

German Criminal Procedure and the Right to a Jury Trial

When many think about Germanic history, images of a turbulent past usually come to mind. Charlemagne, Bismarck, Hitler, and the Berlin Wall all paint a picture of a torn history that involves numerous types of governments and leaders. Surprisingly, however, the rules for criminal procedure in Germany have mainly stayed the same since the nineteenth century.¹ The current Code of Criminal Procedure (*Strafprozessordnung*), analogous to the U.S. Federal Rules for Criminal Procedure, was adopted in 1877 after the first German unification.² These sets of laws contained provisions detailing jurisdictional matters of the courts, general powers of the courts, and the overall criminal procedure against adults,³ and were enacted in order to unify the criminal procedure among the numerous Germanic states.⁴ Although the Code has undergone revision over the last 135 years, the broad, comprehensive nature of the 1877 Code has allowed German legislatures to keep the main structure of the Code and avoid having to conduct massive overhauls to the system.⁵ The Code itself provides for a largely inquisitorial criminal justice system, even though some adversarial elements exist.⁶ Although some provisions of the Code are quite detailed, modern practice often deviates from some of the more formal procedures found in the Code.⁷

In addition to the Code of Criminal Procedure, criminal procedure in Germany is also

1 Pedain, Antje Du-bois (2006), “German Criminal Procedure,” p. 1 (<http://www.law.cam.ac.uk/faculty-resources/summary/german-criminal-procedure/6368>)

2 Id.

3 Id.; See also Bohlander, Michael (2011), “Basic Concepts of German Criminal Procedure – An Introduction,” Durham Law Review, p. 4 (<http://dro.dur.ac.uk/8800/1/8800.pdf?DDC71+DDD19+dla0mb+dul4eg>)

4 Id.

5 Id. at 3

6 The Law Commission (2010), “German Criminal Procedure,” p. 1 (http://www.lawcom.govt.nz/sites/default/files/german_criminal_procedure_0.pdf)

7 Id.

governed by the Constitution for the Federal Republic of Germany (*Grundgesetz*), which provides important procedural rules for the criminal justice system.⁸ Ratified in 1949 by the West German government and later adopted by the East German government after reunification in 1990, the German Constitution has been in effect for over 60 years.⁹ Just like the American Bill of Rights, the *Grundgesetz* provides very important procedural rights and civil liberties to a person charged with a crime.¹⁰ Some of these rights include the right to a predetermined judge (*Gesetzlicher Richter*), the presumption of innocence (*Unschuldsvermutung*), the right to not be punished for conduct that was not illegal at the time of the act, and the protection against double jeopardy.¹¹ Further, the Constitution also provides rules concerning the application and interpretation of the Code of Criminal Procedure.¹² In turn, the Constitution, along with the Criminal Procedure Code, work together to formulate the crux of Germany's criminal procedure.¹³

As one could imagine, there are many differences between American and German criminal procedure. One important difference, the right to a jury trial, is explored in more detail below.

Right to a Jury Trial

In his first Inaugural Address in 1801, Thomas Jefferson stated, “[t]he wisdom of our sages and the blood of our heroes has been devoted to the attainment of trial by jury. It should be the creed of our political faith.”¹⁴ Found in Article Three of the United States Constitution, the right

8 Bohlander (2011), p. 4; See also Jescheck, Hans-Heinrich (1970), “Principles of German Criminal Procedure in Comparison with American Law,” *Virginia Law Review*, Vol. 56, No. 2 (Mar. 2 1970), p. 241

9 Deutscher Bundestag (2012), “Grundgesetz,” (<http://www.bundestag.de/dokumente/rechtsgrundlagen/grundgesetz/index.html>)

10 Jescheck (1970), p. 241

11 Bohlander (2011), 12-14; Pedain (2006), p. 4

12 Pedain (2006), p. 4

13 See *id.*

14 Princeton University (2006), “The Papers of Thomas Jefferson, Volume 33: 17 February to 30 April 1801,” Princeton University Press, p. 148-52 (<http://www.princeton.edu/~tjpapers/inaugural/infinal.html>)

to a jury trial has been a strongly held principle in American jurisprudence since the creation of the country. Although both England and America view the right to a jury trial as an “indispensable bulwark of individual freedom,” many European countries, including Germany, have abolished the right to a jury trial.¹⁵ Instead, Germany has replaced the jury with the *Schwurgericht*, a body of both professional and lay judges that decide matters of fact.

In Germany, less serious crimes are handled in the *Amstgericht* (District Court).¹⁶ If a prosecutor is seeking no more than a year's imprisonment, then the case will usually be heard by one professional judge. If more than a year imprisonment is sought, the case will be heard by one professional judge and two lay judges.¹⁷ More serious crimes are dealt with in the *Landgericht* (High Court).¹⁸ Although originally created to have a *Schwurgericht* containing three professional and six lay judges, cases in the *Landgericht* are now heard by a panel containing two professional judges and two lay judges.¹⁹ This drastic change in the composition of the *Schwurgericht* was the result of efficiency and judicial staffing concerns that arose in Germany during the 1970's and 1990's, although some disapproval for the change has been expressed since lay judges can no longer out-vote the professional judges on the panel.²⁰ In order to achieve a conviction in either the *Amstgericht* or the *Landgericht*, a two-thirds majority decision must be reached by the *Schwurgericht*.²¹

Lay judges (*Geschworenen* or *Schöffen*), like their American counterpart, are chosen from the public at large to serve on the *Schwurgericht*. Similar to American law that requires jurors to

15 Jescheck (1970), p. 243

16 The Law Commission (2010), p. 5

17 Id.

18 Id.

19 Vogler, Richard (2005), “A World View of Criminal Justice,” p. 245

20 Id.

21 The Law Commission (2010), p. 5

be decided at random, German law requires lay judges to be representative of their community.²² However, empirical research has shown that more personal decision-making goes into the selection of German lay judges than that of American jurors.²³ Although the selection method differs between the German states, lay judges are commonly selected by a committee for a five-year term, which usually requires the applicant to sit about 10 times a year.²⁴ In terms of the trial itself, lay judges play a more limited role than that of the professional judges.²⁵ For instance, lay judges rarely ask direct questions to witnesses. If questions are asked by a lay judge, they are usually relayed to the presiding professional judge.²⁶ In terms of decision-making, however, lay judges play an equally significant role. They have the same voting power as the professional judges and are often viewed as being useful in determining the credibility of particular piece of evidence.²⁷ Supporters of the *Schwurgericht* argue that skewed legal opinions are less likely to occur with a professional-lay judge panel. Also, it is argued that the existence of common citizens on the panel is useful in helping professional judges understand the current public opinion concerning a particular crime.²⁸

Although American law may be steadfast in its dedication to the tradition jury system, Germany and other European countries have shown that an efficient criminal justice system can be achieved without the right to a jury. Who knows? Maybe further research into the advantages of a non-jury criminal system would allow Americans to question whether the right to a jury should be, as Thomas Jefferson put it, “the creed of our political faith.”

22 Wolfe, N.T. (1983), “Participation in Courts - American Jurors and German Lay Judges,” NCJRS Abstract (<https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=92336>)

23 Id.

24 The Law Commission (2010), p. 5

25 Id.

26 Id.

27 Id.

28 Jescheck (1970), p. 244