Philosophical and social view of the jury : could it have a renaissance in Germany ?

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PHILOSOPHICAL AND SOCIAL VIEW OF THE JURY: COULD IT HAVE A RENAISSANCE IN GERMANY?

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I. The Roots: Lay Participation in the Criminal Trial as Means to Guarantee Democratization and Social Integration of the Criminal Justice System

Under the influence of the English and French role-model German liberalism of the late 18th and the first half of the 19th century took up lay participation in the Criminal Trial as a central claim. Jury courts were considered to be a "Palladium" of civil rights. In a memorandum on the Prussian jury courts and their reform (1851) it was declared: "One shall not take someone from amongst us and impose on him severe punishment if a professional judge cannot succeed in convincing 12 people, that justice takes its course". Thus lay participation aims at securing civil rights against professional judges representing the authority of the state and at promoting the transparency of decision-making. Also lay participation should yield an impartial, politically unbiased and hence just criminal justice system.

Further aspects are the aversion to an academic approach to law together with the demand for a popular law, the firm belief that lay participation is the only guarantee for the publicity of criminal justice and finally the romantic idea, that lay participation will lead to strong attachment to the legal system, even commitment thereto.

II. The Philosophical Foundation: Hegel´s Philosophy of Rights (1821)

In the preface to *Hegel`s* Philosophy of Right it is asserted that "philosophy is its own time apprehended in thoughts". Concerning the issue of lay participation this was achieved by *Hegel* in a particularly concise way. Unfortunately the transcription of precise thoughts is a troublesome business. Therefore the following commentary on *Hegel* will be a little demanding for the audience as well as for me.

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In criminal justice the principal imperative of right "Be a person and respect others as persons" manifests itself against violation. Within this framework procedure in the criminal court is viewed as a stage to enforce the universality of law. Despite violating the law the defendant can still refer to the principal imperative of being respected as a person. For this reason criminal procedure should not be an act of submission, but rather should raise in the defendant the consciousness of the universality of law. According to *Hegel* the initiation of such a process of becoming conscious is doomed to failure, when placed solely in the hands of professional judges excluding lay participation, in the sense of excluding society from jurisdiction.

This thought is formulated in a very condensed manner in § 228 of *Hegel´s* Philosophy of Right:

> "Owing to the character of the entire body of the laws, knowledge both of what is right and also of the course of legal proceedings may become, together with the capacity to prosecute an action at law, the property of a class which makes itself an exclusive clique by the use of a terminology like a foreign tongue to those whose rights are at issue. If this happens, the members of civil society,..., are kept strangers to the law, not only to those parts of it affecting their most personal and intimate affairs, but also to its substantive and rational basis, the right itself, and the result is that they become the wards, or even in a sense the bondsmen, of the legal profession".

This thought transcends the particular historical context of *Hegel´s* philosophy, the rise of civil society. The criminal justice system is connected with the self-organisation and self-consciousness of civil society and thus to be distinguished from mere control by the class of professional judges. The members of civil society should not be kept "strangers to the law" and to the language of professional judges.

The defendant as well as the civil society must recognise the criminal justice system as their own matter, incorporating the common interests, not particular ones and therefore vouching for justice for all. The objection, that a criminal justice system without lay participation could be time-saving and more efficient, is not accepted by *Hegel*:

> It may be the case that if the administration of justice were entirely in the hands of professional lawyers, and there were no lay institutions like juries, it would in theory be managed just as well, if not better. It may be so, but even if this possibility rises by general consent to probability, or even certainty, it still does not matter, for on the other side there is always the right of self-consciousness, insisting on its claims and dissatisfied if laymen play no part".

To put it in modern terms: That the effectiveness of criminal justice depends on acceleration, simplification and professionalization of criminal procedure is just an illusion. Enforcing the law in such a manner does not succeed in evoking a discourse in society on what is right or wrong. The result will be, that the rules of law will not be accepted in the long term.

III. Academic and Political Criticism: Impracticability and Inefficiency of Jury Trials

In contrast to the Anglo-American and French legal culture jury trials have never firmly established themselves in Germany and therefore never grew out of a tradition. Before 1848 not very many German criminal law scholars were sympathetic towards jury trial. In the years of the civil revolution 1848/49 and the second half of the 19th century, however, the idea of jury trials gained acceptance among those scholars involved in political activism, which gave way to a widespread indifference today. For instance the law professor at the University of Munich *Klaus Volk* writes 1882. "The only argument in favour of lay participation is its very existence".

