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Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233

Anja Seibert-Fohr (ed.)

Judicial Independence in Transition

Max-Planck-Institut für ausländisches
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Judicial Independence in Switzerland

Regina Kiener*

A. Introduction

The basic provision concerning judicial independence in Switzerland is Article 191c Federal Constitution, which states that in their adjudicative activity all judicial authorities are independent and subject only to the law. Furthermore, the basic rights catalogue states the right to an independent and impartial tribunal established by law.¹ Judicial independence as guaranteed in Article 191c Federal Constitution has a two-dimensional meaning: on the one hand, it guarantees a judicial organization that realizes the basic right to an independent and impartial tribunal established by law.² On the other hand, Article 191c Federal Constitution is to be seen in connection with the principle of separation of powers and demands to secure the judiciary institutionally as a separate power.³ In Switzerland with its strong democratic tradition, though, the legislative branch predominates over the other branches of

* The author would like to thank her research assistants Dr. iur. Melanie Krüsi for critical reflection on the text and help with research and translation and MLaw Sibilla Bondolfi for her research assistance.

¹ Article 30 section 1 *Bundesverfassung der Schweizerischen Eidgenossenschaft* (BV) (Federal Constitution) 18 April 1999, SR 101 (Switz.); see R. Kiener, *Richterliche Unabhängigkeit*, at 18 (2001).

² Article 30 section 1 BV.

³ G. Steinmann, Art. 191c (3) BV, in: B. Ehrenzeller/P. Mastronardi/R. J. Schweizer/K. A. Vallender (eds.), *Die schweizerische Bundesverfassung* (in the following: *St. Galler Kommentar*) (2nd ed., 2008). For details see Kiener (note 1), at 25-30.

government.⁴ The Federal Assembly holds essential responsibilities such as high supervision (*Oberaufsicht*) over the federal judiciary⁵ or the power to elect and re-elect the federal judges.⁶ Furthermore, the Federal Supreme Court is bound by federal statutory law and has to apply it, even if it turns out to be unconstitutional.⁷ The Swiss emphasis on the democratic principle also entails constitutional specialities like modest formal criteria of eligibility as a judge⁸ or a limited term of office for judges with the need to be re-elected. Capable of jeopardizing judicial independence in a considerable way, the requirement to be re-elected is one of the most pressing issues of judicial independence in Switzerland.⁹ This chapter will discuss these issues and will show that, in practice, the independence of the Swiss judiciary is not put into question.¹⁰

As to the legal bases of judicial independence, guarantees are included in the cantonal constitutional provisions pertaining to the cantonal judiciary. Both the Confederation and the cantons have their own statutes on the organization of the judiciary and the status of judges. However, there is no specific law on judges, like for instance the German Federal

⁴ For the federal level see Article 148 section 1 BV and Article 190 BV; see also U. Häfelin/W. Haller/H. Keller, *Schweizerisches Bundesstaatsrecht*, at 417 (2008). See *infra* C. I. Separation of Powers.

⁵ Article 169 section 1 BV; Article 3 section 1 *Bundesgesetz über das Bundesgericht* (BGG) (Federal Law on the Federal Supreme Court) 17 June 2005, SR 173.110 (Switz.); Article 3 section 2 *Bundesgesetz über das Bundesverwaltungsgericht* (VGG) (Federal Law on the Federal Administrative Court) 17 June 2005, SR 173.32 (Switz.); Article 3 section 2 *Bundesgesetz über das Bundesstrafgericht* (SGG) (Federal Law on the Federal Criminal Court) 4 October 2002, SR 173.71 (Switz.); Article 3 section 2 *Bundesgesetz über das Bundespatentgericht* (PatGG) (Federal Law on the Federal Patent Court) 20 March 2009, SR 173.41 (Switz.). See *infra* B. I. 1. Organs in Charge of the Administration of the Judiciary; B. I. 2. Judicial Council.

⁶ Article 168 BV; Article 5 section 1 BGG; Article 5 section 1 VGG; Article 5 section 1 SGG, Article 9 section 1 PatGG. See *infra* B. II. 2. The Process of Judicial Selection; B. II. 3. Length of Office and Reappointment.

