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The bad habit of unsigned judgments

Dear Sir or Madam,

It must somehow be horrible for judges to sign their own judgments. A bad habit prevails in many cantons and courts, of either not signing judgments, or having them signed by the court clerk. According to the ongoing administration of justice by the Federal Court, this does not ensure that the content (of the unsigned judgment) corresponds to the will of the plenary court (6B_1231/2015 (31.05.2016), 1B_608/2011, 9C_511/2014, BGE 131 V 483). The signature of the presiding judge is a mandatory requirement, notably for penal law. The Civil Procedure Code (CPC), art. 238, stipulates that a judgment has to be signed by the court. The organisation of the courts and of arbitration authorities is in the hands of the cantons unless determined otherwise by law (art. 3 CPC). With this in mind, cantonal law stipulates specifically who may sign a judgment. In most cantons, the court clerk is not part of the court. The signature of the "court" on a judgement arises from the constitutional entitlement to have a case heard by an independent court. However, the impartiality of a court is not guaranteed if either a court clerk has signed a judgment that he or she has recorded, as this does not determine whether the judgement represents the will of the court, or if the judgment has not been signed.

So far the theory. For several decades, the criminal court of Basel-Stadt has never signed judgements. Now a judgment which had not been signed is at the Court of Appeal for review.

More often than not the court clerk signs instead of the court

It is the same initial position where a judgment by a civil court has not been duly signed by the Court of Appeal. The judgment which has been challenged has only been signed by the court clerk. The signature by the presiding judge is a mandatory requirement. As a consequence, the judgment has not been lawfully delivered and thus is null and void. CPC, art. 238, stipulates that a judgment must be signed by the court. As already mentioned, the organisation of the courts and of arbitration authorities is in the hands of the cantons unless determined otherwise by law (art. 3 CPC). With this in mind, cantonal law stipulates specifically who needs to sign a judgment (Decision by the Federal Supreme Court, 5A_855/2012 from 13 February 2013, E. 2.2 with reference). Presently the question of who should have signed the challenged judgment by the Court of Appeal must be answered under the law of the canton of Basel-Stadt.

What does a court consist of?

The Basel-Stadt Court Organisation Act, in force since 26 May 2016, precisely defines what a court is:

The civil court comprises seven full-time presiding judges, two part-time presiding judges (at 50% each), and 15 judges (women and men). Consequently, the court clerk is not part of the court.

There is no cantonal decree in Basel-Stadt allowing delegation of the signing of judgments from court to court clerk. As the Court Organisation Act actually makes provisions for regulations that did not apply for the Court of Appeal at the time the judgment was made, the canton has not regulated the matter of signatures, other than as per the Civil Code which applies accordingly. It stipulates a signature by the court.

As the Court of Appeal equally does not sign judgments, it will not be able to impartially come to a decision about a judgment that the Criminal Court had not signed.

While unsigned contracts and documents are not taken into account in private industry, the administration of justice by the courts is creating a plethora of decisions to absolve the court in a matter that actually is absolutely clear.

Kind regards

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