Thomas Groß (ed.)

Legal Scholarship in International and Comparative Law

PETER LANG
Frankfurt am Main · Berlin · Bern · Bruxelles · New York · Oxford · Wien

Common Sense v. Legal Expertise
A Case Study of Comparative Analysis of Lay Participation in the Former GDR and the FRG*

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Introduction

1. Why look at the East?

Whether it is the jury in America, magistrates in England, assessors in Italy or African customary courts: in various criminal justice systems of the world there is some kind of participation of non-legally trained citizens in the process of decision making in criminal cases. The role of laypersons in the criminal trial might be more or less active, but for some reason different legal systems based on very different ideologies seem to have one common notion: that citizens should have a say in criminal justice.

This paper explores two very different legal systems that are based on contrary ideologies, yet come from the same criminal law tradition, i.e. the former German Democratic Republic and the (now reunified) Federal Republic of Germany. How much say do these systems give their citizens in the administration of justice? What are the reasons behind any different or common features?

Of course one could ask, what is the use in looking at a legal system that has been extinguished more than a decade ago and that is not likely to be re-established in a similar form ever again. For me there are three reasons for this historical comparison:

Firstly, I want to take a closer look at the past. A reunification of states also means a reunification of history. The GDR is now part of our common German history and also of our common European history that, unfortunately, is still rather Western centralised even today. GDR history, and even GDR legal history is one of the most fruitful research branches of German history. Nevertheless, much of this history is unfortunately read and written under the light of the present claim of victory of the Western superior system over the "failed" Eastern system.[1] Instead of looking at the GDR legal system with the assumption that all areas are biased, political, and of unlawful injustice, we should instead be open for critique of the "victorious" system at the same time. A such historical comparison may reveal new views on both the GDR and the FRG.

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* I am grateful to Prof. Lee Bridges, Prof. Upendra Baxi, and Prof. John McEldowney who read an initial draft of this article. The views expressed and any mistakes are attributable to myself alone.

1 Not only is history usually written by the victors but as Markovits puts it clearly: History most of all serves present aims (Markovits 2001, 514).

Secondly, I believe that the comparison with such a different system coming from the same legal tradition can reveal a fresh critically look at our own (Western) assumptions and notions of criminal justice. Even if we do not follow the socialist views of law and society, a new perspective can help to explain our present system. Additionally, it is healthy that we are forced to rethink our assumed basic principles and see if we still can justify our "victorious" system and justify this victory over all branches of legal practice.

Finally, by putting aside the all consuming condemnation of the socialist criminal justice system and trying to be more discerning as well as critical, about the liberal system and West German practice, new perspectives are opened with regards to the development of our system.

Thus examination of lay participation is one attempt at using research in modern legal history to reconsider our historical view of the East German past, rethink our criminal procedures of the present, and draw conclusions for the future.

2. The 'people's voice' in Germany

Plato and Aristotle favoured the whole community of citizens (i.e. all free male adults) as constituting the jury trial. Participation in a criminal case was considered as a basic right of each citizen in a democracy.

a) Middle Ages

Interestingly, in the Old German process, too, it was the whole fellowship of free men who would come together to attend the oral and public criminal trial, called thing. The community of free men (Volksgenossen) would decide about a sentence suggested by men who were versed in law. Since any crime was understood as a violation of the tribe there was no difference between private law and criminal law trials. The rules of evidence were strict: the accused could give an oath that he was innocent and oath mates (Eideshelfer) could swear about his good character or that his oath was true, but there were no statements given by eyewitnesses. Besides, there were ordeals that would demonstrate guilt or innocence.[2]

During the second half of medieval times, together with the development of public power criminal law was gradually distinguished from private law and became a public matter. The principle of private action was replaced by the principle whereby only the prosecutor could initiate the action. Now, the judge investigated himself and became prosecutor at the same time - the true inquisition process.[3] Procedures became secret, written and more rational and ordeal was

[2] Roxin 1998, 520 ff.; Richter 1983, 49.

[3] This form of procedure with the judge and prosecutor and even defence counsel in one person lived on until the 18th Century.

replaced by witnesses' statements. The victim developed from accuser to witness, the defendant from subject to object of investigation. The advantage of this was that it stopped the former self-administered justice through feuds. The price for more rational evidence was that the confession became the only absolutely reliable proof, which resulted in the extensive application of torture.

In 1532 (following numerous complaints about biased and cruel justice) the German Reich enacted a Criminal Procedure Code including Criminal Law: the Constitutio Criminalis Carolina (CCC) which was adopted by many German states. This law was based on the scientific methods of the Italian, highly developed law, which had merged Roman and canonical law. With the reception of the scientific Italian law, the law became more and more remote from the people.[4] The CCC discouraged private accusations and strengthened the inquisitorial role of the judge. Although the procedures were written and secret there had to be lay judges present when the judge interrogated the defendant. However, only rarely did lay or professional judges receive adequate legal training and consequently, case files were often sent to the Oberhof (highest territorial court) or law schools, neither of which would have even seen the defendant. However, it was on their recommendations that the sentence was determined. Thus, the investigating institution differed from the deciding body.[5]

b) The Enlightenment

With the rise of the absolutist states, laypersons completely disappeared from the jurisdiction. Instead the influence and direct intervention of the absolutist rulers on the professional and state judges increased dramatically.[6] In the 18th Century and especially following the French Revolution, enlightenment movement pressed for rationality, humanity and thus the abolition of inquisition and torture. Public trial, free evaluation of evidence, and the public prosecutor were introduced. Also the constitution of lay participation in the form of juries was demanded. It was hoped that the jury would help to abolish the absolute government's interference in the jurisdiction. The call for procedural reforms could not be separated from political claims and the jury always has been seen as a political device rather than merely an appropriate tool for finding truth in single cases.[7] As a legal instrument it had political importance at the same time.[8] Hence it is not surprising that, right from the beginning the jury was both celebrated and yet condemned at the same time for being an important aspect of representative democracy.[9]

[4] Eser 1995, 162.

[5] Roxin 1998, 522.

[6] Eser 1995, 163.

[7] Richter 1983, 53.

[8] Vormbaum 1988, 133.

[9] Rüping 1976, 270.

In 1798 the jury trial was introduced into Rheinland-Palatine[10] and in 1850-1852 most of the German states introduced new Criminal Procedure Codes with lay participation, prosecutors, public and oral trial and free evaluation of evidence.[11] Shortly after the institution of the jury trial the mixed bench was re-introduced as well.

With the unification of the German Reich and the drafting of a united Reich Judicature Act (Gerichtsverfassungsgesetz) in 1877, the jury could only remain under the compromise of reduction of its jurisdiction.[12] According to the GVG of 1877 most serious crime was decided by the jury that imitated the English model in comprising twelve lay judges, who would decide only about guilt and innocence, while the professional judge bench would issue the sentence.[13] Less serious crime was handled by trials with only five professional judges. Small crime was tried before the lay judge court (Schöffengericht) consisting of two lay judges and one professional where all three decided about guilt and sentence. In all Appeal Courts and in the Supreme Court of the German Reich (Reichsgericht), which heard cases of high treason at first instance, there was no lay participation.[14]

The jury of 1877 excluded expressly women,[15] servants, schoolteachers and de facto those who could not afford loss of earnings.[16]

The jury was considered a democratic achievement, but it gradually became more and more criticised on the continent.[17] This was mainly due to the fact that the jury had to decide without any influence from the professional judges. Since there had to be some legal advice, the judges had to formulate a form of question that was given to the jury. This had to deal with all important legal considerations.[18] The judge was obliged to explain the questions without giving any indication of his view of the answers, especially with regards to the evaluation of evidence. In contrast to the Anglo-American system where the judge is much less actively involved in the hearing, in the inquisitorial systems the explanations had to be purely academic with no reference to the individual case. Too much was often demanded of the jurors and there have been many misjudgements both in favour and against the defendant. Since the jury's verdict had not to be substantiated there was no possibility to appeal against the decision.[19] Hartung argues that the jury did not work in Germany because it was an English institution related to the English adversary system that was foreign to the inquisitorial system with a less impartial and more active judge.[20]

