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《Material》

## The Rise and Fall of Trial by Jury in Germany\*

Rudolf v. LAUN

### I. Introduction

“N’ est il pas absurde, …, que douze citoyens … se constituent juges de la loi? Et que, de peur qu’ elle ne trouve son application, ils declarent inexistant le fait prouve et avoue? Ainsi douze citoyens pris au hasard peuvent abroger les lois criminelles ;… ”<sup>1)</sup>.

“Each jury is a little parliament. I cannot see the one dying and the other surviving. The first object of any tyrant in Whitehall would be to make parliament utterly subservient to his will. And the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject’s freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than a wheel of the constitution : It is the lamp that shows that freedom lives.”<sup>2)</sup>

These two quotations mark extreme positions towards our subject, and it should be understood that civil juries will not be examined here - the idea of introducing them has been abandoned at a very early stage by the “Immediat-Justiz-Kommission”<sup>3)</sup>, a body which we will meet later in this story.

The German equivalent for “Trial by Jury” , “Schwurgericht” , is still known

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- 1) Simeon, Comte Joseph-Jerome, De l’omnipotence du jury, Revue Francaise 1829, no. 9 p. 237.
  - 2) Devlin, Sir Patrick, Trial by Jury, 3rd ed. 1966, p. 164.
  - 3) See the commissions report : Gutachten der Koeniglich-preussischen Immediat-Justiz-Kommission ueber die Muendlichkeit und Oeffentlichkeit des gerichtlichen Verfahrens, Leipzig 1842.

\*Dedicated to my wife.

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to German law. But this does not mean that in reality there is still trial by jury. The body mentioned in art. 76 II of the German Code on Court Organization<sup>4)</sup> consisting of three judges and two laymen is distinguished from a jury in that both judges and laymen decide all issues jointly. This kind of court is called "Schoef-fengericht" in German and is quite different from the Anglo-American jury system known to everybody through movies and detective stories.

### II. Dispute on the Fate of Trial by Jury in the Rhine Countries

(A) Towards the end of the Middle Ages the German court constitution with its wise but lay judges declined<sup>5)</sup>. This was caused by the Constitutio Criminalis Carolina, some Imperial Recesses<sup>6)</sup> and new court constitutions for the Kammergericht<sup>7)</sup> which provided for learned judges, at first only for Imperial courts. But this influenced the territories, and eventually the popular old system was replaced. The procedures become more and more secret, and the situation at the end of the 18th century is described impressively by Feuerbach, to wit<sup>8)</sup> :

"Der Angeschuldigte ist von seinen Richtern getrennt; entfernt von ihnen wird sein Prozess gemacht ; sie sehen ihn nicht, sie hoeren ihn nicht ; nur durch Mittelsmaenner dringt das Wort seiner Verteidigung bis zu ihnen. Sie hoeren weder die Zeugen, welche wider ihn, noch diejenigen, welche fuer ihn sprechen. ... Die Untersuchung ist so geheimnisvoll in ihrem Anfang bis zu ihrem Ende, wie die Entscheidung. Ohne Stuetze, ohne Verteidiger, einsam, verlassen steht der Ange klagte vor dem Inquisitor ... ; der ihn schuldig zu finden alle Kraeft spannt ... ." <sup>9)</sup>

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4) Gerichtsverfassungsgesetz, henceforth abbreviated GVG.

5) Conrad, Deutsche Rechtsgeschichte, 1966, vol. II. p. 286.

6) Reichsabschiede of 1548, para. 23, 25 and of 1555 para. 106.

7) Kammergerichtsordnung of 1521 and 1555.

8) Feuerbach, Paul Johann Ameseln Ritter von, Betrachtungen ueber das Geschwo-renengericht, Giessen 1813, pp. 37.