⁷ Article 190 BV.

⁸ See *infra* B. II. 1. Eligibility.

⁹ See *infra* B. II. 3. Length of Office and Reappointment; B. VII. Judicial Accountability: Discipline and Removal Procedures (especially B. VII. 4. Sanctions and Practice); E. Supreme Court; F. Conclusion.

¹⁰ See *infra* F. Conclusion.

Judges Act (*Richtergesetz*), either at federal or at cantonal level. Provisions on the independence of courts and on the impartiality of judges can be found in the federal and cantonal constitutions, in federal and cantonal statutes on civil, criminal or administrative procedure, and in statutes on court organization. In addition, the federal courts as well as the cantonal courts have passed administrative regulations on matters of court organization.¹¹ In the legislation one will encounter great variety, according to the court level and the judicial branch concerned. Due to these circumstances, from a Swiss perspective it is almost impossible to give a review that takes into account all different aspects of the subject of this chapter. In what follows, the author refers to the federal level and – where data are available – to the cantonal level as well, thereby trying to focus on the rules and regulations common to the majority of the cantons.

Judicial independence in Switzerland is a rather complex issue as, as a result of the federal structure, both the Confederation (*Bund*) and the 26 cantons (*Kantone*, the states) have their own judicial systems.¹² The federal judiciary consists, on the one hand, of the Federal Supreme Court (*Bundesgericht*) and, on the other hand, of the federal courts of first instance. The Federal Supreme Court embodies the highest federal judicial authority.¹³ As the court of final appeal in almost every legal field it watches over the correct and uniform application of federal and international law.¹⁴ On appeal, it reviews the decisions of the cantonal courts in matters of civil, criminal and administrative law,¹⁵ as well as

¹¹ See e.g., with regard to the Federal Supreme Court, *Reglement für das Bundesgericht* (BGerR) (Administrative Regulation on the Federal Supreme Court) 20 November 2006, 173.110.131 (Switz.).

¹² For the federal system see e.g. R. Rhinow/H. Koller/C. Kiss/D. Thurnherr/D. Brühl-Moser, *Öffentliches Prozessrecht* (2010). For the cantonal system see e.g. D. Buser, *Kantonales Staatsrecht: eine Einführung für Studium und Praxis* (2004); R. Hauser/E. Schweri, *Kommentar zum zürcherischen Gerichtsverfassungsgesetz vom 13. Juni 1976 mit den seitherigen Änderungen* (2002); H. Hausheer, *Die neue Gerichtsorganisation des Kantons Bern und deren Auswirkungen auf den Zivil- und Strafprozess* (1996).

¹³ Article 188 section 1 BV. See also Article 1 section 1 BGG.

¹⁴ See H. Koller, Art. 1, in: M. A. Niggli/P. Uebersax/H. Wiprächtiger (eds.), *Basler Kommentar Bundesgerichtsgesetz* (in the following: BSK BGG), at paras. 37-46 (2008).

¹⁵ See Arts. 72-77, Arts. 78-81 and Arts. 82-89 BGG.

the decisions of the federal judicial authorities.¹⁶ As there is no special constitutional court, the Federal Supreme Court also serves as a constitutional court when such issues are raised by litigants.¹⁷ The Federal Criminal Court (*Bundesstrafgericht*)¹⁸ is the court of first instance in matters of federal crimes, i.e. crimes of a specific nature assigned to the federal jurisdiction by federal statutory law,¹⁹ whereas the Federal Administrative Court (*Bundesverwaltungsgericht*) deals with appeals against decisions of the federal administration.²⁰ There are a limited number of specialized courts, such as for instance expropriation tribunals (*Schätzungskommissionen*).²¹ The military courts are part of a specialized military judiciary entirely separate from the civil judiciary.²²

At cantonal level, each of the 26 cantons has its own constitution and its own parliament, government and court system. Although the cantonal courts mainly apply federal civil and criminal law and a considerable part of federal administrative law is administered by them too, the cantons are autonomous in the organization of their courts.²³ In civil and criminal matters there are generally two judicial levels within one can-

¹⁶ See Article 75 section 1, Article 80 section 1 and Article 86 section 1 BGG.