10 Because of the French occupation of the left bank of the Rhine (Richter 1983, 53).
11 Richter 1983, 53.
12 Vormbaum 1988, 143. The conservative government favoured a replacement of the jury by a bench of lay judges.
13 Hartung 1970, 601 (The author was himself involved in the Emminger'sche Reform.)
14 Schäfer 1988, Einleitung, Rn. 2.
15 Women were allowed in 1922.
16 Vormbaum 1988, 146.
17 Hartung 1970, 601.
18 Hartung 1970, 605.
19 Hartung 1970, 606.

c) Lex Emminger

In the Weimar Republic, the selection of lay judges and jurors was gravely criticised, not at last because the working class was underrepresented.[21] In 1923 the Ministry of Justice of the German Reich (Reichsjustizministerium)[22] formulated a draft for abolishing jury trial. This was strongly opposed by the law commissions of both Reichsrat and Reichstag (especially the Social Democrats) and the abolition was "balanced on a knife-edge".[23] However, due to the political events in mid 1923[24] the government was able to introduce the draft as a decree without the procedure of parliamentary legislation (Notverordnung). On the 4th January 1924 the jury was abolished by the so called Emminger'sche Reform[25] against the strong opposition of Reichtstag and Reichsrat and hence since than it was always held in disrepute.[26] This development had the approval of practising lawyers because of their academic resistance against the opinion of the simple people, bad practical experiences of unjust verdicts, and consciousness of their social rank.[27]

After the new regulation, middle and serious crime was now decided by a mixed bench consisting of three professional and six lay judges at the Regional Court, so-called Schwurgericht. Lay judges even sat in the appeal cases,[28] whereas minor criminal cases now were decided by one single professional judge only.[29]

In 1933 in a re-election of the lay judges all "Non-Aryans" and "people's enemies" were replaced. At the beginning of World War II a decree ended any participation of lay judges.[30]

20 Hartung 1970, 609.
21 Rüping 1976, 270; Hitler's trial 1924 was judged by fanatic supporters of him.
22 Under Gustav Radbruch with the support of the Prussian Ministry of Justice.
23 According to Hartung no modification of the Judicature Act by the decree has been examined and discussed so much as the change of jury in lay judges' trial: Hartung 1970, 605.
24 Passive resistance against the French occupation of the Ruhr District, currency reform.
25 So named after the Minister of Justice Erich Emminger (1880-1951).
26 Vormbaum 1988, 141.
27 Vormbaum 1988, 134.
28 However, in practice a professional judge with two lay judges has much more power than three professional judges with a twelve member jury who alone can decide about guilt and innocence and thus (in case of an acquittal) exclude the professionals completely from sentenceing.
29 Hartung 1970, 605. The reason for this was that in the time of inflation minor crime increased and the lay judges trials were too slow.
30 01.09.1939 RGBl. I. p. 1658.

d) After the Second World War

After the war the different states and zones enacted different laws regarding lay participation.[31]

In West Germany the Act of Unification of Law (Rechtsvereinheitlichungsgesetz) from 12.9.1950 re-established the legal situation from 1932 for the Federal Republic. In 1975 the Criminal Law Amendment Act (Strafrechtsänderunsgsgesetz) reduced the Emminger'sche Schwurgericht even further.[32] Now in the criminal division of the Regional Court only two lay persons sit with three professional judges. In contrast to 1924 this time the diminishment of lay participation was no longer criticised publicly. The question of lay participation was no longer a matter of public interest.[33]

Officially GDR and FRG had the same Criminal Procedure Code until 1968, i.e. the code from 1877. Whereas the FRG developed the Old Penal and Criminal Procedure Code, the GDR completely revolutionised criminal law and replaced the old law with a new system.[34] In the GDR there was no question of reintroducing the jury that was seen as fruit of the bourgeoisie. In 1949 the lay judges were re-introduced in East Germany. Besides, socialism found a number of different ways to let the citizens participate in the administration of criminal justice, as we will see later on.

Today German criminal law and criminal procedure law consist mainly of West German law, with some East German provisions and some transitional measures.

A. Sense of Right and Wrong - Lay Participation in West

As we have seen there is no jury trial in Germany. Lay persons participate in today's German criminal justice process as lay judges or in arbitration bodies.[35]

1. Western Lay Judges

At the District Courts the Schöffengericht, (i.e. a bench consisting of two lay and one or two professional judges) hear cases for which a punishment higher than two years is expected.[36] Minor offences and procedures of Private Criminal Action are heard only by one professional judge. At the Regional Court, in first instance cases two lay and three professional judges decide about serious crime and crimes against the state. In appeal procedures two lay and one professional

31 Only Bavaria introduced a jury deciding only about the guilt and innocence.
32 Erstes Gesetz zur Reform des Strafverfahrensrecht vom 9.12.1974 BGBl. I, p. 3393.
33 This decreased public interest is mirrowed by the small ambition to become a lay judge: Vormbaum 1988, 148.
34 Renger 1990, 12.
35 By lay persons I mean not legally trained citizens who are not paid for their legal work.
36 Because of the limited space I leave out special regulations for juvenile cases.

judge sit. The Higher Regional Court and the Federal Court consist only of professional judges.

Every four years, the local councils have to produce a proposal list (§ 36 GVG). In practice the candidates are proposed by parties, churches, union etc. or the citizens themselves.

Nobody should be elected who did not agree to the election. After the election the position is an obligation.[37] From this list the lay judge election commission at every District Court elects the lay judges. Generally, every German citizen can become a judge. Between 1997 and 2000 there have been about 61 000 lay judges. That is about ten times as much as professional criminal law judges.[38]

According to § 42 II GVG the lay judges are supposed to display a representative cross section of the population regarding sex, age, profession, and social origin. However, empirical research has shown that women are highly underrepresented. The same is true for young male and older female citizens. The self-employed and members of the civil service are highly over-represented, whereas retired persons are gravely underrepresented.[39]

The lay judge who has administered an oath has to sit about 12 days per year. Her obligations are to take the oath, to appear for each hearing, to contribute to the bench discussion, and vote. Lay judges participate only in the main proceedings and do not sign the written sentence. What is often criticised is that lay judges are denied the right to read the case files and reports in order to prevent undue influence and to ensure that all evidence is brought orally and in public.[40]

The function of lay judges is the participation of the people in the administration of justice.[41] Besides the publicity of the public hearing the people shall have the opportunity to look into the court's conference room and understand the problems and inner conflicts that affect the deciding of a case.[42] The idea is not only that the citizens control the courts (which is the reason for the principle of public trial) but moreover that they understand the difficulties and inner conflicts of conscience in taking judicial decisions and share the responsibility of judicial decisions.[43] The aim is to maintain and strengthen the citizens' confidence in the justice system.[44]

37 Gerstein 2002, 2.
38 Gerstein 2002, 1.
39 Katholnigg/Bierstedt 1982, 267.
40 Rüping 1976, 272.
41 Kissel 1985, 490; BGH NStZ 1985, 512.
42 Rüping 1976, 273.
43 Rüping 1976, 273.
44 Kissel 2001, 681; That is why originally the lay judges were in the majority on the judges' bench (Kissel 1985, 490).

