

From landfogto to FINMA: governance lessons for the modern financial centre

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A financial centre sells trust in institutions. Clients who deposit assets in Lugano, trading houses that structure their contracts under Swiss law and families that plan their succession through Ticinese fiduciaries rely on the expectation that courts will decide disputes impartially, that the state will tax them according to known rules and that supervisory authorities will act according to law and without a financial interest in the outcome. The early modern bailiwicks offered the opposite on each count. Their history therefore provides a set of negative examples against which the guarantees of modern Swiss law can be measured. This section draws out four of them: the separation of justice from its revenue, the independence of judges and supervisors, the legality and predictability of taxation, and the combination of communal autonomy with federal guarantees.¹

1 Justice separated from its revenue

The central defect of justice in the bailiwicks was that the judge was paid by the parties and by the punished. Modern Swiss law cuts that link at several points. Judges are salaried officials whose remuneration does not depend on their decisions. Court fees are fixed by tariff and flow into the public treasury. Fines, monetary penalties and confiscated assets imposed under the Swiss Criminal Code are at the disposal of the cantons, or of the Confederation where the Federal Criminal Court has judged the case (Art. 374 SCC), and the officials who impose them receive no share.² The Federal Act on the Division of Forfeited Assets governs the sharing of confiscated assets among the cantons, the Confederation and foreign states. Within Switzerland it lays down a fixed key: five tenths of the net amount go to the public body that ordered the confiscation, three tenths to the Confederation and two tenths to the cantons in which the assets are located. The allocation is thus determined by statute, and the authorities concerned may depart from it only by agreement among themselves.³

The parallel with the *sindacato*, which divided fines and confiscations among the coowners of a bailiwick, is striking. The modern legislator faced the same question: how to allocate the proceeds of criminal justice among several public bodies without creating incentives that distort prosecution. The answer of the Federal Act on the Division of Forfeited Assets is a statutory key applied by an administrative authority. The answer of the early modern Confederation was annual bargaining among the beneficiaries. For practitioners in Lugano, whose clients are affected by Swiss forfeiture proceedings and by Italian requests for mutual assistance (Chapters G.III and H.IV), the difference is not academic. Asset sharing agreements between Switzerland and foreign states, and the domestic division of confiscated assets, are now among the most significant revenue flows generated by criminal justice, and their legitimacy depends on the rule that no prosecutor or judge benefits personally from them.

2 Notes

1. The four criteria correspond to the classical components of the rule of law as applied to financial centres; the formulation is the author's. ↩
2. Swiss Criminal Code of 21 December 1937 (SCC), SR 311.0, Art. 374 para. 1 ("Über die auf Grund dieses Gesetzes verhängten Geldstrafen, Bussen und Einziehungen verfügen die Kantone"; English: "The cantons are entitled to the monetary penalties and fines imposed and the property and assets forfeited in accordance with this Code") and para. 2 (proceeds of judgments of the Federal Criminal Court to the Confederation), with paras. 3–4 reserving the use for persons harmed and the Federal Act on the Division of Forfeited Assets, consulted at <https://www.droit-bilingue.ch/de-en/3/31/311.0-374-456.html>. ↩
3. Federal Act on the Division of Forfeited Assets of 19 March 2004 (TEVG/LVPC), SR 312.4, Art. 1 (division of confiscated assets "unter Kantonen, Bund und ausländischen Staaten") and Art. 5 (key of 5/10, 3/10 and 2/10; para. 4 on deviating agreements), consulted at <https://www.droit-bilingue.ch/de-fr/3/31/312.4-1-4.html> and <https://www.droit-bilingue.ch/de-fr/3/31/312.4-5-8.html>. ↩

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