

# **Judges and Juries in Austria**

## **Shall Austria abolish its Jury System?**

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# I. Agenda

## a. *Jury reform in Austria*

150 years (mixed) history of juries in criminal procedure, but

- In recent years there have been many proposals to abolish juries (but to retain “enlarged mixed panels”)
- Current coalition agreement: Reform of lay-men participation
- Pertinent constitutional guarantee; only 2/3 majority

## b. *Contribution of this talk*

- Not: description of current law and the reform project as such
- But: issues to be considered for this (and any comparable) reform

## c. *Institutional comparison:*

- Instrumental (not: “expressive”) approach: role of juries in accomplishing certain procedural policy goals
- Comparison of different legal regimes ⇒ informed policy choice

## d. *Also:* Example for continental procedure; role of expert witness

## II. Framework

1. *Institutional status quo as the starting point*
2. *Historical reasons for establishing juries*
  - Safeguard against influence of emperor and state institutions
  - "Fourth power"
  - Verdict by peers
3. *Critics: Merits conceded, but:*
  - Unable to perform tasks
  - Too high a price for that advantage (namely, inability to give reasons for verdict)
4. *Goals of paper*
  - Discuss the aforementioned critical arguments
  - Provide outline or role of expert witnesses
  - Provide an analytical approach to juries
  - On that basis, an institutional comparison of juries and alternative regimes

### III. Description of current positive law

- Austria as a member of the continental legal system (inquisitorial elements)
  - adversarial: judge as referee
  - continental: judge may also seek evidence and ask questions
- Rich legal tradition
- No death penalty

#### A. Institutional status quo: three tier system

- Juries (8 lay men): decide "on the guilt" of the most severe and of political crimes ("Geschworene")
  - Mixed panels (1:2): decide in cases concerning "second tier crimes" (= if penalty range reaches beyond 5 years, and "listed crimes"): "Schöffen"
  - Single professional judge: decides all other cases
  - [Appeals always decided by panels of professional judges]
- ⇒ Juries < 1 % of cases

## B. Juries in Austria

### 1. *Legal background*

- Jury of 8 laymen
  - Randomly chosen on the basis of the electoral roll
  - No pre-emptory challenges, but juror may be disqualified
- Procedural position
  - Jurors may ask questions
  - And even request evidence (to be approved by the professional panel)
- Decides on the guilt of the accused
  - By simple majority (= 5 : 3 = 62%)
  - On the basis of a (detailed) "question schedule" provided by professional judges
- Decides on the penalty rendered
  - together with professional judges (i.e. as a panel of 11)
  - by simple majority (= 6: 5)
- Jurors not involved in appellate proceedings

## 2. "Rights" by professional judges

- Panel of 3 professional judges
  - They formulate and explain the question-schedule to the jury
  - May (unanimously) decide to participate in jury *deliberations* unless jury (by majority vote) rejects this
  - May never participate in the "decision phase"
  - May order "improvement" of verdict if verdict is unclear, inconsistent (in itself or with the reasons the jury gives) or one juror claims misunderstanding ⇒ new verdict by same jury in same proceeding
  - May "suspend" verdict if judges unanimously consider the verdict to be incorrect on the merits (in which case the high court determines different court/panel to decide afresh); possibly both to the advantage/disadvantage of the accused.
- ⇒ Complex interplay of jury and panel of professional judges
- procedural guidance
  - legal structuring of case
  - certain control of rights

3. *Possibility of appeal (to the advantage and disadvantage of the accused)*

- Scope of appeal restricted
- Appeal on the question of guilt only possible if verdict is “totally unreasonable” (no reasonable man could have decided this way on the basis of the facts presented), only to the advantage of the accused.
- Appeal on legal grounds possible.
- Appeal on penalty: possible in both directions (note: no lay-involvement in this instance).

#### 4. *Role of expert witnesses*

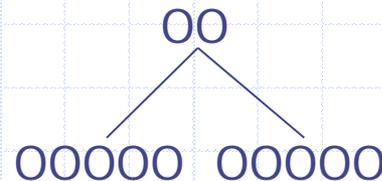
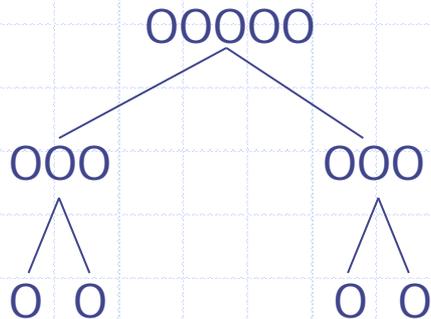
- General problem
  - Austrian criminal procedure: “quasi-monopoly” of appointed expert. Hardly any role for party-hired expert.
  - Appointed by whom?
    - Court?
    - In early stage by prosecutor: But: “witness of prosecutor”.
    - Different expert in main proceeding?
    - Eitler: allow private experts or appoint expert also in early stage.