¹⁷ See W. Kälin/C. Rothmayr, The Judicial System, in: U. Klöti/P. Knoepfel/H. Kriesi/W. Linder/Y. Papadopoulos (eds.), *Handbuch der Schweizer Politik*, 177, at 179 (4th ed., 2006). See also *id.*, at 186-192.

¹⁸ See SGG.

¹⁹ Article 26 section a SGG in conjunction with Arts. 336-337 *Strafgesetzbuch* (StGB) (Federal Penal Code) 21 December 1937, SR 311.0 (Switz.): e.g. organized crime, white-collar crime, money laundering, corruption etc.

²⁰ See Article 33 VGG; regarding the Federal Administrative Court see B. Ehrenzeller/R. J. Schweizer (eds.), *Das Bundesverwaltungsgericht: Stellung und Aufgaben, Referate der Tagung vom 24. Oktober 2007 in Luzern und vom 15. Mai 2008 in Lausanne* (2008).

²¹ See Arts. 59-65 *Bundesgesetz über die Enteignung* (EntG) (Federal Expropriation Act) 20 June 1930, SR 711 (Switz.).

²² The *Militärstrafprozess* (MStP) (Federal Military Criminal Code) 23 March 1979, SR 322.1 (Switz.), establishes military courts of first instance (Arts. 5-8 MStP), military appellate courts (Arts. 9-12 MStP) and military courts of cassation (Arts. 13-15a MStP). The judges are members of the (non-standing) armed forces; the decisions of the military courts may not be appealed to the Federal Supreme Court. See G. Biagini, BV-Kommentar, Vorbemerkungen zu Art. 188-191c, at para. 10 (2007).

²³ Biagini (note 22), Vorbemerkungen zu Art. 188-191c, at para. 8.

ton. There are district courts (*Bezirksgerichte*, *Kreisgerichte*, or *Amtsgerichte*) serving as courts of first instance, and a cantonal court (*Kantonsgericht*, or *Obergericht*) serving as a court of appeal.²⁴ As for public law disputes, specialized administrative courts (*Verwaltungsgerichte*) decide on appeals against decisions of the cantonal administration, because in Switzerland disputes between citizens and the government are considered not as civil law proceedings but as a separate area of law. In several cantons, there is no special administrative court and the administrative judicial function is instead exercised by the administrative law division of the cantonal court.²⁵ In any case, the decisions of the cantonal courts and of the administrative courts may be appealed to the Federal Supreme Court.²⁶ In most cantons, there are a number of specialized courts, such as for instance juvenile courts (*Jugendgerichte*), tenancy courts (*Mietgerichte*), labour courts (*Arbeitsgerichte*) or cantonal expropriation tribunals.²⁷ In a number of larger cantons specialized divisions of the cantonal courts like commercial courts (*Handelsgerichte*) or economic crimes courts (*Wirtschaftsstrafgerichte*) serve as courts of first instance in the specific issues assigned to them by law.²⁸ The rules and regulations on specialized courts vary widely among the cantons. In general, there are no special constitutional courts at cantonal level.²⁹ As a result of the new unified federal codes on civil procedure and on

²⁴ See Kälin/Rothmayr (note 17), at 182.

²⁵ See also P. Zappelli, Switzerland, in: Union Internationale des Magistrats (ed.), *Traité d'organisation judiciaire comparée*, Volume I, 329, at 332 (1999).

²⁶ See Article 75 section 1, Article 80 section 1 and Article 86 section 1 subsection d BGG.

²⁷ See Kälin/Rothmayr (note 17), at 182-183.

²⁸ With regard to the cantonal *Wirtschaftsstrafgericht* see e.g. Article 1 section 1 subsection 1 and Article 11 subsection 2 *Gesetz über die Organisation der Gerichtsbehörden in Zivil- und Strafsachen* (GOG) (Bern Law on the Organization of the Civil and the Criminal Courts) 14 March 1995, 161.1 (Bern). See also O. Vogel/K. Spühler, *Grundriss des Zivilprozessrechts und des internationalen Zivilprozessrechts der Schweiz*, at 129 (102) (8th ed. 2006); R. Hauser/E. Schweri/K. Hartmann, *Schweizerisches Strafprozessrecht*, at 8 (6) and (9) (6th ed. 2005).