Another important function of lay judges is the promotion of modern popular justice.[45] The professional judge's reasoning shall be checked by an untrained sense of right and wrong.[46] The lay judges' common sense is supposed to guarantee popular administration of justice[47] including non legal values. The common criticism that court decisions are taken by remote judges without connection to real life shall be undermined. Besides, the judge should be prevented of being absorbed by routine decision making and instead consider each single case individually.[48]

Furthermore, the professional judge should be forced to express her argument in such a way that lay people can follow it (so called plausibility check).[49]

Another aim is to increase the citizen's legal knowledge as well as his understanding of the jurisdiction and the judges' problems.[50] Additionally, professionals increase their experience and general knowledge through the lay judges' technical expertise.[51]

2. Obligation of Peace - Conciliation Proceedings

Following the development of the French revolution and the rise of civil liberalism, settlement and conciliation institutions were established, often in the hands of lay people and most of all in the area of civil law. In 1851 Prussia introduced an obligatory Conciliation Proceeding for cases of libel and assault before criminal proceedings. After some controversial discussions, the Criminal Procedure Code of the Reich of 1877 also introduced these institutions[52] in order to relieve the District Courts and to open a forum for offender and victim to communicate with each other. There was a high number of such proceedings at the end of the 19th Century and in 1924 the number of offences was extended.[53]

Today a private criminal action (in cases of trespass, libel, breach of the secret of correspondence, assault, threat or criminal damage of property), - i.e. a criminal action brought by a private party instead of the public prosecutor - can only be brought about, if a previous arbitration proceeding was not successful. The idea is to avoid unnecessary private criminal actions and to conciliate interpersonal conflicts especially in the neighbourhood.[54] The arbitration boards are regulated in each German state independently.

45 Kissel 2001, 681.
46 Schäfer 1988, Einleitung, Rn. 8.
47 Schäfer 1988, Einleitung, Rn. 9 "Volkstümlichkeit der Rechtspflege".
48 Rüping 1976, 273.
49 Rüping 1976, 273.
50 Kissel 2001, 681.
51 Kissel 2001, 681.
52 But only for libel cases.
53 Trespass, breaching the secrecy of correspondence, assault, threat and criminal damage.
54 Luther 1991, 18.

The main function of a conciliation process is to prevent the stigmatisation of the offender yet still make her responsible for her behaviour. The Conciliation Proceedings can end in compensation, apologies, or payment to charity.[55] Besides, the proceedings are suppose to consider in particular the victim's interests social re-integration. Peaceful conflict management replaces punishment and retaliation, damage is compensated and relationships are re-established, which in the neighbourhood is usually easier to achieve than in a formal state court.[56]

The fact that obligatory conciliation proceedings work as a precondition for private criminal action, is proven by the statistics: there are three times as many conciliation proceeding than Private Criminal Action. 50% of the conciliation proceedings are successful, i.e. the case is settled. Surprisingly, 50% of the proceedings are initiated not as requirement for a later Private Criminal Action but informal private action and as the desire to mediate.[57] However, both Private Criminal Action and Conciliation Proceeding are initiated very rarely and numbers are even decreasing.

Obviously, the main advantage of arbitration proceedings is the private informal atmosphere. However, the comparison with the formal proceeding, i.e. application, proceeding, summon to appear, and taking of evidence might give the image of the arbitrator as judge and scares the parties. Often the settlement reflects the view of the arbitrator rather than that of the parties.[58]

Only in the new East German states the Arbitration Boards in Communities Act (Gesetz über Schiedsstellen in den Gemeinden) is valid.[59] The East German Parliament (Volkskammer) passed this law on the 13.09.1990.[60] Its function was to replace the GDR Social Courts[61] with conciliation boards. In accordance with this Act, each community or group of communities is supposed to establish an arbitration board (Schiedsstelle) for not more than 10 000 citizens. The bench consists of three arbitrators who are elected by the local council and confirmed by the head of the District Court for five years. The arbitration board is in charge of the conciliation proceedings as well as for the arbitration proceedings (as precondition for the private criminal action). Defence counsel can take part in the proceedings and whilst the proceedings are not public, witnesses or experts can nonetheless (voluntarily) appear.[62]

55 Rössner 1996, 457.
56 Rössner 1996, 456.
57 Rössner 1996, 457.
58 Rüssel NJW 2000, 2801.
59 On the discussion in the Volkskammer: Schönfeldt 2002, 416 ff.; Rössner (1996, 457) would like this law to be nation-wide.
60 GBl DDR I, p. 1527.
61 See below.
62 Luther 1991, 18.

Besides in cases of private criminal action, the prosecutor can hand over a criminal case to the arbitration board to extra-judicial settlement. The aim is to re-establish social peace as well as to find compensation between offender and victim. Condition is that the consequence of the offence is minor, that the offender has only minor guilt, and that he agrees to arbitrate proceeding, and finally that there is no public interest in state prosecution.

In the arbitration procedure the offender can voluntarily agree to one or more of the following obligations:

- apologise to the injured party
- compensate any damage
- pay a sum to charity or the state
- voluntary public work

The offender then has a time limit to carry out his obligation and to report to the prosecutor who is controlling it. After fulfilling of all the agreed duties the prosecutor will abandon the court proceeding. Otherwise the criminal case is continued at the formal court.[63] Unlike the Social Courts in the GDR, the arbitration boards require a fee.[64]

In 1997 there were 996 arbitration boards in the new German states.[65] But for reason of efficiency the prosecutors show a tendency to dismiss the charge of cases that were eligible to be transferred to arbitration boards.[66] Also defence lawyers do not encourage these procedures that are quite unprofitable for them.

3. Probe

As we have seen there are a number of aims that lay participation in West respectively reunified Germany is expected to serve. Now let us examine, whether these numerous expectations are in practice fulfilled.

a) The expectation of democracy

It is always claimed that lay persons involved in the administration of criminal justice is part of democracy. The people from whom all state power emanates[67] shall have a share of the jurisdiction in one of the three arms of state powers. This assumes that the group of people that participates in the jurisdiction is democratically elected. As illustrated above, lay judges are only elected indirectly by the citizens through several election levels, hence they can hardly

63 Luther 1991, 18, § 43 I.
64 Schönfeldt 2002, 423.
65 Schönfeldt 2002, 431.
66 Schönfeldt 2002, 433.
67 Art. 20 II 1 Basic Law.

be described as a democratic element.[68] Similarly, lay judges do not represent a representative cross section of the general population.

Secondly, the democracy argument presupposes that the lay judges have some influence on the court decisions. It is often complained that in practice the lay judges are acting rather passively on the bench. They seldom intervene and hardly ever outvote the professional judge, who de facto is the decision maker.[69] In addition the lay judges have quite restricted jurisdiction regarding the democratic importance that is ascribed to them. Crimes against the state, for instance, or the question whether a special case should be re-opened, are decided solely by professional judges.[70]

Of course the arbitrator boards have a more active role.[71] However their jurisdiction is limited to small cases when the offender has confessed and the damaged party is to some extent willing to conciliate. They come only into action when the question of guilt and innocence is undisputed. And as mentioned before, the number of cases they decide is extremely small. Hence their influence on the general jurisdiction is too small to speak of democratic involvement.

As well as having very little influence over the single court decision that the lay judges are supposed to control,[72] the lay judges themselves are easily influenced. Baur explains that originally lay judges were supposed to protect the court against undue influence exerted by the executive on the professionals who were highly dependent on the state. Today the risk of undue pressure comes not so much from the government[73] as from the mass media. All judges, but lay judges more than the professionals, are easily influenced by the mass media. The function of controlling the professional who is applying the law with his sense of justice is clearly undermined when this same sense is created by the media.[74] It is argued that the lay judge bears the risk that he puts too much weight on public opinion, whereas the professional judge is trained to distinguish between different arguments, interests and influences.[75] On the other side, the belief that professionals are more resistant to outside influences is an assumption that needs confirmation by empirical research.

Lay judges are also called an important democratic device, because in addition to the public audience, mixed benches "takes the public in the judge's conference chamber" and thus extend public control by the citizens. Kühne opposes

68 Volk 1982, 374.
69 Baur 1968, 52.
70 Volk 1982, 381.
71 I refer here expressively only to the participation in criminal law.
72 Gerstein 2002, 3.
73 For the undue influence from political parties see Schmidt-Hieber and Ekkehard Kiesewetter, Parteigeist und politischer Geist in der Justiz, NJW 1992, p. 1790.
74 Baur 1968, 53.
75 Baur 1968, 55.

this argument by pointing out that unlike the times when the judge was a profession exclusively for a special class, nowadays every citizen can become a professional judge. Thus it is assured that the judge is just a simple citizen as everybody. Besides, the discussion in the conference chambers are subject to professional confidentiality, so that public scrutiny is not extended to that part of the process.[76]

Another point is that lay participation was introduced, when today's procedural safeguards, i.e. the principle of immediacy, free evaluation of evidence and oral and public trial that were supposed to replace the inquisition process, were not yet introduced.[77] But today court hearings are public and oral and the judge is in theory and in practice highly independent. Further control is assured by the defence lawyer.[78]

b) The expectation of extending legal knowledge

Another expectation is that through the direct participation in court trials, the legal knowledge of the general population will be increased, deepened and internalised. Volk, however, reminds that in the courts only the lay judges themselves are trained, which is a comparatively small part of the population.[79] Contrary to the GDR, West German lay judges have no mission to spread their knowledge and experiences, so that there is no feedback to the society (only within the circle of acquaintance if at all).