# IV. Maintenance, abolishment or expansion of juries?

## Basic foundations

### 1. *Goals and costs of procedure: general approach*

- Goal of procedure: minimization of total cost (direct cost plus error cost)
- The split of resources between the instances
  - Typically: Single judges in first instance, control by panel
  - Juries: Diversion of resources into first instance, limited control of judgment



- Different paths to Rome

## 2. *Mixture of adversarial and inquisitorial elements*

- Different paths to Rome also with regard to adversarial/inquisitorial structure
  - Issue of direct (procedural) costs
  - Ability of legal system to reveal factual (material) truth ⇒ error cost
  - But again legal error: Judge prepares hearing on basis of file ⇒ unescapable bias of inquisitorial judge??
- Possible solution: differentiation between “judge of procedure” (procedural referee) and “judge of decision”  
Who is “judge of decision”?
  - second judge
  - second panel of judges
  - could be professional, could be lay judges.

## V. Arguments against juries

### A. Inability of juries to answer the question of guilt?

- a. Claim: lay-people are categorically unable to accomplish the task of rendering correct judgment.
- b. Empirical findings
  - Divergence between juries and professional judges: not too substantial  $\Rightarrow$  Kalven/Zeisel
  - Number of suspension decisions by panel of professional judges
    - 1951-56: 2,2 %
    - 2006-2008 between 1,3 and 2,2 %
  - Agnostic interpretation, but divergence not so considerable.
- c. Systematic reasons for this small divergence?
  - Ability of a single lay judge greater than commonly perceived
  - Ability of jurors as a group greater than single juror
  - Ability of jury system (in the sense of interplay between lay judges and professional judges) greater than mere jury.

## 1. *Ability of a single lay judge*

### a. Certain systematic shortcomings in decision-making to be conceded

- Inadequate intuitive answers to analytical questions
- Context-dependent decisions
  - Context-dependent inconsistencies
  - Framing

### b. Normative evaluation

- Aforementioned findings are not encouraging, but
- Similar mistakes are made by professional judges  
⇒ *Rachlinski*
- Advantage of judges: possible feed-back circles ⇒ learning, accumulation of experience

### 3. *Ability of single juror versus ability of group of jurors*

- Condorcet-Jury-Theorem
- Problem of free-riding regarding gathering and processing of information and deliberation, if group is too large

### 4. *Ability of "Geschworenengerichte" in the light of the interplay of lay judges and professional judges*

- Professional judges have experience and knowledge of the law; they have the task of
  - structuring the proceedings and gathering evidence
  - comparing the relevant legal parameters in a question schedule
  - enjoying something "close to veto power" against totally unreasonable jury verdicts.
- Lay judges decide on questions of guilt within the aforementioned framework.
- Lay judges decide „in the shadow“ of control rights exercised by professional judges.

## B. Violation of requirements of fairness?

Verdicts by juries do not give reasons. Is this intrinsically unfair?

1. *Historically*: Juries are not viewed as a violation of fairness requirements, but as a tool for ensuring a fair procedure.
2. *Current discussion*:
  - a. ECHR Appl 926/05, 13.1.2009 ("Taxquet");
    - Not a problem of meaningful appeal, but of fairness of proceedings according to Art 6 ECHR.
    - "Important to highlight considerations [of] jury and to indicate precise reasons for the *purpose of explaining verdict to accused and public*", to avoid "impression of arbitrary justice lacking in transparency".
  - b. Now: Judgement of Grand Chamber, 16.10.2010:
    - Question of „sufficient safeguards to avoid any risk of arbitrariness [and to] enable accused to understand reasons for his conviction“.
    - Fair trial to be assessed on the basis of the „proceeding as a whole“.

### 3. *Implications*

- No instrumental purpose for giving reasons for appeal, but
- Functional meaning for rule of law.