²⁹ For an example see Article 104 *Constitution de la République et Canton du Jura* (Jura Constitution) 20 March 1977, SR 131.235 (Switz.). In the Canton of Waadt constitutional jurisdiction is exercised by a constitutional division of the cantonal court, see Article 136 *Constitution du Canton de Vaud* (Waadt Constitution) 14 April 2003, SR 131.231 (Switz.).

criminal procedure,³⁰ cantonal court organization will lose some of its complexity, firstly because the number of first instance courts will be reduced rather than increased, and secondly because cantons tend to converge rather than to diverge when harmonizing the organization of their authorities according to the minimal standards prescribed by the Confederation.³¹

B. Structural Safeguards

I. Administration of the Judiciary

1. *Organs in Charge of the Administration of the Judiciary*

The responsibilities for the administration of the judiciary vary due to the fact that the Confederation and the 26 cantons enact their own rules on court administration. At federal level, the courts by constitutional provision administer themselves.³² At cantonal level, there is a tendency towards judicial self-administration;³³ however, in a considerable number of cantons the parliaments and the ministries of justice hold compe-

³⁰ *Schweizerische Zivilprozessordnung* (ZPO) (Federal Code on Civil Procedure) 19 December 2008, SR 272 (Switz.); *Schweizerische Strafprozessordnung* (StPO) (Federal Code on Criminal Procedure), 5 October 2007, SR 312 (Switz.).

³¹ In 2006, Switzerland was one of the European countries with the highest number of courts per inhabitant, see European Commission for the Efficiency of Justice (ed.), *European judicial systems: efficiency and quality of justice* (in the following: CEPEJ report), at 83 and at 86 (2010).

³² See Article 188 section 3 BV and Article 25 section 1 BGG (Federal Supreme Court); Article 14 VGG (Federal Administrative Court); Article 23 section 1 SGG (Federal Criminal Court). For the Federal Supreme Court see C. Kiss/H. Koller, Art. 188 BV, in: St. Galler Kommentar (note 3), at paras. 26-40; R. Ursprung/D. Riedi Hunold, Art. 13, in: BSK BGG (note 14).

³³ See e.g. Article 12 *Gerichtsorganisationsgesetz Kanton Appenzell Innerrhoden* (Appenzell Innerrhoden Law on Court Organization) 25 April 1999, 173.000 (Appenzell Innerrhoden); § 82 section 2 *Verfassung des Kantons Basel-Landschaft* (Basel-Landschaft Constitution) 17 May 1984, SR 131.222.2 (Switz.); § 96 section 1 *Verfassung des Kantons Aargau* (Aargau Constitution) 25 June 1980, SR 131.227 (Switz.); Article 91^{bis} section 1 *Verfassung des Kantons Solothurn* (Solothurn Constitution) 8 June 1986, SR 131.221 (Switz.). See also Kiener (note 1), at 294.

tences with regard to the administration of the judiciary. Moreover, both at federal and at cantonal level, even the courts with the right to self-administration remain under the high supervision (*Oberaufsicht*) of the parliament.³⁴ In addition, the federal and cantonal parliaments are involved in the management of the budget of the courts,³⁵ as they have to approve the draft court budget. In the Confederation and in cantons with self-administration of the judiciary the budget is presented to the assembly by a representative of the highest court,³⁶ whereas in cantons with a stronger involvement of the executive branch the court budget is part of the general state budget and therefore presented to the assembly by the government.

