

System with lay participation in administrative courts

German perspective

by: Holger Böhm, Judge at the High Administrative Court of Mecklenburg-Vorpommern,
Greifswald, Germany

1. Do you have lay judges in your country and in what kind of courts?

There is a participation of lay judges in the decision making process in most of the specialized courts such as the administrative courts in Germany. In the general courts at first instance there is mostly no participation of lay judges. In criminal procedure it depends on the severeness of the criminal act trialed and in civil cases on the amount of money claimed or the legal matter on the substance. For the latter it is related to the jurisdiction of the court whether the matter is allocated to the municipal or the district courts. While there is no lay participation foreseen at the municipal courts, there are lay judges at the district level; there can even be a participation of special lay judges (e.g. chambers for commercial law matters). At the federal level there is no lay participation.

As for the administrative courts there is lay participation at the first and the second instance. According to sec. 5 par. 3 of the Code of Administrative Court Procedure (CACP, *Verwaltungsgerichtsordnung*) the chambers of the admin. courts (of first instance) shall rule composed of three judges and two lay judges unless an individual judges adjudicates. The lay judges shall not be involved in orders outside the oral hearing and with summary decisions (*Gerichtsbescheid*, sec. 84 CACP). As for High Administrative Courts (second instance) sec. 9 par. 3 CAPC provides that the senates shall rule composed of three judges; legislation of the federal states may provide that the senates rule composed of five judges, two of whom may also be lay judges. In most of the federal states there is lay participation at the second instance. Sec. 10 does not mention any lay participation for the composition of the senates of the Federal Administrative Court (third instance). In general sec. 19 CACP rules that lay judges participate only in decision after an oral hearing in a formal court session (not in written procedures).

2. Nomination procedure

The 3rd chapter of the CACP contains provisions concerning lay judges. A lay judge must be a German, he/she should have reached the age of 25 and have his/her place of residence within the court district (sec. 20). There are provisions on the exclusion (sec. 21), on non designation (sec. 22), grounds for rejection of the nomination for office (sec. 23) and the release of lay judges (sec. 24).

Sec. 25 ff of the CACP prescribe that lay judges have to be elected. The term is 5 years (sec. 25). A committee established according to sec. 26 (composed of the President of the court, an admin. civil servant designated by the government of the federal state and seven trusted third party as associated judges) elects the number of lay judges as determined by the court President (sec. 27). The admin district authorities or the authorities of the not associated cities draft a list of proposals for lay judges which shall contain the double amount of proposals as the number of lay judges determined by the President (sec. 28).

3. Performance in the bench

The Presidium of the court (committee composed of elected judges of the court) shall determine prior to the commencement of the business year the subsequence in which the lay judges are to be called in to the sessions (sec. 30). The lay judges shall take part in oral hearings and in reaching a judgement with equal rights as judges (sec. 19). That means in practice they have the right to ask questions to the parties and participants of the oral hearing (witnesses, experts etc.). The presiding judge conducts the court session and asks the lay judges if they have questions to the parties or participants.

4. Purpose of lay judges

Critical views see lay participation in admin. court procedure as a relic from the time of the establishment of an independent admin. Judiciary, which should be set under a control of the civil society. More positive it is argued that admin. judiciary as a part of the democratic state power must not be excepted from participation of citizens. Hence lay participation has a democratic function. The constitution itself, e.g. the democracy principle under art. 20 par. 1 of the Basic Law, does not require a lay judge participation. It's up to the discretion of the legislator of the federal states. At least lay judges support the democratic legitimation of judges the court in general.

Although lay judges -by definition – do not obtain special knowledge, e.g. legal

skills, so it is argued that even the information about the legal background by the professional judges does not enable them to a proper assessment of the case. On the other hand it is the duty of the professional judges to inform the lay colleagues accordingly in in this one purpose of lay participation can be seen. The professional judges have to structure their assessment and findings which enables the lay judges to understand and follow the decision finding process. By this in addition to the voting by the lay judges there is a kind of control of plausibility of the decision making process and the outcome, the verdict. Does the outcome stand in a relation to the facts? Here also the life experience of the lay judges, who regularly come from public administration or are engaged in politics in some way, is referred to for the justification of lay participation. Last but not least it is alleged that lay participation supports peoples -and especially parties confidence in the judiciary.

5. Swearing of an oath

According to the Court Constitution Act (Gerichtsverfassungsgesetz) lay judges have to swear the same oath like professional judges when they commence their office (in the first public court session they participate).

6. Individual vote

As they have the same rights like professional judges (sec. 19), their vote has the same weight like the professional judges: one man one vote. Officially there is a formal voting procedure after the secret deliberation of the judges. First the reporting judge gives his/her vote, followed by the lay judges, the other professional judge and finally the vote of the presiding judge is casted. In practice it is more like an open discussion with an agreement at the end.

7. Overruling of professional judges

As the CACP foresees a composition of the bench of maximum 2 lay judges sitting together with 3 professional judges, lay judges can overrule professional judges only if one of the professional judges shares their opinion.

8. Discussion on the role of lay judges

Lay participation is under discussion since its establishment with above stated arguments but there are no current developments in the political debate or legislation.

9. Personal experience

Personally in 16 years of performance of the office I never experienced that lay judges turned a decision opposite to the majority of the professional judges. Under the special situation in the eastern federal states after the reunification it was very helpful to have lay judges who experienced living conditions in the former German Democratic Republic (GDR), because the vast majority of professional judges was of west German origin. Especially in cases concerning expropriations in the former GDR, where performance and legal reality in the former times has to be assessed frequently, lay judges who had lived under such conditions are very helpful. The increase of specialization and complexity in modern legislation, e.g. in the various fields of admin. law such as in the genetic or atomic field, makes its application more difficult not only for trained jurists but even more for lay people. As in admin. cases mostly not facts but legal questions are under debate, the contribution of lay judges to the discussion within the bench is small.

10. Participation of other judges

In some specialized chambers or senates of the admin. judiciary there is a participation of lay judges who possess a specific profession or belong to specific professional groups or institutions. In cases concerning the representation of civil servants (Personalvertretung) the participation of one professional judge and two lay judges is foreseen. From the two lay judges one comes from the employers and one from the employees side. In the chambers senates in charge of cases concerning the professional performance of medical doctors and pharmacologists (Berufsgericht für Heilberufe) two lay judges sit together with one professional judge, who have to be medical doctors or pharmacologists themselves. There are some more examples like this.