9) The accused is separated from his judges; his trial is conducted at a distance ; they do not see him, they don't hear him, Through middlemen only his defence reaches them. They hear neither the witnesses against him, nor the witnesses against him, nor the witnesses in his favour. ... The inquiry is, from its beginning to the end, as mysterious as the decision. Lonely, forlorn the accused faces the prosecutor ... ; who tries to find him guilty with all his might. (author's translation) .

To protect innocence a principle of tardiness was, according to Feuerbach<sup>10</sup>, applied, and a two years' trial ending in the release of the accused roused nobody even if the accused was proven innocence.

No wonder, then, that many welcomed trial by jury when it was introduced in 1798 by Napoleon when he occupied the Rhine Countries<sup>11</sup>. No wonder, too, that after the end of Napoleon's regime this evil child of the revolution was to be abolished as a matter of course - this at least was thought in Prussia, where officials were totally convinced of the merits of the Prussian law.

But all this was not as simple as people thought in Prussia : Juries had found many supporters in the Rhine Countries, even if the level of discussion was at times somewhat low.

Until about 1818 Feuerbach's publication<sup>12</sup> was the only serious one. There, Feuerbach opposes the French jury system, distinguishing political and legal reasons<sup>13</sup> :

Juries are, according to Feuerbach, necessary for countries with a democratic constitution and a separation of powers. If the people are the sovereign, then the judiciary has to consist not of standing benches but of representatives of the people. Therefore, it would be wrong to judge Feuerbach as an opponent of the jury system.

From a lawyer's point of view Feuerbach finds points of criticism :

(a) The so-called question of guiltiness ( "Schuldfrage" the "guilty or not guilty?" ) is often said to be a mere question of fact. But Feuerbach shows that this is not quite true because this question can be separated into two parts : (1) are certain alleged facts true? and (2) do these facts constitute a crime? Both questions are answered by the jury, and necessarily so. Would the jury decide only part (1) of the question, then the judges would be free to declare the accused guilty or not

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10) Feuerbach supra (8) p. 38.

11) 6. Germinal an VI, according to the new calendar.

12) cf. supra (8).

13) cf. supra (8). p. 47.

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guilty and they could declare the most innocent action a crime<sup>14</sup>). Then, the question arises whether “about guilt or innocence laymen could better judge than men who know the law and are trained in its application”<sup>15</sup>).

(b) In the French system sometimes juries have to answer many questions and it has happened that a jury’s answer to one question contradicted the answer to another one <sup>16</sup>). In Anglo-American law this disadvantage is avoided by the more general “guilty” or “not guilty” verdict. Moreover, jurors are laymen, and there is fear that they might be led astray by a good plea. Therefore, one must discuss how jurors are to be appointed. In the French system the government had a great influence here : Only wealthy individuals with higher education could be empanelled, and this was done by a committee of two civil servants dependent on the government and one judge whose independence was questionable<sup>17</sup>). When selecting jurors for a certain trial the same procedure was applied<sup>18</sup>). Further, Feuerbach is criticizing that juries decide by majority<sup>19</sup>) and finally he finds faults in that there were no rules and regulations on the matter of evidence ; here the French principle of “intime conviction” was applied, according to which the truth emerged from the conscience of the jurors.

For these reasons Feuerbach opposes the French jury system and hence the system in the Rhine Countries<sup>20</sup>). However, he was sympathetic to the English system specially because of the English evidence rules<sup>21</sup>).

(B) While on the theoretical side for the next six years there are neither new arguments nor serious publications there are some other developments :

(a) In February 1814 trial by jury is abolished in the “General Gouverne

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14) Feuerbach supra (8) p. 170.

15) Feuerbach supra (8) p. 178 (author’s translation) .

16) Schwinge, Erich, Der Kampf um die Schwurgerichte, Breslau 1926, p. 14.

17) Schwinge, supra (16) p. 5.

18) Feuerbach, Betrachtungen ueber die Oeffentlichkeit und Muendlichkeit der Gerechtkeitspflege vol. II, Giessen 1825 p. 436.