2. *Judicial Council*

At federal level, there is no judicial council and only a few cantons – Fribourg,³⁷ Geneva,³⁸ Neuchâtel,³⁹ Jura⁴⁰ and Ticino⁴¹ – have established

³⁴ Article 169 section 1 BV; for the Federal Supreme Court see Article 3 section 1 BGG. See P. Mastronardi, Art. 169 BV, in: St. Galler Kommentar (note 3), at para. 20; Kiener (note 1), at 296-297; A. Lienhard, *Oberaufsicht und Justizmanagement*, 1 Justice – Justiz – Giustizia (2009), available at <<http://richterzeitung.weblaw.ch/content/edition.aspx?id=587>>; A. Tobler, *Zur Tragweite der parlamentarischen Oberaufsicht über die Gerichte – Positionen in der Rechtslehre*, Bericht der Parlamentarischen Verwaltungskontrolstelle zuhanden der Geschäftsprüfungskommission des Ständerats (11 March 2002), BBl 2002, at 7690-7726; M. Béguelin/H. Hess/P. Schwab, *Parlamentarische Oberaufsicht über die eidgenössischen Gerichte*, Bericht der Geschäftsprüfungskommission des Ständerates (28 June 2002), BBl 2002, at 7625-7640.

³⁵ For the federal level see Article 167 BV; T. Stauffer, Art. 167 BV, in: St. Galler Kommentar (note 3).

³⁶ For the Federal Supreme Court see Article 142 section 3 and Article 162 section 2 *Bundesgesetz über die Bundesversammlung* (Parlamentsgesetz, ParlG) (Law on the Federal Parliament) 13 December 2002, SR 171.10 (Switz.); see also H. Koller, Art. 3, in: BSK BGG (note 14), at paras. 40-57.

³⁷ Arts. 125-128 *Constitution du Canton de Fribourg* (Fribourg Constitution) 16 May 2004, SR 131.219 (Switz.). See A. Colliard, *Le Conseil de la magistrature dans le canton de Fribourg: ses fondements, ses compétences et ses activités*, 2 Justice – Justiz – Giustizia (2009), available at <<http://richterzeitung.weblaw.ch/content/edition.aspx?id=629>>; P. Vallet, *L'élection et la surveillance des Autorités judiciaires et du Ministère Public dans la Nouvelle Constitution du Canton de Fribourg*, 3 Justice – Justiz – Giustizia, at 24-31 (2006), available at <<http://richterzeitung.weblaw.ch/content/edition.aspx?id=215>>.

such bodies.⁴² The judicial councils consist of between five (Jura) and eleven (Geneva) members. In general, they are composed of members of the judiciary, the prosecution authority, parliament and the government as well as of external professionals like university professors and lawyers.⁴³ The bodies appointing the members of the judicial councils vary from canton to canton, as the responsibility can be given exclusively to the parliament, but also to other bodies such as the executive or the judiciary.⁴⁴ To the best of my knowledge, there are no rules on dismissal.⁴⁵

In general, the judicial councils are entrusted just with the administrative and disciplinary supervision of the courts, whereas the high supervision (*Oberaufsicht*) is exercised by the cantonal parliament.⁴⁶ With regard to the disciplinary power of the judicial councils, two systems can be distinguished: either the judicial council is competent to deliver even the harshest sanction – the removal of a judge – or that power is as-

³⁸ Article 135 *Constitution de la République et Canton de Genève* (Geneva Constitution) 24 May 1847, SR 131.234 (Switz.). See L. Peila, *Conseil supérieur de la magistrature à Genève*, 2 Justice – Justiz – Giustizia (2009), available at <<http://richterzeitung.weblaw.ch/content/edition.aspx?id=630>>.

³⁹ *Loi instituant un Conseil de la magistrature* (LCM) (Law on a Judicial Council) 30 January 2007, 162.7 (Neuchâtel).

⁴⁰ *Loi d'organisation judiciaire* (Law on the Judicial Organization) 23 February 2000, 181.1 (Jura). See J. Moritz, *Le Conseil de surveillance de la magistrature dans le canton du Jura*, 2 Justice – Justiz – Giustizia (2009), available at <<http://richterzeitung.weblaw.ch/content/edition.aspx?id=649>>.

⁴¹ Article 79 *Costituzione della Repubblica e Cantone Ticino* (Ticino Constitution) 14 December 1997, SR 131.229 (Switz.). See V. Tuoni, *Il consiglio della magistratura del Canton Ticino*, 2 Justice – Justiz – Giustizia (2009), available at <<http://richterzeitung.weblaw.ch/content/edition.aspx?id=616>>.