On the other side it is hoped that the court will profit from lay judges' special knowledge. But in criminal cases, lay judges are elected for a fixed period of time, so they cannot be chosen according to their special knowledge.[80]

c) The expectation of popular justice

It is said that lay participation increases the quality of adjudication, because the citizens' sense of justice will bring the law closer to the people and make court decisions relevant to the present day. Antiquated values and academic dogmatics should be replaced by modern common sense.[81] It is claimed that jurisdictions with lay participation are becoming more popular due to the fact that legal gaps are filled with people's sense of justice, whereas the professionals are remote from reality and "professionally blinkered".[82] Gerstein argues that the criminal case not only consists of complicated judicial problems, but also of evaluation of witness statements, prognosis of future behaviour of the defendant

76 Kühne 1985, 238.
77 Vormbaum 1988, 135.
78 Kühne 1985, 237.
79 Volk 1982, 374.
80 Kühne 1985, 237; this was different in the GDR as we see later on.
81 Kühne 1985, 238.
82 Katholnigg/Bierstedt 1982, 267.

and finding the right sanction for offender and offence. A lay person can judge these issues as competently as a professional judge.[83] Kühne, on the other hand, argues that no explanation is given for the assumption that lay person are more able to identify and to express the people's sense than the professional. Since the legal profession is open to everybody, there is no risk of class distinction. It is true that statistically the lower classes are underrepresented in legal professions, but (as seen above) this is unfortunately true, for the lay judges, too.[84] But Kühne only considers class differences as an issue, whereas the proponents of lay participation state that it is the legal training and routine that makes the judges remote from the common citizen, not their social background.

Furthermore, the diversity of today's German society makes it for everybody difficult to speak about **the** people's wisdom and **the** common sense.[85]

In favour of lay participation it is often claimed that the people accept the court judgement better if it is taken not only by professionals but also by lay persons like themselves.[86] The question is whether the citizen has confidence in a lay person taking the right decision or whether he rather considers him as non-professional with too much emotional involvement and too little competence. Citizens also might feel that they have a right to a fully trained "expert".[87] Since neither of these has been addressed in empirical research, we have little to analyse aside from personal experiences and speculations.

The claim for a more popular justice is commendable but as Volk makes clear: if law steadily moves away from the people, moving people closer to the administration of criminal justice does not reverse or stop this development.[88]

One of the main functions of lay judges is the so called plausibility check. Because she shares the bench with lay persons the professional judge is forced to express herself in a way that her colleagues without legal training can understand her. But courtroom observations show that lay judges only rarely request explanations by the professionals. Moreover, I would suggest that the judges should be forced to express themselves in a way lay persons can understand it not just for the sake of the lay judges, but also for the defendant, injured party, public audience etc. Besides, the lay judges have no control over the reverse translation from their contributions into technical terms in which the final decision will be formulated.[89] Secondly, regarding sense of justice, one must not forget that precise legal language and interpretation has a justification in finding the

83 Gerstein 2002, 3.
84 Kühne 1985, 238.
85 Kühne 1985, 238.
86 Rüping 1976, 273.
87 Baur 1968, 52.
88 Likewise Kühne 1985, 238.
89 Volk 1982, 387.

balance between stability of law and justice in the single case.[90] Lays might evaluate the defendant's life style and character more than the offence itself and let concerns about recidivism and danger for society prevail over common rules of evidence.[91]

Maybe I am biased due to my own German and English legal education, but I strongly hold that exact legal language and technical terms have a very strong justification in making law and its administration controllable, equal and foreseeable. Clearly, law needs to be expressed in such a way that it is understandable for lay persons, but language is a forceful tool and both sides have to be balanced carefully.

B. Towards a better us - Lay Participation in East

The GDR assumed[92] that the many factors leading to crime have been eradicated by the establishment of the socialist society, guaranteeing full employment,[93] social security, equality, justice, free education, encouragement of collective consciences, and opportunities for political engagement.[94] Thus, it was assumed, socialism would replace individual envy and social interest differences with co-operation, mutual help and respect between the members of society.[95] In contrast to West Germany, the GDR believed that it was possible to overcome crime. The fact that there was still crime in socialist countries was explained with the theory of class struggle (the conquered resist the new order and foreign imperialists try to undermine the system) and the relic theory (crime is a remnant of bourgeoisie).[96]

Corresponding to that, criminals were classified in two categories:

On the one had there were those, who acted against the socialist society of the GDR. Everybody falling in this category was called a political criminal.[97] On the other hand, there was general crime, which was not directed against the state.[98] but damaging society and hence seen as failure to understand the benefits and the necessity of socialism. The punishments of "erring friend" serves special deterrence and education of the individual, where as the punishment of "enemies" serves general deterrence and repression.[99] Political crime was separated from general crime, investigated by the State Security, prosecuted by a special

90 Kühne 1985, 238.
91 Volk 1982, 376.
92 Engels argues that general crime is a form of workers to protest against their exploitation.
93 Laziness was considered as main condition for crime (Herzog/Wagner 1997, 81).
94 Kräupl/Reuter 1987, 24.
95 Herzog/Wagner 1997, 73.
96 Brunner 1975, 179.
97 For example persons who criticised the system or who tried to leave the country.
98 Herzog/Wagner 1997, 81.
99 Brunner 1975, 180.

state attorney and adjudicated by a special court, i.e. the IA,[100] all laying in the responsibility of the Ministry for Interior.[101] This feature is mirrored by the prison population. In 1988, the GDR had 24,305 prisoners. This ratio of 160 per 100,000 inhabitants was nearly twice as high as the one in the FRG with 85 per 100,000 citizens, but less than half of the USA ratio with 351 prisoners per 100,000 population.[102] Although only 27.5% of the convicted had committed offences against state security, they accurated for 47% of the prison population.[103] Whereas the perceived political criminals felt the whole range of the socialist state's strength, the "normal" criminal was treated as "the lost son", who was to be guided back to the right path.[104]

Within this system of criminal categories, the criminal courts demonstrated both repression and benevolence at the same time or as Markovits puts it:

> "Like a possessive parent, socialism could tolerate misbehaviour, but not rejection".[105]

Hence education of the criminal as well as of the general population was an essential task of the criminal justice system. This explains the active involvement of citizens in the administration of criminal law cases.

1. As many as possible

The belief in the necessity of large public participation is expressed in Art. 87 and 90 III of the GDR Constitution, whereas the West German Basic Law fails to mention any lay participation. Also the preamble of the Criminal Code and several provisions of the Criminal Procedure Code emphasise the importance of active involvement of lay persons. According to § 4 StPO-E[106] the citizens have a basic right to participate actively in matters of state and society and thus in the criminal procedure. The participation of the public is supposed to underpin the unbiased solving of cases, the mobilisation of the people, and contribute to the development of the citizens' conscience of state and law.[107] To involve as many members of the society as possible, but also to encompass leaders

100 Markovits 1992, 97.
101 Herzog/Wagner 1997, 70.
102 Markovits 1992, 97. The GDR prison population comprises 25% convicted who had refused to work, 10% who had attempted to flee and 6% who had resisted state organs.
103 Markovits 1992, 98. Some sentences were in the first place supposed to get Western money from the FRG who would buy the prisoners free (Roenne 1997, 110).
104 Herzog/Wagner 1997, 72.
105 Markovits 1992, 98.
106 StPO = Strafprozessordnung = Criminal Procedure Code. Since both German states used the same name, I chose the abbreviation StPO-E for the East German and StPO-W for the West German Code.
107 Ministerium der Justiz 1968, 30.

of economic entities was considered important[108] not only for the reintegration and education of the criminal, but also with regards to crime prevention.[109] It was the obligation of court, prosecution and the investigating organs to ensure citizens' participation (§ 4 III StPO-E).