19) Feuerbach, supra (18) pp. 420.

20) supra (18) pp. 433, pp. 472.

21) supra (18) pp. 432, pp. 447, pp. 450.

ment Berg”<sup>22)</sup> and replaced by a court consisting of learned judges<sup>23)</sup>.

(b) But even before this another development had started - in 1813 the Prussian Minister for Home Affairs von Kircheisen proposed the re-introduction of the old, pre Napoleonic law in territories which had been Prussian before the war, but in 1814 the plan was extended to the new acquisitions<sup>24)</sup> and carried out with effect from January 1st, 1815 in the Prussian territories on the right side of the Rhine<sup>25)</sup>. In the territories on the left side of the Rhine Governor-General Sack refused to carry out the order relying on an instruction by Hardenberg and on royal desire. Therefore, von Kircheisen requests support from Hardenberg, but his letter is filed away without reply<sup>26)</sup>.

(c) On July 18th, 1815, the President of Oberlandesgericht Muenster<sup>27)</sup> was appointed “Justiz-Organisations-Kommissar” and charged with the introduction of Prussian law. Sethe experienced much protest even from officials and therefore reported to Berlin that the French procedure had found much approval even from the judiciary<sup>28)</sup>. Thus the introduction of Prussian law was delayed until 1816. In 1816 the opponents of the Prussian law succeeded in convincing the Prussian chancellor Hardenberg to thoroughly examine the planned step. For this examination the “Immediat-Justiz-Kommission” was appointed, and von Kircheisen’s attempts had failed so far. The commission presented its findings in autumn 1818<sup>29)</sup> and proposed to maintain the French system. In these findings the commission also dealt with Feuerbach’s Points of criticism, but sometimes only by not mentioning them. Advocates of the Prussian law were told that trial by jury was

22) By Order of the Governor-General Alexander Prinz zu Solms ; the order dated Feb. 28, 1814.

23) cf. Landsberg, Ernst (ed.) Die Gutachten der Rheinischen Immediat-Justiz-Kommission und der Kampf um die Rheinische Rechts- und Gerichtsverfassung (Publicationen der Gesellschaft fuer Rheinische Geschichtskunde XXXI) , Bonn 1914, p. XII.

24) cf. Landsberg supra (23) p. XX.

25) By “Patent” of Sept. 9, 1814, cf. also Landsberg supra (22) pp. XXXIV.

26) cf, Landsberg supra (22) pp. XXIV.

27) Christoph Wilhelm Heinrich Sethe ; cf. Landsberg supra (22) p. XXI.

28) As reported by Landsberg supra (22) p. XXXIII.

29) The report seems not to have been published in full ; for excerpts Landsberg, supra (22), can be consulted.

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an originally German institution<sup>30</sup>. Incidentally, a few political arguments were given : The desire of the judiciary in the Rhine Countries<sup>31</sup> and the population's greater confidence in juries made it advisable to keep up trial by jury<sup>32</sup>.

(C) The first sensational trial in Germany, the trial of the Cologne merchant Fonk caused information on juries to spread. Fonk was twice arrested under suspicion of murder, released twice, sentenced to death and finally pardoned in 1822. In the trial some deficiencies of trial by jury became evident - mainly the fact that even there the main objective of the trial was to obtain a confession<sup>33</sup>. Although this trial provoked a royal order to introduce Prussian law in the Rhine countries, trial by jury was not abolished. A last attempt to abolish the institution was rejected by the provincial Diet of the Rhine Countries in 1843<sup>34</sup>, and that was the end of attempts to abolish trial by jury in the Rhine Countries.

### III. The Discussion on Introducing Trial by Jury in the other German States

Since 1819 trial by jury is constantly demanded by liberal movements in Germany. This is partly due to political trials, which undermined the remaining confidence in the court system. As soon as diets convened in Bavaria and Baden juries were demanded in 1819, and in Wurttemberg the restoration of the old court system was demanded. But other developments made this impossible : On March 23rd, 1819, the Russian councillor of state von Kotzebue was assassinated by a member of a liberal movement. Fears of a revolution by Austrian chancellor Metternich led to consultations between Prussia and Austria and further to the Karlsbad resolutions<sup>35</sup>. Reactions to these resolutions silenced demands for juries for a couple of years.

