

# NEWSLETTER

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Author:

**Dr. iur. Bernhard Madörin**

Edition: 12'500  
(sent electronically)

Tax and Fiduciary Expert  
Licensed Audit Expert RAB  
Licensed Insurance Intermediary FINMA

(23.01.2024)

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(English machine translation provided as courtesy)

## Does a judge have to know German?

Dear Ladies and Gentlemen

In a pending case (6F\_44/2023 /HUM), the Federal Supreme Court has to decide whether a judge of the Federal Supreme Court of the Criminal Division who does not (sufficiently) speak German was allowed to participate in a judgement; specifically, seven judgements of the Federal Supreme Court are up for revision in this context. This article reports on absolute and relative grounds for appeal, the fundamental right to a lawful judge and German as the language of the court (with reference to Dr Jan Bockemühl; Strafprozess: "Die Schöffin, die nicht Deutsch sprach").

In addition to the substantive complaint raised by the petitioner for appeal, the petitioner also raised the complaint that the Federal Court had violated formal law. This is because the panel of the Federal Supreme Court, which rejected the appeal and thus upheld the judgement of the first and second instance, included a French-speaking judge who barely spoke German. It is well known among the judges in the Federal Supreme Court that the lady hardly speaks any German. The judge was not provided with an interpreter for the deliberations in the chamber or the panel. In addition to the main judgement, the federal judge also dismissed various appeals (seven decisions in total).

In the application for revision, the applicant complains that the panel was not properly composed with the judge not having sufficient command of the German language.

The annulment of the judgement due to the objection of occupation is probably unavoidable under European law. The standards in Switzerland and the Federal Supreme Court are significantly lower.

"Absolutely" bad: an incorrectly composed court

The complaint that the bench was not properly staffed due to the participation of the judge, who did not have sufficient command of the German language, is significantly serious (absolute procedural impediment). It concerns the fundamental judicial right of the so-called statutory judge. If it is not the statutory judge but an improperly constituted court that decides on the guilt or acquittal of a defendant, there is an absolute ground for appeal. It is irrelevant whether the formal error actually influenced the judgement, i.e. whether the judgement was "based" on it.

The court language is German - and now?

In principle, judges must be proficient in the official language. The court languages at the Federal Supreme Court are German, French and Italian. However, this does not help with the question of revisability if a judge speaks an official language but not the language of the case assigned to her.

For the accused, the right to the linguistic competence of the judge already arises from the provision of Art. 6 para. 3 lit. e) of the European Convention on Human Rights (ECHR) and also from the principle of a fair trial. If you cannot form an opinion, you cannot make a judgement.

Judges, including federal judges, have a decisive function in criminal proceedings. They must draw their conviction of the guilt or innocence of the accused from the epitome of the main hearing and, in appeal proceedings before the Federal Supreme Court, from the legal submissions of the parties. The judges must form their own judgement directly. They must therefore be in a position to understand the facts themselves with all their senses.

The Swiss Federal Supreme Court does not take absolute legal obstacles seriously. See 6B\_1208/2020: If the Federal Supreme Court finds that the appointment of the panel of the criminal court and the court of appeal was unconstitutional, only the second-instance judgement must be repeated. The judgement of the court of first instance remains valid despite the unconstitutional appointment of the panel of judges. The guarantee of the two-tier cantonal appeal procedure is cancelled. The judgement concerns the same proceedings and the same party to the proceedings.

The Federal Supreme Court does not formally conduct recusal proceedings by means of a Federal Supreme Court recusal judge. The judges requesting recusal decide on their recusal themselves. A hearing does not take place. The petitioner for recusal has submitted a request for recusal to the federal judge, who has insufficient knowledge of German, so that this request for recusal is not decided by her herself. It may well be that the federal judge will rule on it herself. This means that the judge, who has insufficient command of the German language, will once again decide on herself as president of the panel. The last requests for revision by the applicant for revision were ignored (no notification of receipt, no judgement on revision). It is therefore also possible that the linguistic incompetence of the federal judge is being glossed over or ignored in the judgement.

The basic problem with our jurisdiction is that elected judges are judges and, apart from re-election in four years and retirement, are not subject to any control. With regard to the language discussed here, there is no procedural protocol documenting the decision-making process.

It is therefore easily possible, as an example in criminal proceedings, for judges to pass judgement on defendants and it is not documented

- whether they have read the files,
- whether they have understood the facts of the case,

- whether the judges have jointly passed judgement as a panel,
- whether they judged the facts of the case, when they did so and for how long,
- whether they formed their own opinion or agreed with the opinion of the presiding judge,
- whether there was a minority opinion,
- when, where and how the judgement of the panel was reached.

The federal judge has not duly signed the judgement 6F\_6/2023 (here under appeal). The judgement is signed by the court clerk and not by the president of the panel. According to Art. 121 BGG, a revision can be requested due to a violation of procedural regulations. This was requested and there is no notice of receipt from the Federal Supreme Court. The federal judge probably did not understand anything, did not sign anything and delegated the handling of the case. This decision does not comply with the Federal Supreme Court's ruling.

As expected, the request for revision was rejected by the Federal Supreme Court (judgement of 15.01.2024).

As is so often the case, the Federal Supreme Court presents the facts in a manner that is contrary to the facts. The Federal Supreme Court incorrectly states the following consideration: "The lack of German language skills of the federal judge in question, as asserted by the petitioner in the present case, is an argument that is limited to a mere and inaccurate assertion."

The appellant had submitted a letter from former federal judge xyz as evidence, as well as former federal judge xyz as a witness. The reference to the judge's lack of linguistic competence is therefore not limited to a "pure and also incorrect assertion", but to formal evidence with the testimony of a witness. The Federal Supreme Court deliberately overlooked and negated this. In this way, the appellant has no chance before the Federal Supreme Court.

Best regards

**artax** Fide Consult AG

Gartenstrasse 95, Postfach, 4002 Basel  
Tel: +41 61 225 66 66  
[info@artax.ch](mailto:info@artax.ch), [www.artax.ch](http://www.artax.ch)

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