According to § 4 II citizens acted as lay judges, representatives of the collectives, social prosecutors or defendants or give a surety for the convicted (§ 31 StGB). The function of lay judges was only in part the involvement of "general common sense and real-life experience of the citizens" in the state court adjudication. More important was the popularising[110] of law and the education of the general population through the communication of the lay judges with other people.[111]

2. Eastern Lay Judges

It is true that the term „judge" in the West German Basic Law also embraces the lay judges, but in the East German constitution the lay judges were expressively named in Art. 94 II, 95 and Art. 96 II. Every first instance procedure at the District Court and the Regional Court (not only criminal cases) was judged by one professional judge[112] and two lay judges.

a) Recruitment of Lay Judges

In opposition to the members of the Social Courts,[113] finding people willing to work as lay judges was not a difficult task.

> "They would get their normal salary and it could be interesting to get for two weeks an insight at the court, some enjoyed this. It can be interesting to have a change from the every day's work".[114]

The selection of lay judges was quite different to the procedures in the FRG: The election took place every four years.[115] The enterprises were in charge of providing a certain number of lay judges.[116] The parties and mass organisations nominated their people according to a particular scheme and the whole enterprise would then discuss whether or not this person was worthy and appropriate

[108] Kräupl/Reuter 1987, 24.
[109] Herzog/Wagner 1997, 77.
[110] Markovits 1992, 99.
[111] Meador 1986, 143.
[112] In exception two professional judges.
[113] See below.
[114] Interview with an former GDR judge. (All interviews mentioned in this paper have been semi-structured interviews conducted 2001/02 as part of my empirical research in Brandenburg.).
[115] "Some of the lay judges were elected again and again and thus sitting there for years."
[116] Interviews.

to sit as a lay judge. The nominees were then elected.[117] The list of the elected lay judges would be passed to the court which checked whether they had any previous convictions. Anybody previously convicted was usually excluded from sitting as a lay judge. Afterwards the list was passed to the State Security which would check whether there were any security problems, for example if they had contact to the West. In this case the State Security would speak directly (without consulting the court) with the parties, who nominated another person. Afterwards the confirmed list went back to court and in a formal event the lay judges would be appointed. The lay judges were regularly trained by the judges, but it is now hard to evaluate how much political training and even propaganda was involved.

Each lay judge would go to court for a fortnight. Every professional judge was accompanied by two lay judges, who then worked with him in all cases. In special cases, if the judge thought that lay judges with special knowledge and experience were needed, the lay judges could be chosen from the list, usually of the same profession as the offender. For example if a train accident was caused by a train driver, they would invite train drivers, "because they might be more adequate than housewives".[118]

b) Lay Judge Decisions

The lay judges had equal voting rights as the professional judge and the presiding judge had to consult the lay judges for each decision, not only in the main hearing as in the FRG, but even in the opening proceeding (§ 188 StPO-E) deciding whether there was sufficient evidence. Literally every single court decision should be supported by lay people[119]. In the GDR, in contrast to today the lay judges had access to the files before the hearing and thus were able to check the prosecutor's evidence.

As "full judicial participants" the two lay judges could outvote the professional[120] like today. Outwardly, however, the sentence had to be unanimous. If one of the lay judges or the professional judge was outvoted, she could write down her opinion, put it in a sealed envelope and put this on file.[121] Only the next higher court would open it in case of an appeal or prosecutor's protest.[122] Lay judges would not only attend the trials but also control the probation afterwards (instead of today the professional probation officer). For example the lay

[117] Interviews: Since 95 % of the workers were member of the union, the election could take place e.g. at a trade union meeting.
[118] Interviews.
[119] Interviews.
[120] Meador 1986, 141.
[121] Interviews.
[122] Although the interviewee stresses how equal the lay judges were, he only wrote two such statements in an envelope during his whole working life.

judge had to get information from the work place of the accused, so as to ensure that he worked and fulfilled all obligations imposed upon him as part of the probation sentence.[123]

With regard to the question whether the role of the lay judges in East Germany differed from its function today, my respondents came to different conclusions.

One judge explained that the concept of lay judges was reasonable, and sometimes helped to discuss the sentence and to hear other opinions. However, he disapproved the quantity, i.e. having lay judges, every single case and not only in criminal law, but also in civil law, family law and labour law cases etc. The District Court in Nauen, for example, would get every 14 days 10 new lay judges, who would come to court every day.

Most of my respondents pointed out that the lay judges in the GDR were quite passive, very much like today. One judge told me that he was never outvoted but he admitted that he tried to influence his lay judges to get the right decision.

Many of my respondents claimed that lay judges used to be much more important than they are today, because they had more functions, were more involved in the proceedings and were better prepared, whereas today the lay judges do not know all the facts.[124]

> "Today the lay judges only come for the procedures without knowing the file and deciding only according to the expression they got in the oral trial. Today they work more like a jury rather than lay judges".[125]

The reason given for their more active role was that they were trained whereas today legal training is seen as a danger of undue influence. Moreover, they would have time to see the files before the trial, so they had more possibilities to put questions forward themselves rather than just listening all the time.[126]

c) Observations

Through comparison of lay judges in the FRG and of those in the GDR many important differences are disclosed.

The selection process, for instance, was quite different, although formally they are both based on democratic elections. The election procedure in the GDR took place in the working place and each nominee was carefully checked and chosen, whereas the community based election in the FRG was often so formal and anonymous that cases are known in which the election was replaced by

123 Often the convicted was not allowed to change the working place for some time without the court's permission.
124 Interviews.
125 Interview.
126 Interview.

drawing lots.[127] Besides, in the GDR lay judges could be re-elected without restriction, whereas in West Germany lay judges can be re-elected only once (so that the period in office is limited to eight years).

In contrast to the GDR, in West Germany lay judges are not allowed to access the court files in order to avoid prejudice and preconception. In the GDR, on the contrary, greater store was set in informing and preparing lay judges for the proceedings. The West German reluctance to put the lay judges under any influence results not only in the denial of access to the judgement records, but also in very limited amount of training. In the GDR, on the contrary, regular and intensive legal training of the lay judges was considered necessary.

Also the lay judges' special knowledge was used by appointing them from special professions to special cases. Since the West German lay judges are elected for a fixed time period, this selection per case is not viable. Besides, as it was shown earlier, East German lay judges participated not only in the main hearing, but also in the preliminary procedure, and they even acted in the role of probation officers.

In sum, one can see that the lay judges in the GDR had a bigger role to play. In practice however, they seem not to have influenced the court decisions more than today, because their extended rights to participate on the one side were neutralised by extended political control and influence on the other.

3. Justice in the Community - Social Courts

The establishment of courts only staffed with lay persons, is unique in German legal history.

a) Organisation of lay judges

In every residential area, community, enterprise, agricultural co-operative and so on there existed a so-called Social Court.[128] In opposition to other communist regimes, in the GDR these lay courts were recognised as part of the state court system.[129] A Social Court was either a Conflict Commission or an Arbitration Commission.[130] The Conflict Commission was a group of 5 to 15 volunteers that dealt with legal matters in the working place. Since in the GDR there was no unemployment, nearly the whole population was covered by such a Conflict Commission. For people who had no working place, for example pensioners, housewives etc. there was the equivalent in the neighbourhoods: the Arbitration Commissions.[131]

127 BGH NJW 1984, 2839.
128 Gesellschaftsgericht.
129 Meador 1986, 145.
130 Konfliktkommission and Schiedskommission.
131 Interviews.

