

Independent courts established by law

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The *landfogto* was a political appointee who held judicial power for two years and returned to his canton's politics afterwards. The Federal Constitution guarantees every person whose case is to be judged in judicial proceedings the right to a court established by law, with jurisdiction, independence and impartiality (Art. 30 para. 1 Cst.), and it guarantees the independence of the judicial authorities (Art. 191c Cst.).¹ Article 6 para. 1 of the European Convention on Human Rights adds the requirement of a fair and public hearing within a reasonable time by an independent and impartial tribunal.² The Swiss Federal Supreme Court has developed an extensive case law on the appearance of bias, on the incompatibility of judicial functions with other roles and on the requirements of organization and procedure that these guarantees impose.

In Ticino the judges of the Court of Appeal (*Tribunale d'appello*) and of the lower courts are elected for fixed terms by the Grand Council (*Gran Consiglio*), after a public call for candidates and an assessment by an independent commission of experts, while the justices of the peace (*giudici di pace*) are elected by the people. A Council of the Judiciary (*Consiglio della magistratura*) of seven members, four elected by the Grand Council and three by the full-time judges, supervises their conduct under the cantonal constitution and holds disciplinary power over them.³ The election of judges by political bodies and their membership of political parties are features of the Swiss system that foreign observers have examined, among them the Council of Europe's Group of States against Corruption (GRECO), whose Fourth Evaluation Round on corruption prevention in respect of members of parliament, judges and prosecutors produced an evaluation report on Switzerland in 2016 and compliance reports up to 2024.⁴ The comparison with the bailiwicks nonetheless shows how far the modern system has moved. A Ticinese judge today is elected for a fixed term, receives a salary from the public budget, can be removed only under procedures laid down by law and decides cases under procedural codes that

are uniform throughout Switzerland: the Civil Procedure Code of 2008 and the Criminal Procedure Code of 2007, both in force since 1 January 2011.⁵

1 Supervisors without a stake in the revenue

The *sindacato* audited a revenue in which its members had a financial interest. Modern financial supervision in Switzerland is organized on the opposite principle. FINMA is financed by fees and supervisory levies paid by the supervised institutions, but these are calculated according to statutory rules and do not depend on the outcome of enforcement proceedings, and FINMA cannot impose fines on institutions.⁶ Its enforcement instruments are orders to restore compliance, declaratory rulings, prohibitions of practice and of activity, publication of its rulings, confiscation of profits obtained through serious breaches of supervisory law (which accrue to the Confederation unless they are paid out to injured parties) and, in the most serious cases, the withdrawal of licences. Criminal breaches of financial market law are prosecuted and judged by the Federal Department of Finance under the law on administrative criminal procedure. The absence of a power to fine is sometimes criticized as a weakness of Swiss supervisory law. From the perspective of this chapter it can also be read as a safeguard against the confusion between supervision and revenue that marked the bailiwicks.

The same principle applies to the audit firms that carry out regulatory audits of banks, securities firms and fund managers on behalf of FINMA, which must be licensed by the Federal Audit Oversight Authority and must be independent of the audited institution.⁷ For the fiduciaries and independent asset managers of Lugano, the supervisory organizations recognized by FINMA under the Financial Institutions Act of 2018 and the cantonal authority responsible for the licensing of fiduciaries under Ticinese law perform comparable functions (Chapter E.III). In each case the law seeks to ensure that the supervisor has no personal interest in the conduct it supervises.

2 Notes

1. Federal Constitution (above), Art. 30 para. 1 ("Jede Person, deren Sache in einem gerichtlichen Verfahren beurteilt werden muss, hat Anspruch auf ein durch Gesetz geschaffenes, zuständiges, unabhängiges und unparteiisches Gericht") and Art. 191c. ↩
2. Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ECHR), SR 0.101, Art. 6 para. 1,

consulted at <https://www.droit-bilingue.ch/de-fr/0.1/0.10/0.101-6-9.html>. ↩

3. Constitution of the Republic and Canton of Ticino of 14 December 1997, SR 131.229 (Italian: Costituzione della Repubblica e Cantone Ticino), Art. 36 (election of the judges of the Court of Appeal and of other judicial officers by the Grand Council after a public call and review by an independent commission of experts) and Art. 79 (supervision by the Council of the Judiciary, reporting to the Grand Council; composition of seven members), consulted at <https://www.droit-bilingue.ch/de-fr/1/13/131.229-36-43.html> and <https://www.droit-bilingue.ch/de-fr/1/13/131.229-79-88.html>; Legge sull'organizzazione giudiziaria of 10 May 2006 (LOG), RL 177.100, Art. 2 (election of the judiciary by the Grand Council, except for the justices of the peace, who are elected by the people) and Art. 74–75 (disciplinary and supervisory power of the Consiglio della magistratura), <https://m3.ti.ch/CAN/RLeggi/public/index.php/raccolta-leggi/legge/num/132>. ↩
4. Council of Europe, GRECO, "Evaluations: Switzerland", <https://www.coe.int/en/web/greco/evaluations/switzerland> (Fourth Evaluation Round: evaluation report adopted at GRECO 74, 30 May–3 June 2016, published 15 March 2017; compliance reports adopted on 13 June 2019 and 10 June 2021; addenda of 11 May 2023 and 17 October 2024). ↩
5. Swiss Civil Procedure Code of 19 December 2008 (CPC), SR 272, and Swiss Criminal Procedure Code of 5 October 2007 (CrimPC), SR 312.0, titles as in the bilingual edition, <https://www.droit-bilingue.ch/de-en/2/27/272-index.html> and <https://www.droit-bilingue.ch/de-en/3/31/312.0-index.html>; Lukas Müller, "The Revised Lugano Convention from the Swiss Perspective", Columbia Journal of European Law Online 18 (2011), <https://www.alexandria.unisg.ch/server/api/core/bitstreams/92b70bc2-c31c-4c8b-b63e-c51d9a29d225/content>, on "the newly enacted Swiss Federal Civil Procedure Code on January 1, 2011"; Federal Criminal Court, "Cronistoria", <https://www.bstger.ch/de/il-tribunale/cronistoria.html>, entry for 1 January 2011 ("Mit dem Inkrafttreten der neuen schweizerischen Strafprozessordnung (StPO) [...]"). ↩
6. FINMASA (above), Art. 15 para. 1 (fees for individual proceedings and services and an annual supervisory levy for the costs not covered by fees), Art. 31 (restoration of compliance), Art. 32 (declaratory ruling), Art. 33 and 33a (prohibition of practice and of activity), Art. 34

Independent courts established by law

(publication), Art. 35 (confiscation; para. 6: "Die eingezogenen Vermögenswerte gehen an den Bund, soweit sie nicht Geschädigten ausbezahlt werden"), Art. 37 (withdrawal of licence) and Art. 50 para. 1 (the Federal Department of Finance as prosecuting and judging authority), consulted at <https://www.droit-bilingue.ch/de-fr/9/95/956.1-index.html>. ↩

7. Federal Act on the Licensing and Oversight of Auditors of 16 December 2005 (Auditor Oversight Act, AOA), SR 221.302, Art. 9a (licensing of audit firms for audits under the financial market laws, which may not themselves carry on an activity requiring a licence under those laws) and Art. 11 (independence), consulted at <https://www.droit-bilingue.ch/de-fr/2/22/221.302-9a-13.html>; FINMASA (above), Art. 24–28 (audits carried out by FINMA or by audit firms on its behalf). ↩

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