In addition both German dictatorships have abused and perverted the idea of lay participation by setting up institutions like "Volksgerichtshof" and "Volksjustiz" in this century. For this reason the criticism of *J. P. A. Feuerbach,* the father figure of modern German criminal sciences and legislation, of jury trial going back to the year 1812 does still appear to be valid. *Feuerbach* calls for a distinction between the legal and political perspective on the jury trial. He concedes that the demand for lay participation is politically comprehensible, but cannot be sustained under examination according to the principles of criminal law and procedure. From this point of view it is doubtful whether the purposes of punishment could be attained through jury trials.

First of all Feuerbach maintains that the realization of the political notion, namely that every citizen be judged by his equals, is practically impossible: "the legislation would have to carefully distinguish social groups and classes and establish for every social group and class its own jury". Thus the universality and equality of criminal law would be jeopardized. Secondly decision-making by juries may seriously undermine the authority of the criminal justice system, because laymen do not consider the general preventive function, but get carried away into overemphasizing the peculiarities of a case with the consequence of irrational spontaneous decisions.

Finally *Feuerbach* holds that through lay participation the development of a sophisticated criminal law and elaborated rules of imputation will be obstructed, because common sense can only grasp simply structured or simplified criminal cases.

The universality and equality of law versus the threat of arbitrariness of jury-decisions. General preventive orientation versus decisions taking into account the

idiosyncrasies of each individual case. Sophisticated criminal law and elaborated rules of imputation versus coarse common sense. These are in brief the arguments versus lay participation in criminal procedure put forth by *Feuerbach.*

IV. Perspectives: A Clear and Distinct Criminal Law Paving the Way for a Renaissance of Lay Participation

Since the 19th century criminal law has been growing wild and almost unrestrained. It is no longer concentrating on the fundamental conflicts between persons concerning life, physical integrity, personal freedom, self-determination, honour and property, but wants to regulate a variety of problems of social disorder and moral disorientation. Whether this is adequate and right, would be a topic for a further talk. I believe, that this development causes substantial damage to the criminal justice system

With respect to the fundamental offences of the criminal law the legislator in Germany has to comply with the jurisdiction of the Federal Constitutional Court, that the description of an offence must be the more precise the severer the punishment will be. If this is correct, then it is by no means obvious, why the application of such clear and distinct criminal laws should lead to arbitrary decisions of laymen.

Only those who naively believe in the impartiality and detached view of professional judges and deny the existence of irrationality among them, only those could stress that lay-participation may involve the risk of decisions based on irrational motives. Criminal procedure is a scene, a stage, with persons interacting and not even professionalism can safeguard judges against emotions arising from their biographical background, from psychological dispositions or their moral prejudices. Criminal procedure is not an unbiased subsumption of a case under the law.

Lay participation may create a setting, that prevents individual prejudices from determining decisions. The chances increase that a rational analysis of the defendant and his motives will take place, as more people participate in the discourse. Jury trial is especially suitable to provide conditions for a climate of communication, such that *Hegel´s* principal imperative of right "Be a person and respect others as persons" can gain validity.

The jury consisting of twelve laymen – its number having been determined in the 14th century in England, which is a "historical accident, wholly without significance, except to mystics" according to the U. S. Supreme Court – ensures in a wondrous way favourable conditions for a discursive rationality of decision-making in court. The jury is large enough to escape from persistent domination by an opinion leader. Juries guarantee a vast variety of opinions and characters, such that manipulation through public opinion becomes increasingly difficult. Furthermore by their number it is likely that the jury adequately mirrors the structure of society.

Since 1924 jury trials have been abolished in Germany, the participation of lay assessors in professional courts is a compulsory exercise. There are no signs of a renaissance of lay participation and jury trial in the German criminal justice system. I regret this state of affairs, indeed.

On the threshold of the 21th century we should reflect on concepts and institutions of the past millennium worth preserving. In my opinion lay participation in the criminal trial is definitely one of these concepts and institutions. Lay participation is an old, but nonetheless very modern concept, since this concept captures the very idea of democratization of civil society.

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