The Members of the Social Court would come together on a regular basis (approximately every fortnight[132]) and – among other things - settle petty offences that were committed by one of their workmates or neighbours. The interesting point is that the Social Courts would even decide cases that had nothing to do with the enterprise or the neighbourhood itself. Thus a Conflict Commission could hear a colleague that had stolen tools from the enterprise as well as, for example people, who took the train without paying for the ticket.

Although both kinds of Social Courts had similar functions and working mechanisms, they were formed and controlled differently. The Arbitration Commission was elected by the City Council and legally trained by professional judges. The members of the Conflict Commission however, were nominated by political parties and then elected by the colleagues. The training was provided by prosecutors.

b) The Informal Procedures

According to § 18 GGG[133] the Social Court could act upon requests from citizens, but usually it was the prosecutor who - after completing the police investigation - would hand the case over. Moreover, the police themselves could transfer a case to a Commission without asking (though reporting to) the prosecutor. The judge, too, had the right to pass on the case to the Social Court.

Only petty crime cases such as minor insult, libel, fraud, assault, falsification of documents small violations of property (until 1000 Mark) were allowed to be transferred to the Social Courts.[134] The simplicity of the case, low level of damage and minor guilt, lack of any previous conviction and an expectation of educational result constituted the prerequisites.[135] The evidence had to be complete and sufficient and the offender had to have confessed so that the Social Court needed not decide about guilt but only about the sentence. A further condition was that both the effects of the crime and the guilt of the offender were not too significant.

The Social Court would meet, at the latest, two weeks after the transfer of the case[136] and discuss the occurrence with the offender. There were no professionals present. Although the participants were allowed to receive judicial counsel before the process, the presence of professional defence counsels was not permitted at the Social Court. The reason for this was that defence should not be professionalised in this court of lay persons.[137] Instead the defendant could be

132 Herzog/Wagner 1997, 82.
133 Gesetz über die gesellschaftlichen Gerichte der DDR of 1982 = Code of Social Courts.
134 Herzog/Wagner 1997, 71.
135 § 28 I StGB-E.
136 Habermann 1996, 198.
137 Herzog/Wagner 1997, 82.

prosecuted and defended by lay persons.[138] The Social Courts procedure was not very legalistic, but rather informal. The aim was to find the underlying causes for the social problem and also to resolve the disharmony by removing the cause of the problem and educating the involved persons.[139] There were no fees to pay to the court.

If the Social Court found that the results of the crime and the offender's guilt was not overly harmful for society, and the social education of the criminal could be expected, it chose between the following measures:[140]

- Apologise to the injured person or the working collective
- Redress through money or work
- Obligation to work voluntarily at free time
- Fine between 10 and 500 Mark[141]
- Obligation to start working
- Duty of education by individual or collective
- Public withdrawal of insult in public
- Public reprimand[142]

In contrast to the state courts, a decision by the Social Court was not registered as a conviction against the offender.[143]

The accused could not choose whether to be tried at a State or a Social Court. In theory there was the possibility of not appearing at the hearing at the Social Court, because then the case was automatically sent back to the state court. However, there are no signs that this possibility was ever used (either because this option was not known or because it was feared that the state court might punish this tactic or other reasons). The prosecutor controlled the Social Court's decision. If it did not conform with the law or criminal justice policies, the prosecutor would annul the decision and the case was heard at the state court. The accused, too, could appeal against the Social Court decision. In this case, a state court with one professional judge and two lay judges would try him again, but only very rarely was an appeal brought about.[144]

One might be surprised that the Social Court decisions were supervised not by the judge but rather by the prosecutor. This demonstrates once more the comparatively powerful position of the prosecutor in the GDR. However, it protects the independence of the judge, who has an appeal function if the Social Court Decision is contested.

138 Herzog/Wagner 1997, 85.
139 Meador 1986, 144.
140 Schubel 1997, 136 ff.
141 Herzog/Wagner 1997, 83; Habermann 1996, 193.
142 Habermann 1996, 231; Interviews.
143 The offender in East Germany would not be sacked because of a conviction and every prisoner was guaranteed a working and a living place when he was released.
144 Schubel 1997, 152.

c) Did it work?

The main aim of the Social Courts was to "enforce socialist standards of behaviour through education"[145] of the party's "responsibility to socialist society".[146] The success of the Social Courts was measured by the future behaviour of the offender.[147] Herzog and Wagner hold that the Social Court has been used to establish moral education and scapegoats, to spread propaganda and general prevention, as well as to educate the members of the court.[148] The professionals in the GDR mostly favoured the Social Courts, because these commissions knew the offenders much better than the prosecutor or the judge did and came up with "sometimes extraordinary decisions".[149]

The Social Courts involved a huge number of citizens. In the mid Eighties nearly 300,000 people worked as judges in the about 26,000 Conflict Commissions and 5,200 Arbitration Commissions.[150] To provide you a comparison: there were only 215 District Courts staffed with 1111 professional and 2222 lay judges.[151]

One truly can say that the Social Courts formed

> "a countrywide network embracing all citizens, either in their residential areas or in their work places".[152]

Statistical data give different numbers, but the overall picture is clear: Social Courts played an essential role in administering criminal cases and hence engendered an enormous relief of the state courts. In 1988 the Social Court handled 78.2% of the falsifications of documents cases, and 46.4% of the intentional bodily harm cases. In 1989 about 40% of the intentional assaults and 35% of thefts and frauds were transferred to the Social Courts.[153] Overall, 24.4% of the defendants were adjudicated by Social Courts.[154] The Social Courts decided 26,084 cases and the State District Courts 44,256.[155] One prosecutor I have interviewed estimated that the Social Courts decided about 40% of all small criminal cases. Another judge held the view that few cases were brought to the

[145] Meador 1986, 145.
[146] Meador 1986, 144.
[147] Bericht der zentralen Arbeitsgruppe Schiedskommissionen im Ministerium der Justiz über die Untersuchung im Bezirk Dreseden vom 25. Juli 1967, in: Habermann 1996, 243.
[148] Herzog/Wagner 1997, 85; but they do not explain how the accused could and were used as escape goats.
[149] Interview.
[150] Herzog/Wagner 1997, 85; Meador (1986, 145) talks about ca. 1250 professional judges and 348,000 lay people (50% women) into adjudicating cases.
[151] Habermann 1996, 191.
[152] Meador 1986, 144.
[153] Habermann 1996, 202; Statistisches Jahrbuch DDR 1990, 439.
[154] Herzog/Wagner 1997, 82.
[155] Blankenburg/Stock/Wolff 1996, 127.

Social Courts, because many Conflict Commissions existed only on paper, since it was so difficult to find volunteers. However, this opinion does not reflect the majority of my interviewees although it seems to be true, that because of the high number of voluntary social groups in each enterprise (trade union group, party group, cultural group etc[156]), it was sometimes difficult to get enough people.

The Social Courts were very effective, primarily because of the embarrassment caused as a result of the accused being judged by his working collective.[157] Even the Criminal Procedure Code itself equated the process of the Social Court with other punishments, such as a fine or imprisonment.[158] And indeed, the trial in front of the Social Court itself was perceived as punishment and the embarrassment in front of the working colleagues was feared.[159] Sometimes the case was even mentioned in the enterprise newspaper and of course, it was always subject to gossip. Certainly if the crime affected the enterprise and the colleagues themselves, the lay court was much more awkward for the defendant than an anonymous state court with an unknown judge. To have to account to his own colleagues for his offence had a big effect on the defendant. Another prosecutor I have spoken with told the story of a man who refused to pay maintenance for his children and was sent to the Conflict Commission of his working place. The commission consisted of 20-30 mainly female working colleagues and he had to give them explanations. He ran immediately to the bank, transferred the money and never delayed any payment again "I don't want to end up there ever again!". Indeed there were only very few recidivists. In Rathenow for example one judge and one prosecutor I spoke to estimate that only 2% returned to trial as offenders.[160]

Beside the effects on the convicted person, the Social Courts were also effective on socialist education. Not only did they guarantee active participation and legal training of a huge number of lay persons but also served as a demonstration that the GDR let their people take part in decision making.

d) Observations

aa) Two sides of a coin

Coming from a German and English legal education, an analysis of the institution of the Social Courts as an outsider shows many negative as well as positive sides.

