to five percent of all cases, they would have favoured a different opinion from that of the professional judges. Lay judges told Baderschneider (2010: 113) they liked the ‘very open and pleasant atmosphere’ in court. The *Führungsstil* of the presiding judge is key (Baderschneider 2010: 236).

The vast majority, about 80% of the respondents were prepared to serve for another period (Machura 2001a: 279; 2006: 44). Those who were not often cited age and ill health.

## **Conclusion**

Most countries have lay judges in one form or another. The institutional framework and design of lay participation vary, as does the legal culture in which it takes place. All this affects what lay assessors can achieve. In Germany lay participation follows the pattern of the mixed court. When two parties are in dispute the German court culture emphasizes as far as possible that the tribunal is cooperating with the parties to ‘find’ the truth. While other legal cultures tend to aggravate discontent through adversarial trials, the German culture does not. At the same time, compared to many countries, the quality of professional judges certainly attracts much less criticism. As a consequence of all this the work of lay judges has no sensational aspects. By and large, lay judges do indeed carry out their assigned role. They raise their voices if the proposed decision seems unjust and they also react when trials are not conducted fairly. Casper, cited above, was right:

*... German lay judges exercise independent judgment..., and do serve a societal purpose ... – namely, injecting the values, experiences, and judgments of the lay community into the adjudication process.*

The court of lay assessors is a task-related workgroup, in which professional judges normally have greater prestige, partly because of their legal studies, familiarity with work routines, and specialized legal knowledge. In addition to this the presiding judge has the responsibility for running the main hearing and deliberation. Lay assessors regard professional judges as authorities they are tasked with supporting and influencing – by their sheer presence, by questioning, by partaking in the deliberation and (if it comes to that) by voting. As mentioned by Casper, lay assessors in both criminal and administrative courts are expected to bring the

people's legal views and life experience into the work of the courts. They have a demanding legal-political task and a – sometimes – precarious standing in the tribunal of judges. The situation is slightly different for expert lay judges, as mentioned above. Their capacities, coupled with the professional prestige of a social worker, a company manager, a union legal advisor etc. automatically makes them more accepted.

The majority of professional and lay judges seem to cope with the tensions involved. There is a 'culture of cooperation' between lay and professional elements. A lot depends on the fairness shown by professional judges to their lay colleagues, and most of them are thought fair. However, the system could benefit from a number of proposed reforms which have been put forward by the German Lay Judge Association (DVS 2016b), by lay judges and lawyers at seminars, and in articles and surveys (overview in Machura 2002; 2006: 105-113). They include:

- It should be ensured that lay judges are in the majority in the mixed tribunal.
- All local councils should put in place the necessary measures to recruit the right mix of qualified candidates for the criminal and administrative courts (on recruiting: Struck 2011: 108–109; Lieber 2013a and 2013b).
- In criminal courts, presiding judges should involve lay assessors in any decision based on deals with the defence and prosecution.
- In criminal courts lay judges should be allowed to read necessary parts of the case dossier. This would have to be supported by the next proposal, which is important for other reasons.
- Lay judges should have a more systematic preparation for their work.

The latter could include the opportunity to shadow a trial. Lay judges have little opportunity to learn about their work before they are recruited. It was indicated above that the overwhelming majority are positive about their role and would like to continue. As suggested by Gerken (1986: 186-187) and Rennig (1993: 580) it would thus be possible to allow people to resign if they feel they are not suited. This could mean that, after the initial introduction, they are given the opportunity to sit in on a hearing and deliberation (as legal apprentices do already).

The discussion may also serve to underline the importance of analysing legal institutions in their socio-cultural context, and drawing on empirical evidence. In the present case, this is facilitated by a number of studies from different angles. Questionnaire studies, structured interviews, discussions with judges and lay judges, and with scholars at events such as training seminars, together with literature, including reports by those with direct experience, can serve to build the evidence base. Understandings formed by familiarity with one particular legal system and legal culture can be challenged by findings in another country.

The leading German sociologist of law, Niklas Luhmann, says that in the political system, the periphery is much more important than the centre, simply because it does the bulk of the work (Luhmann 2000). From a sociological point of view, the courts of first and second instance are pivotal for how aggrieved citizens experience the legal system. It is here that the cooperation of lay and professional judges can be an important element – to help safeguard the ‘social state of law’.

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