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NEWSLETTER

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All court rulings in Basel-Stadt from 1 July 2016 on contestable

Dear Sir or Madam,

Basel's courts are in a dilemma – however, they still seem to be ignoring it. In particular, the procedures to appoint a judge at both the penal court and the court of appeal are anything but transparent. This means that, among other things, they are in breach of the European Convention on Human Rights (ECHR). As a consequence, all court rulings made in Basel-Stadt since 1 July 2016 are contestable. How this has come about is described in the article following, also published as an essay (in German only) in the respected internet publication on jurisprudence 'Jusletter' on 3 April 2017.

On 1 July 2016 the canton of Basel-Stadt introduced a new Court Organisation Act. It replaced the 1985 Court Organisation Act. Thanks to this new act, an overdue adjustment to the requirements of a modern constitutional state had been introduced. After all, Switzerland has been a signatory state of the European Convention on Human Rights since 1959, which thus meant an adjustment to the constitutional claims of its citizens was overdue. With considerable delay, these demands have now been adjusted, but only partially.

Judicial districts too small

Any criticism of the courts is problematic. Lawyers are predestined to do so, since they are duty-bound to make a professional appearance in court. Nonetheless, this could be professionally damaging to them, as the same lawyer might face the same judge again a short time later. Thus it might be a good idea not to make yourself unpopular with criticism. The judicial districts of the cantons are too small to allow an anonymous independent judge to be effective. One knows the other, each would like to be working in a mutually professional atmosphere – thus criticism would be counterproductive. In contrast, judicial districts in other countries are significantly larger, and the probability of meeting one particular judge again is therefore smaller, allowing criticism of judges and of judicial law. The body of a canton's judicial district comprises 30 to 50 judges, abroad it is around 3 to 10 times greater.

Thus very few judicial activities are criticised in Switzerland, to the detriment of many parties involved. Abroad, numerous applications for recusal are made, and can even be part of a strategy during trials (Rote Armee Fraktion trials). Such applications have only been made in exceptional cases in Switzerland, and are regarded by many judges as an invasion of personal privacy. Switzerland ought to have a "German-speaking

Switzerland" judicial district and a "Francophone Switzerland" judicial district. This would greatly meet the demand for an independent judge.

Formation of the ruling body
The courts must adhere to statutory obligations and implement provisions to the Court Organisation Act. According to art. 9, para 2, clauses 5-7 and art. 31, ruling bodies are formed as follows:

> *[4] Otherwise courts must organise their ruling bodies according to demand; details are covered by the courts' provisions.*

Recently, the Court of Appeal and the Penal Court have been asked for information about who is in charge of proceedings and how the ruling bodies are formed. Apparently, no provisions exist for the courts as of March 2017, 9 months after the law came into effect.

As an aside, it must be noted that all appointments to the ruling bodies of the Court of Appeal and to the Penal Court in 2016 have been in breach of the law until now.

Prerequisites for courts and judges
Based on this, the tenets set out by the ECHR regarding appointment of judges need to be considered.

The 2014 report by the European Network of the Councils for the Judiciary proclaims 11 standards as international standard references:
1. Allocation of court cases compliant with art. 6 ECHR
2. Public announcement of allocation criteria
3. Fair allocation
4. Established method of allocation of judges
5. Objective allocation methods
6. Consideration of case's complexity in the allocation
7. Regulated approval procedure
8. Seniority principle
9. Duty to state reasons of judges' allocation
10. Explanation of composition of ruling body
11. Information to parties concerned about composition of ruling body.

The Penal Court and the Court of Appeal currently comply with at most two or three of these requirements. The same applies to the court scheme of distribution by the Penal Court and for the non-existent court regulations of either of the two courts. The designated allocation of judges by a president or by the chief registrar of a court is also insufficient.

Judges prefer to keep their cards close to their chests
A justified and well-documented decision to allocate a judge is not current practice in Switzerland, in contrast to many other countries. In practice, there is a clear obligation of documentation:

Decision of the Swiss Federal Supreme Court (DSFSC) 6B_721/2011: *It is an elementary principle of criminal procedure law that each and every enquiry undertaken during criminal proceedings must be on record. (...) Therefore during criminal proceedings there is an obligation to keep records and an obligation of documentation.*

Accordingly, all procedures relevant to a trial need to be documented by the authorities in a suitable manner, and all the relevant records need to be integrated into the criminal files.

How the courts appoint their judges to the ruling bodies has not been documented so far. This is the case for all courts. Article 77 of the Criminal Procedure Code stipulates that all important procedural acts need to be recorded. The appointments to a court are such an important procedural act, but they are never recorded.

Consulting the reference book "Grundrechte in der Schweiz" ("Fundamental rights in Switzerland") by Paul Müller and Markus Schefer (Stämpfli Verlag Bern 2008) shows two ground-breaking decisions:
DSFSC 117 Ia 157 and 125 V 499. In essence: Be the formation of the ruling body regulated by law then any deviation of the formation of the ruling body from legal provisions is a breach of the constitutional claim to an orderly formation of a court (page 936 elsewhere).