[156] Interview.
[157] Interviews.
[158] Habermann 1996, 201; § 23 StGB-E. This was a contradiction as such as the police and the prosecutor could transfer a case to the Social Courts. Besides, the Social courts were jurisdiction themselves according to the constitution.
[159] Herzog/Wagner 1997, 85; The authors hold that this effect had diminished during time.
[160] Interviews.

An important advantage of Social Courts is that the judging persons know the defendant and are able to include more personal information into the judgement. On the other hand the defendant is exposed to her colleagues or neighbours even if the case has nothing to do with the working place. There might be very personal matters to be discussed. This gives the colleagues and neighbours a huge and uncontrolled power over a person's private life. Neither is reconcilable with our current notion of privacy, even in its mildest form.[161]

Besides, excluding every professional interference at the Social Court holds the danger that law is not applied correctly and safeguards of the defendant are disregarded. One of my biggest criticisms of Social Courts is that the defendant could not insist on being tried by a state court.

The Social Court, of course, also realises the idea behind the principle of public trial, that it is open to public scrutiny. On the other hand, there are good reasons to limit the public and evaluate the public interest against the defendant's interest of privacy. In Social Courts this evaluation is too strongly in favour of public exposure.

It is very valuable for the criminal justice system, of course that the Social Courts show an extremely small number of recidivism. But the price to pay for this is stigmatisation in the closest circle of personal relationships. The embarrassment of being judged by one's own neighbours and colleagues can cause emotional stress that might not be justified by the crime committed. It is true that in opposition to a state court conviction by a Social Court does not lead to a criminal record, but the publicity of conviction might be more severe than a registration.

The active involvement of the citizens not only increases public interest and public involvement but also contributes to the legal knowledge and understanding of law. On the other hand, the free legal training includes the risk of state propaganda. Moreover, there is the risk, that lay persons make emotional decisions based on and according to personal interests and prejudices and following social pressure. One interviewee expressed his concerns that commissions used the Social Courts for their own interests. In theory professionals are trained to be more unbiased, but there is no empirical research data to confirm this.

Of course the extended work of Arbitration and Conflict Commissions meant an enormous advantage of relieving the state court of the high case load in small crime. But in the end this saving was paid for by unpaid volunteer work.

bb) Power of the people?

Herzog and Wagner criticise the Social Courts for disguising power. The delegation of deviance control to the society seems to be emancipating but in reality, - so the authors argue, - does the state hand over problem to the society, claiming that it itself holds the reason for the deficits of its members. The society is asked to look for the guilt in itself, not in the state, the party or the socialist ideology.[162]

I disagree with this argument. I strongly believe that only at the surface, the state handed deviance control back to the society. The fact that the Social Courts, free from any professional participation, decided such a huge number of criminal cases could suggest that the state draws back from a part of criminal justice and let the citizens handle this part. A closer look, however, shows that the Social Courts were but free from professional interference. The regular legal training sessions in particular made sure that the Social Courts would follow the state approved jurisdiction. Furthermore, it was the state that decided which case would end in the Social Courts, the state that could take the cases from the Social Court and the state that controlled the Social Court's decisions. Rather than diminishing the state's power over a part of its jurisdiction, the state enlarged its range by incorporating part of the society. The state employed part of the society for its own purpose and strengthened its own justification in a number of ways:

Firstly, apart from their legal training, the members of the Social Courts (remember this were about 300.000 in a country of only 16 million citizens) were exposed also to considerable propaganda.

Secondly, society was led to believe that the state would give them power in an essential part of the jurisdiction, and this bolstered its claim of democracy.

Thirdly, through the direct contact between judicial staff and population, the state could make its law more public and the citizens more aware of it, demonstrating the state's presence and observance power over the citizens, but at the same showing the closeness between state and society.

Criminal law is an integral part of the public law. A Social Court that offers the public such a big role in the administration of criminal justice signals a powerful tool of direct democracy. But there is the huge risk proven by the practice of the GDR that the state that can use this institution to penetrate and control communities and community values.

4. "Goody" or" Baddies" - Labour Collectives

Also in the formal state courts persons or groups who were not affected directly by the case were regularly involved in the litigation. In showing the collective consciousness about the right behaviour, this lay participation, too, educated the public.[163]

[161] However, the publication of name and address in English newspaper of convicted offenders shows that there are systems who are less reluctant to make criminals public.

[162] Herzog/Wagner 1997, 86.

[163] Meador 1986, 121.

a) Colleagues' verdict

In every criminal case the working colleagues of the offender would be asked to come together and formulate a common statement about his personality.[164] Then a person was chosen who would come to the trial and present this colleague's evaluation.[165] According to my interview partners, in practice the question was often, whether this worker was needed or would the colleagues be glad to get rid of him, rather than his character or his expected future development etc. It was therefore very purpose oriented.

The collective's statement was used to evaluate a person and to find the right punishment, for example establish whether a sentence on probation was useful. Although in general the representative of the collective was not all that powerful, he could nonetheless tip the balance.[166]

b) Defender and Accusers

Beside the collective representative there could be a social defender or social accuser appearing at court. Usually this would be a member of the neighbourhood or working collectives,[167] but also local political representatives and the most important social organisations could take this part.[168]

They could support either the prosecution (for example claiming that the defendant did not support his family, or did not engage in the socialist society) or the defendant (for example witnessing her loyalty to the party or her good work).[169]

c) A surety for the fallen colleague

In addition to the collective's evaluation, it was also possible that the working collective would give a surety for the defendant. That meant that the colleagues agreed to control the person in future, regarding certain obligations, especially in case of a probation sentence, for example that he had to fulfil a particular amount of work. Or they would guarantee to make sure that he would pay maintenance.

One prosecutor admitted that there was a question of intruding into private lives, but she stressed that these procedures were very successful.

> "...especially the young guys who had a bad background and were in some way unstable. And then there was somebody at the working place who helped him to decorate his house and would bring him furniture and helped him to get a start. That had a big effect."[170]

5. And more legal education

The trial was used not only to educate the offender herself, but also the surrounding society. In general all criminal cases were public.[171] In addition the judge could decide to try in front of an extended public audience, for instance school classes or working collectives. If for example, a train engine driver caused an accident because he was drunk, the judge could invite a hundred engine drivers to attend the trial. Sometimes the whole case was moved in the enterprise instead of a courtroom. This happened, when the cases was closely related to the work place. Once, for example somebody was killed in a working place accident by a forklift truck. The judge, the lay judges and the prosecutor would then go directly into the enterprise. A judge told me that he did not favour this measure because it meant on the one hand more organisation and preparation and on the other hand more noise and disturbance during the trial, for instance when the case was held in an enterprise cantina. Once a judge had a trial in a cow stable![172]

In opposition to Western legal professionals, lawyers in the GDR, especially judges and prosecutors had a huge social role outside the courtroom, too. It was important not only to educate the people directly involved and persons present in the courtroom, but also to spread the findings. They had to hold seminars, discussions, and speeches in factories, and schools etc. about security, order, and law.[173]

Hence, the prosecutors had to go to the enterprises and organise sessions, where cases were discussed. The colleagues might be criticised of not foreseeing or preventing the crime. They also could be told what they had to take care now that the accused got a probation sentence with obligations concerning the working place.

Additionally, the prosecutor had to give talks in the different associations, societies or any commission in the village. Often the prosecutors were out two or three evenings per week to explain law to the people.

Another important connection between legal administration and citizens was free legal advice. Whereas today judges and prosecutors are not allowed to give legal advice, in the GDR courts, lawyer and prosecution offices were obliged to

164 Kollektiveinschätzung.
165 Interviews.
166 Interviews.
167 Meador 1986, 121.
168 Brunner 1975, 200.
169 Meador 1986, 121.
170 Interview: "...hat eben doch etwas ausgeloest". On the other hand the disappointment if this unstable person fell back to crime, was of course very big.
171 However, it was easy to exclude the public, like it was done in nearly all the political crime procedures.
172 Interview: "The proceedings were very short this day...".
173 Herzog/Wagner 1997, 79.

spend one whole day a week providing free information on all points of law.[174] In the prosecution offices people would seek help against state authorities and institutions, because administration in the GDR was until the very end not subject to judicial review.