⁴² See P. Zappelli, *Le Conseil Supérieur de la Magistrature, instrument pour l'indépendance des magistrats*, 2 Justice – Justiz – Giustizia (2009), available at <<http://richterzeitung.weblaw.ch/content/edition.aspx?id=636>>; P. Zappelli, *Le juge et le politique, en particulier la question de l'élection*, in: M. Heer (ed.), *Der Richter und sein Bild*, 83, at 94-98 (2008).

⁴³ See e.g. Article 126 section 1 Fribourg Constitution. See also Zappelli, *Le Conseil Supérieur* (note 42), at 31-36.

⁴⁴ See Zappelli, *Le Conseil Supérieur* (note 42), at 31-36.

⁴⁵ See e.g. Article 126 sections 2 and 3 Fribourg Constitution.

⁴⁶ Arts. 127 and 104 Fribourg Constitution; Article 79 section 1 Ticino Constitution; Article 135 Geneva Constitution.

signed to the cantonal parliament.⁴⁷ In two cantons – Fribourg and Ticino – the judicial councils are also involved in the nomination of the judges; however, their recommendations are not binding on the authority entrusted with the formal appointment.⁴⁸ In the last few years, several attempts to introduce judicial councils have been turned down both by the federal and the cantonal legislators.⁴⁹ One of the main objections raised is the supposed lack of democratic legitimacy and accountability of those bodies. One might suggest that the political parties, traditionally playing a crucial role in the selection and election of judges, in fact are not willing to cede this power to any body independent of party influence.⁵⁰

II. Selection, Appointment and Reappointment of Judges

1. Eligibility

In Switzerland, the formal criteria of appointment for judges are modest, as democratic legitimacy is still considered more important than professionalism, at least by the formal requirements laid down by the constituent power. Candidates for the Federal Supreme Court must fulfil the same criteria of eligibility as candidates for the National Council (*Nationalrat*, i.e. the House of Representatives) and for the Federal Council (*Bundesrat*, i.e. the Federal Government).⁵¹ According to Articles 143 and 136 Federal Constitution, besides being vested with legal

⁴⁷ See Zappelli, *Le Conseil Supérieur* (note 42), at 23 and 31.

⁴⁸ Article 103 section 1 subsection e and Article 128 Fribourg Constitution. See also Zappelli, *Le Conseil Supérieur* (note 42), at 31-32.

⁴⁹ Regarding the Confederation see Ch. Bandli/M. Kuhn, *Erste Erfahrungen am Bundesverwaltungsgericht – Interne Zuständigkeitsfragen und Beziehungen zu anderen Staatsorganen*, in: Ehrenzeller/Schweizer (note 20), 35, at 63-65; D. F. Marty, *Qui a peur du Conseil de la magistrature?*, 2 *Justice – Justiz – Giustizia*, at 3-5 (2009), available at <<http://richterzeitung.weblaw.ch/content/edition.aspx?id=638>>. Regarding the Canton of Aargau, see U. Hodel, *Totalrevision des Gerichtsorganisationsgesetzes des Kantons Aargau (GOG) verbunden mit einer Teilrevision der Kantonsverfassung, Beschluss des Grossen Rates vom 11. November 2008 auf Rückweisung*, 1 *Parlament – Parlement – Parlamento* 13, at 13-14 (2009).

⁵⁰ See Zappelli, *Le Conseil Supérieur* (note 42), at 26-27; Marty (note 49), at 5.

⁵¹ See R. Kiener, Art. 5, in: *BSK BGG* (note 14), at paras. 17-20.

capacity candidates need to be Swiss citizens and at least 18 years old.⁵² In practice though, only legal professionals with significant practical experience, such as judges, lawyers and law professors, qualify as Federal Supreme Court judges.⁵³ The same rules apply to the eligibility of judges of the federal courts of first instance. Federal judges are recruited either from within the judicial system, notably among the judges of the higher cantonal courts, or from among legal professionals such as lawyers, law professors or administrative officials.⁵⁴ As for the cantonal courts, the formal criteria of eligibility are similarly open. However, they vary from canton to canton and may even differ between the first instance and appeal courts within a canton. Only in a minority of cantons is legal education a statutory eligibility criterion. In practice, legal experience plays a vital role, though. In almost half of the cantons only candidates with an overall legal education and professional experience are considered.⁵⁵ Most first instance judges served as court clerks, public prosecutors or lawyers before taking the bench.⁵⁶ Nevertheless, there are still cantons where district courts are composed entirely of lay judges, the court clerks being the only trained jurists taking part in the law-finding process.⁵⁷ Furthermore, in a few cantonal courts and in quite a number of district courts only the president is required by law to be a professional, whereas the other members of the court – often sitting as occasional judges – need not have professional legal training.