The trials resulting from the Karlsbad resolutions caused any surviving

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30) This opinion is contested by Brunner, Heinrich, *Die Entstehung der Schwurgerichte*, 1871 pp. 58.

31) Report pp. 69 according to Schwinge supra (16), p. 26.

32) Report p. 370 according to Schwinge supra (16), p. 26.

33) cf. Schwinge supra (16) p. 32.

34) Schwinge supra (16) p. 38.

35) Gebhard, *Handbuch der deutschen Geschichte*, 7th paperback ed. edited by Gundmann, vol. 15 edited by Schieder 1982, pp. 29.

sympathy for the prevalent court system to vanish ; censors prevented critical opinions from being published and only oral reports were available - but they were often exaggerated<sup>36)</sup>.

At the diets the issue is raised again from 1831 onwards. The diets in Baden demand juries at least for offences against the press laws - in vain. In Bavaria and in the electorate of Hesse juries are talked about but also to no avail, at least for the time being<sup>37)</sup>. Efforts to introduce juries can be seen more often now, but only in 1843 (Baden) and 1844 (Schleswing and Holstein) majorities can form which however cannot change anything<sup>38)</sup>. Meanwhile more publications supporting trial by jury are being published since 1830. The issue has changed somewhat, and now the introduction of juries for all German territories is the issue. Publications after 1830 develop some new arguments for juries, and besides other issues emerge, to wit :

- rules of evidence (a)
- the origin and nature of juries (b)
- the "Tatfrage" discussion <sup>39)</sup> (c)
- the question whether the English or the French system should be adopted (d)
- the competence and power of the juries (e)
- the political significance of juries (f)

(a) Three opinions dominated the discussion on the rules of evidence. Feuerbach proposed a "negative rule" which defines only what was not sufficient as evidence<sup>39)</sup>. Then, there was the French doctrine of "intime conviction". And there was the new theory proposed by the Immediat-Justiz-Kommission according to which the evaluation of evidence is left to the discretion of the jury (or judge in cases where juries do not decide). Soon this opinion was dominating, and it was indeed implemented<sup>40)</sup>.

(b) As to the origin of juries some thought romantically that its roots might be found on German soil. But this argument was used by the Immediat-Justiz-

36) cf. Schwinge supra (16) pp. 45.

37) cf. Schwinge supra (16) pp. 59.

38) cf. Schwinge supra (16) p. 66.

39) supra (18) pp. 433, 472.

40) Schwinge supra (16) p. 92.

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Kommission probably only to ease Prussian resistance. In reality, the origin can be found in anglo-saxonian institutions<sup>41)</sup>. As to their nature, juries were found to be a means of proof by some. This is true only for the old German court constitution<sup>42)</sup>. As soon as juries judge from evidence presented to them they cannot (and this is the prevailing view) be regarded as means of proof<sup>43)</sup>.

(c) With regard to the "Tatfrage" some supporters of the jury system admitted that this included legal issues. But they submitted that jurymen could cope with small differences from textbook-cases better than learned judges who, they feared, might submit to routine too easily. Also, the legal issues involved could in their view be avoided by well-worded laws, and this opinion was successful<sup>44)</sup>.

(d) Always significant was the problem how jurors should be selected, and most important were these questions :

Who may act as juror? and  
Who selects the jurors?

The first question was disputed-some thought, that everybody should be able to act as juror. But this was not worked out too well, and successful was another view, according to which only the educated and prosperous could be empanelled. The second question was answered simply in France - the government selected, and in Germany this defect was realized and one tried to avoid it<sup>45)</sup>.