### 4. *Evaluation of Austrian Jury System*

- Basic idea: Main proceedings in 1. instance.
- Implicit control of jurors by professional judges already in 1. instance (“quasi-appeal”).
- Verdict without reasons, but legitimation by jury decision by independent laypeople.
- Application of control instruments also not reasoned
- “Veto power” of professional judges.

⇒ Conclusion: fair procedure

### 5. *Austrian Supreme Court in Criminal Matters: Jury System not unconstitutional, no need to address Constitutional Court.*

## VI. Arguments for maintaining juries

### A. Why two panels?

Relevant questions:

- Are there systematic differences between professional judges and lay judges regarding an answer to the question of guilt?
- If yes: Why not entrust the verdict to the better qualified group?

Answers:

- Neither group ("professional judges", "lay judges") is necessarily superior
- Both groups have relative strengths and weaknesses,
- Therefore:  $\Rightarrow$  combination.

B. Decision-making by professional judges and lay judges: Empirical differences regarding the question of guilt

1. *Relative harshness of professional judges*

- a. High ethos of professional judges,
- b. but: "professional harshness". Empirical findings:
  - USA: *Kalven/Zeisel*: (hypothetical) conviction by professional judges, given actual conviction by lay judges 5 times as frequent as in inverse constellation
  - USA: *Eisenberg et al.*: 3 times as frequent
  - Austria: Suspension of jury verdict (1951-65): 48 to the disadvantage of accused, 2 to advantage
- c. Conclusion:  $\Rightarrow$  judges are relatively harsh
- d. Question: Are they "too harsh"?

## 2. *Problem of “judicial routines” and biases*

a. Empirical basis for of “constantly getting harsher” by professional judges:

- spontaneous mechanism without cynical motivation
- unavoidable consequence of structure of judicial decision-making

b. Analytical foundations

- “Confirmation Bias”
- “Perspective Bias” ⇒ spillover of assumed perspective to next case
- Interplay of both factors ⇒ positive feedback circle

Example: conviction of accused ⇒ generalised assumption that the accused is usually guilty ⇒ hypothesis for next case ⇒ confirmation bias ⇒ conviction ⇒ increasing harshness regarding the question of guilt

c. Conclusion: professional judges in question of guilt not only harsh, but inherently “overly harsh”.

### 3. *Relative lenience of lay judges*

#### a. Jurors: relatively lenient

- higher requirements of proof
- more scepticism towards expert witnesses

#### b. Problem: lay judges being “overly lenient”.

#### c. Analytical foundations of excessive leniency

- Divergence of incentives vis-à-vis professional judges  
⇒ differences in respective cost-benefit-calculus (in particular: intrinsic disutility of punishment).

#### d. Professional lay judges versus professional judges. Differences:

- Lay judges orient themselves towards the consequences for individuals in the court room
- Benefit of conviction: limited interest in prevention (= dispersed positive effects in distant future): high discounting of future
- Costs: see harmful consequences for accused.
- Experience intrinsic disutility of punishment
- “focussed” costs of ex post punishment (punishment dilemma)

#### e. Implications ⇒ the problem of being “overly lenient”.

C. Implication for interplay of lay judges and professional judges

- If verdict is entrusted to one single group, relative disadvantages will be maintained.
- Differences in relative behaviour suggest combination of both groups.

Different possibilities:

1. *Decision by professional judges, "suspension" by jurors*

- Advantage: reasons for decision
- Disadvantage: verdict by professional judges overly harsh; no incentives for jurors to effectively control professional judges

2. *Mixed panel*

- Joint decision; reasons may be given by professional judges
- Appealability: within the system very low anyhow.
- Instead of control by suspension ("quasi-appeal"), implicit control by means of the right of co-decision.
  - Advantage: economising on direct costs of proceedings (no renewal of proceedings)
  - Problem: loss of separate control; little incentives for lay judges to exercise de facto control in the presence of professional judges.

### 3. *Austrian jury system*

- Verdict by jurors; control by professional judges in 1. instance by means of “quasi-appeals”
- Advantage: incentives for jurors to diligently decide on the case
- Disadvantage: no reasons
- But: instruments of control in 1. instance (“quasi-appeals”)

## VII. Evaluation of Austrian jury system overall

- Austrian system: well-balanced
  - Expensive jury system, to be applied: where costs are high
    - Severest offences
    - Offences of a “political nature”
  - Separation of “judge of proceedings” and “judge of decision”
  - High transparency within a continental system
- ⇒ Abolishment not warranted