Contestability
DSFSC 117 Ia 157
"4.a) Therefore the procedural objection under constitutional law is to be upheld and the contested interim decision to be set aside. Thus the foundation for the decision by the Criminal Court for Economic Offences of the canton of Berne has been withdrawn as the deciding court's formation was in breach of art 1 FC and art 6 clause 1 ECHR."

Current court proceedings: the ruling bodies of the Court of Appeal have not been set up according to the statutory obligations of a provision for the formation of a ruling body, which is a violation of the claim to the formation of a ruling body within the law. The same applies to the Penal Court.

The Basel-Stadt Court Organisation Act stipulates:
1.5.9. Decision-making powers
Art 33, para 1 A ruling body is able to reach decision if it is formed according to the provisions of this act.

Due to lack of any regulations the ruling bodies have not been formed according to the law and thus by law have no decision-making powers.

Elective criteria for the allocation of judges to the ruling body: DSFSC 1B_291/2015, 1B_301/2015. Assessing an application for recusal regarding judge G. the Federal Supreme Court explained in its deliberations:
"According to adjudication the court-internal allocation of cases and the formation of ruling bodies on a case-by-case basis have to follow objective criteria as long as the relevant procedural law – as in the canton of Basel-Stadt – does not contain pertinent provisions (see also Gerold Steinmann, St. Galler Kommentar BV, 3rd edition 2014, Art. 30 N. 13)".

With this the Federal Supreme Court has approved an unrecorded, unmotivated and unfounded allocation of judges. Thus the Federal Supreme Court also decided criteria not recorded comply with the demand for objective criteria. It is not the first time that "nice" reasons for the judgement and actual circumstances are opposed to each other. A record of the allocation of judges does not exist, contrary to mandatory records according to art 77 Criminal Procedure Code. Objective reasons for an allocation of case

are not evident and thus cannot be recognised as such. The verifiability of the formation of a ruling body has thus been made impossible.

What the future regulations for the formation of the ruling body will look like is wide open. A provision according to which the first clerk constitutes the ruling body is not compliant with the ECHR, as therefore objective reasons are not demanded from the regulations yet to be passed. Equally unsuitable is or would be a retrospective interim solution with the intention to naturalise any appointments of judges from 1 July 2016 onwards until a regulation comes into force, as the allocation of judges cannot be legalised retrospectively.

Thus, both the Court of Appeal and the Penal Court Appeal reject demands for independent, unprejudiced and impartial judges without being affected by extraneous circumstances. The problem is that even the Federal Supreme Court has no regulation for the formation of ruling bodies.

Not only does this apply to the Court of Appeal and the Penal Court but also to other Courts like Administrative Court, Civil Court, Social Insurance Court, Juvenile Court, Court for Welfare Housing, Tenants' Arbitration Board and many more. A small number of replies by courts are still pending, rendering a final assessment impossible.

Supervision by Court of Appeal
The Court Organisation Act has placed the task of supervising all the other courts in the hands of the Court of Appeal.

Art. 90.1
The Court of Appeal as Plenary Court has the following specific duties:
1. It organises elections it has been granted by law.
2. It approves the regulations provided by statutory law for the lower courts.
3. It supervises the lower courts under the full reserve of the judicial independence of the supervised instances; supervision will be made via resolutions and directives.
4. It undertakes periodical visits of the lower instances and receives their reports about management and case handling.

Lack of authorisation: the question remains unanswered as to whether the Court of Appeal has approved the regulations for the formation of the ruling bodies of the supervised courts, as requested by the Court Organisation Act since 1 July 2016. The Penal Court does not have such regulations, and neither has the Court of Appeal.

Lack of supervision: it remains open whether the Court of Appeal has sent reminders to the supervised courts about their regulations for the formation of ruling bodies, should these not have been handed in yet for approval – and that nine months after the new law came into effect.

Due to a lack of approved regulations, no ruling body has been formed according to the stipulations of this new law and has thus by virtue of law been unable to reach decisions. As far as the author is informed, there are no approved regulations for the courts. This is the case for the Juvenile Court, the Social Insurance Court, the Administrative Court, the Civil Court, the Court for Welfare Housing and the Arbitration Boards.

Conclusion I: all decisions by the Court of Appeal between 1 July 2016 and 14 March 2017 have been made in the absence of a regulation required by law, thus refusing all involved parties their right to have cases heard by a constitutional judge.

Conclusion II: since 1 July 2016 the Court of Appeal has reached all its verdicts about appeals in the absence of regulations for all supervised instances as required by law, thus refusing all involved parties their right to have their cases in all instances heard by a constitutional judge.

Until now, none of the courts have published any court regulations according to the 2016 Court Organisation Act. Thus the judiciary has become a secret arbitrary judiciary and is therefore unconstitutional.

Post scriptum:
In a letter dated 16 March 2017, the Court of Appeal has informed the author that those regulations are in process and being assessed by the Department of Justice, and that they are soon to be published in the "Kantonsblatt" (official announcement by the canton). Thus a situation in compliance with the law and the constitution is created pro futuro; the legal position for all judicial proceedings between 1 July 2016 until publication and these regulations coming into effect remains unchanged: the courts' ruling bodies are unconstitutional.

Kind regards
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