(e) Juries should not, this much was clear, try trifles<sup>46)</sup>. Disputed was whether they were necessary where a confession had been obtained by the prosecutor. The French view, according to which everything should be investigated by the court, was adopted here<sup>46)</sup>. Another kind of competence was discussed on a

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41) See references at Schwinge supra (16) p. 93 n. 4.

42) cf. Grimm's Deutsches Woerterbuch under the entry "Schoeffe".

43) Schwinge supra (16) p. 101.

44) Schwinge supra (16) pp. 117.

45) Schwinge supra (16) p. 129.

46) Schwinge supra (16) pp. 13

more philosophical level : It was held that juries were not bound by the law. They were said to be representatives of the people, and if a law was not approved by the people's representatives i. e. the jurymen, then the jury could ignore the law<sup>47</sup>. This doctrine of "omnipotence du jury" originated in France but had found supporters in Germany<sup>48</sup>. In France, Simeon rejected it on the grounds that this would grant arbitrary powers to the jury<sup>49</sup>. In Germany, the doctrine was not adopted although few realized its dangers.

(f) Political reasons for adopting the jury system have been mentioned already. It was felt that the judges' independence was not sufficient and that the individual's liberties would be protected better this way<sup>50</sup>.

Most German scholars were turned to supporters of the jury system only in 1847 on the "Luebecker Germanistenversammlung". The deciding reasons were probably the insufficient rules of evidence and the lack of confidence in the old system, and last but not least also the authority of Karl Josef Anton Mittermaier who was giving the final speech on the subject (50a). But the event securing the introduction of juries was the adoption of the system in the Constitution drafted by the Paulskirche Diet. Even though this constitution never was implemented, its impact was strong enough to secure introduction of juries in most German states.

#### IV Developments until 1879

It was, however, still a long way to juries in most German states. "Schwurgerichte" i. e. juries in the anglo-american meaning were introduced only in Prussia, Bavaria, Saxony and Bremen. Lay participation was introduced in the form of "Schoeffengerichte", i. e. bodies in which judges and laymen decided jointly in most states and no changes were made in Luebeck, Lippe and Mecklenburg-Schwerin<sup>51</sup>. In 1861, one of the most influential legal societies, the "Deutsche Juristentag" discussed the issue for the first time, and the committee for criminal law adopted after a long and loud discussion a resolution supporting

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47) See Schwinge's account, *supra* (16) pp. 133.

48) Leue, Friedrich Gottfried, *Das deutsche Schoeffengericht*, 1847, pp. 28, 154.

49) *supra* (1), pp. 235.

50) cf. *supra* III B (c).

50 a ) cf. Schwinge *supra* (16) p. 144.

51) Benz, Ulrike, *Zur Rolle der Laienrichter im Strafprozess*, Luebeck 1979 pp. 49.

juries. However, when in full session the Juristentag rejected the committee's resolution<sup>52</sup>, a fact which Schwinge seems to overlook<sup>53</sup>.

In 1865 Mittermaier published his book "Erfahrungen ueber die Wirksamkeit der Schwurgerichte in Europa und Amerika" ; Mittermaier observes correctly that the French system has few supporters<sup>54</sup>, that sometimes juries seem to be led by emotion<sup>55</sup> and that the office of juror is well respected<sup>56</sup>. He supports the English system which he thinks should be improved somewhat before being introduced in Germany<sup>56</sup>.

At the same time another publication is published which criticizes the jury system<sup>57</sup>, and in 1873 the same author collects wittily all that can be said against juries<sup>58</sup>. Main points of criticism are that trials are too long<sup>59</sup> and that a joint body of judges and laymen (Schoeffengericht) would better be able to decide the legal aspects of the "question of fact"<sup>60</sup> and that often the most important matters are discovered during deliberation<sup>61</sup>. Such objections are successful in convincing the commission for criminal law of 9th Juristentag in 1871 to propose that juries should be abolished and "Schoeffengerichte" (joint bodies of judges and laymen) be created<sup>62</sup>. Consequently, three expert opinions are asked for by the Juristentag, the majority of which proposes to keep on the jury system, and the full session decided accordingly<sup>63</sup>. Finally, the GVG was passed<sup>64</sup>, and it kept juries, but it

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52) Verhandlungen des Dritten Juristentages 1862, vol. 2 Berlin 1862, p. 693.