> "Tuesday it was always crowded, depending on the weather (more people when it was raining), sometimes 50 people were coming"[175]

C. Some Conclusions

1. Lessons of the past

The different ways in which lay persons took an active part in the administration of criminal justice in the GDR outnumbers West German lay participation decisively. If we look at the different law texts, especially the constitutions of the GDR and of the FRG and see how often and in what ways lay participation is mentioned, we can get a clear picture about how much more importance lay persons were given in the socialist system. In West Germany, on the other side, the role which lay persons have in the criminal proceedings has decreased to a symbolic level. Lay judges have a long tradition and are acknowledged, but they are nowadays seldom the topic of academic discourse and even less the object of empirical research. They are not an issue of public discussion and it seems to be that, due to American movies and crime programs, there are more people who think that Germany has a jury than people who actually know of the existence of lay judges.

In the GDR the claims for more democracy, legal education, understandable law and language could be fulfilled and in part were fulfilled, because lay participation played a much bigger role both in quantity and quality. Moreover, one can assume that the law was much simpler and easier to understand and accessible to the general population in the GDR than in West Germany. The social gap between legal professionals and other citizens was minor and considered politically unacceptable. The laws were short, simple, and easy for lays to understand.[176]

But the primary claim for democracy was not fulfilled here either. Whereas in the FRG one cannot speak of the people sharing the state power of adjudication, because they have both in theory (seeing files, hearing appeal cases and less serious crime) and in practice (diminutive active participation) too little influence, the GDR gave the lay persons more power. But at the same time they

[174] Interviews: Also the lawyers and the Social Courts would give free legal advice once a week.

[175] Interview.

[176] The extent to which simple legal provisions provide space for political interpretation shall not be considered at this point.

subjected them to so much state influence and propaganda that one cannot speak of democratic decision making process either. The GDR undermined free decision taking by lay persons by intensive political control, but the FRG decreased lay persons influence on the criminal justice system, too, if in different ways.

The analysis of lay participation in the West has shown that it is put forward as a response to criticism of the current criminal justice system. Lay participation is supposed to make the administration of law more democratic, more understandable, more people related and less dogmatic. Although I share these criticisms of the criminal justice system, I do not consider that just any kind of participation can be the appropriate solution.

If one wants to make court decisions more democratic, one could consider electing the judges as is done in the USA,[177] or making court decisions and related statistical data more open to public access. One could undertake empirical research on how the public would like to see the policy of court decisions in general[178] and take these findings into account when deciding cases.

Regarding the closer connection between law and people (in terms of legal language as well as the complexity of legal provisions), I believe that the professional judges should move to "the people" instead of the other way round. Judges have to be trained to express themselves precisely and understandably at the same time. Also they should be encouraged to take all their decisions not only according to the law but also bearing common sense in mind. Law should give space for taking common sense and sense a of justice into account. To some extent German law does these things, but there is still the correct criticism of German law being too complicated and remote from the people. However, to make law known and understood by the people is not the function of lay persons but rather of legislation.

On the other hand, legal education of the public would be much more increased by using the media rather than employing a small section of society at courts. We already have recently seen an enormous increase of TV dramas involving courts involving both criminal as well as civil law, and this demonstrates quite clearly public interest. Whether or not the quality of these programs is acknowledged, it is definitely a way to make the law and the criminal court system more public.

At the end of the day, I think that in both systems lay participation was used as a showpiece for the application of democracy, whereas there was none or just very little. Lay participation in different legal systems always shows what kind of picture a state has of its citizens. Whereas lay persons in the FRG, who are denied a look into the case files, do not seem to be considered to be able to de-

[177] I personally do not support this way, because it holds the risk of deferring decisions based on fact and law to political considerations.

[178] For example more severe sentences in sexual offences or white collar crime, or more lenient sentence in minor drug offences.

cide objectively, their counterparts in the former GDR with the continuous political influence seemed to be unable to decide in accordance with the party's wishes. In both systems we see the sad picture of a state which feels the need to involve lay persons in decision making without acknowledging their capability to actually do this. Accusing the other side of giving lay persons too little rights or influencing them too much, one could pretend to be much more democratic oneself, whereas in the end neither system seemed really to rely on its people enough to let them take court decisions free from professional and political influence.

Given the such different roles that lay judges had to play in West and East German courts the actual practice of both was quite similar, i.e. passively sitting at the side of the professional who leads and actually decides the trial. And laymen's passivity, disinterest, and reluctance to serve is reported in many legal systems.[179]

2. Lessons for the present

Lay participation in the forms which we could find in the former GDR, i.e. Social Courts and involvement of the working collectives is not possible any longer under the current liberal system. Such institutions would require not only full employment and a strong connection between employer and working place, but moreover a strong sense of social interests prevailing over the individual right to privacy (not to mention the willingness to do volunteer work). Besides, without centralised control (as by the party in the GDR) equal jurisdiction could not be guaranteed.

However, if we see how close the criminal administration used to be to the people, the present German legal system has to ask itself the following questions:

How simple do we want our criminal justice system to be? – In part the reason for the high complexity of German law is due to the aim of balancing criminal justice with the civil rights of the defendant and safeguards against state power. Do we want to give up this complex system of balance of interests in favour for a more understandable law? This question is particularly difficult, since comprehensibility of the law is part of the defendants' protection.

How important is our right to privacy? - Our sense of anonymous dealing with cases and the extended protection of rights bears the risk of removing social conflicts away from their contexts and the involved people. The often-criticised neglect of the victim's interests is just one aspect of this topic.

How much lay decision making do we want? – In our society with extended importance given to experts, do citizens really still look for the often praised common sense of the people or do we rather prefer the professional judge with her training and experience? How much confidence do people have in people's decision making?

[179] Richert 1983, 13.

3. Lessons for the future

One can observe that systems are very eager to establish many democratic institutions but only insofar as the outcome is controllable.[180] People are being influenced by the system rather than the other way around and that is true for the liberal FRG as well as for the socialist GDR.

A legal system should be clear about how much confidence it has in its citizens in order to establish how much lay participation it should allow.

First, if the system has confidence in its citizens, why not giving them a say in high jurisdiction, where not only important cases are decided, but moreover directions for future jurisdiction is set, which can be a highly political task.

Second, in the future Germany could think of combining its claim of democracy with its notorious overwork of the courts, by letting small criminal cases be decided by lay persons, like in the former GDR. As well as the mentioned confidence by the state, this change would require a population which is willing to participate in this work and moreover, which would accept such lay jurisdiction. Both requirements seem to be quite questionable in our present individualistic society. If such a model would find sufficient acceptance it would be indispensable to create a procedure that would guarantee the involved individuals, particularly the defendant the basic safeguards. The non-professional judges in such proceedings should be, to some extent, trained but guaranteed independence at the same time. If this is possible for professional judges, why not for lay judges?

How democratic a criminal justice system should be is subject to personal favours, political reasons and professional experience. In any case it is my belief that the most important thing, even outweighing any democratic claim, is transparency: it should be made public why the system does or does not allow lay participation.

4. Closing

This paper attempts to make the reader think about the important question: by whom do we want to be judged? Should there be only one judge or more than one? Should it be somebody who knows me (whether I am the defendant or the victim)? Should it be someone with legal training or somebody who lets common sense prevail over legal dogmas?

The question of what characteristics a judge should have goes directly to the core of justice as it implies the questions about what issues should be judged, i.e.

[180] One example is the big disappointment of nearly all political parties (except for the SED) when the people did not vote in favour for the unification of the states Brandenburg and Berlin, or the reluctance to let the British people vote about the introduction of the Euro.

what is part of the case? The question of the person of the judge is not only a political one but also always part of the question of justice itself.

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