53) No mention can be found in his otherwise very authoritative doctoral dissertation.

54) Mittermaier, Karl Josef Anton, Erfahrungen ueber die Wirksamkeit der Schwurgerichte in Europa und Amerika, Erlangen 1865, p 697.

55) supra (54) p. 694.

56) supra (54) p. 698.

57) supra (54) p. 716.

58) Schwarze, Friedrich Oskar, Das Deutsche Schwurgericht und dessen Reform, Erlangen 1865.

59) Schwarze, F. O., Das Schoeffengericht, Leipzig 1873.

60) supra (59) pp. 49.

61) supra (59) pp. 51.

62) Verhandlungen des 10. Juristentages vol. 1 Berlin 1872 p. 18.

63) supra (62) vol. 2 Berlin 1872 pp. 18, pp. 90 and pp. 312.

64) But only after many discussions, cf. Caspar, Gerhard and Zeisel, Hans, Der Laienrichter im Strafprozess, Heidelberg 1979, p. 25 with further references.

also introduced “Schoeffengerichte” (joint bodies of judges and laymen). This solution was soon criticized heavily<sup>65)</sup>.

## V The Developments since 1879

The critique shows that the experiences with the French jury system have not been as encouraging as its supporters had hoped. While the battle for juries was won, the popularity of the system seems to decline already in the last quarter of the 19th century. A government commission soon suggested to abolish juries. As a reaction to this suggestion the issue is taken up once more by a Juristentag session, and this time it is common opinion that “Schoeffengerichte”<sup>66)</sup> should be used also in courts of secondary rank<sup>67)</sup>, but not - as the experts had suggested in their opinions<sup>68)</sup> - in all courts. But this time the Juristentag did not exert immediate influence. However, the First World War had some effects as it was draining personnel from the courts<sup>69)</sup>. Consequently, the competence of “Schoeffengerichte” was extended at the expense of juries. In the Weimar Republic juries were abolished completely, an act which was applauded by most scholars as a useful simplification of procedures<sup>70)</sup>. Lay participation came to a complete end on the day the Second World War was kindled. Some may say that this is not entirely correct because lay participation was existing in the “Volksgerichtshof”<sup>71)</sup>; reviewing however the activities of this institution this author finds it difficult to call it a court.

After the Second World War juries were used by the occupational forces in Bavaria. They were abolished again after West Germany had gained sovereignty in a move to unify the court system<sup>72)</sup>. It seems that there was no significant resistance to this move, particularly as lay participation in the form of “Schoeffengerichte”<sup>73)</sup> was established for the lower courts.

65) Benz, *supra* (51) p. 56.

66) i. e. joint bodies consisting of judges and laymen.

67) Verhandlungen des 22. Juristentages 1892 vol. IV, Berlin 1892, pp. 481.

68) *supra* (67) vol. I Berlin 1892 p. 122, vol. II Berlin 1892 p. 27.

69) Benz *supra* (51) p. 56.

70) See Schwinge's preface to the second edition of his doctoral dissertation, Aalen 1970.

71) Caspar/Zeisel *supra* p. 25.

72) See Vereinheitlichungsgesetz of September 12th, 1950.

73) See *supra* (66).

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Today, lay participation in the form of “Schoeffengerichte” is in use at lower courts trying crimes of small and medium importance. At the higher courts of appeal there are benches of five judges, but there is no lay participation. The same applies to the Federal Criminal Court (Bundesgerichtshof), which is the court of last resort for all but the smaller crimes.