⁵² See A. Kley, Art. 136 BV, in: St. Galler Kommentar (note 3), at paras. 3-5; R. Lüthi, Art. 143 BV, in: St. Galler Kommentar (note 3), at paras. 2-5.

⁵³ See Kälin/Rothmayr (note 17), at 178; Kiener (note 1), at 263-264; Kiener, Art. 5, in: BSK BGG (note 14), at para. 23 with further reference at footnote 69; Zappelli (note 25), at 329.

⁵⁴ With regard to Federal Supreme Court judges, see W. Bosshart, Die Wählbarkeit zum Richter im Bund und in den Kantonen, at 62-67 (1961); Kälin/Rothmayr (note 17), at 183; Kiener, Art. 5, in: BSK BGG (note 14), at para. 23; K. Spühler/A. Dolge/D. Vock, Kurzkomentar zum Bundesgerichtsgesetz, Art. 5, at para. 9 (2006).

⁵⁵ Zappelli (note 25), at 329.

⁵⁶ Bosshart (note 54), at 62-67; Kälin/Rothmayr (note 17), at 177; Kiener, Art. 5, in: BSK BGG (note 14), at para. 23; Spühler/Dolge/Vock (note 54), Art. 5, at para. 9.

⁵⁷ E.g. Grison or Appenzell Innerrhoden; see Kälin/Rothmayr (note 17), at 178; as for lay judges see R. Ludewig-Kedmi/E. Angehrn, Sind Laienrichter noch zeitgemäss?, 3 Justice – Justiz – Giustizia (2008), available at <<http://richt.erzeugung.weblaw.ch/content/edition.aspx?id=524>>.

Most cantonal constitutions set the minimum age at 18 years, although in practice most judges are older than 30 at the time of their election. In a couple of cantons, a higher minimum age is either required by law⁵⁸ or set by the fact that a professional education is a mandatory prerequisite for election. Neither specialized tests nor competitive exams are part of the application procedure.⁵⁹ As a general rule, candidates are asked for a personal interview, first by the political parties endorsing them, and later by the parliamentary judicial committee preparing for the election on behalf of the assembly. In a number of cantons, these committees also hear the cantonal court, the cantonal lawyers' associations and the cantonal judges' associations on the candidates,⁶⁰ whereas in cantons with direct elections of judges there are normally no preliminary hearings at all.

2. *The Process of Judicial Selection*

The political nature of judicial appointment is characteristic of the Swiss judicial system.⁶¹ Federal Supreme Court judges are elected by the United Federal Assembly (*Vereinigte Bundesversammlung*),⁶² the two chambers of the federal parliament specifically conjoined for this purpose.⁶³ At cantonal level, judges are elected either by parliament or by plebiscite.⁶⁴ In 17 cantons, district court judges are elected by popular vote, whereas for the cantonal courts election by the cantonal parlia-

⁵⁸ Such as for instance 25 years in Geneva; see Zappelli (note 25), at 329.

⁵⁹ See also Zappelli (note 25), at 329 and 330.

⁶⁰ S. Deutsch/C. Wissmann, *Neuerungen im Verhältnis zwischen Parlament und Justiz im Kanton Bern*, 1 *Parlament – Parlement – Parlamento* 15, at 16 (2009).

⁶¹ Kälín/Rothmayr (note 17), at 177.

⁶² See B. Ehrenzeller, *Art. 168 BV*, in: *St. Galler Kommentar* (note 3), at paras. 10-19.

⁶³ Article 157 section 1 subsection a BV in conjunction with Article 168 section 1 BV. See A. Fischbacher, *Richterwahlen durch das Parlament: Chance oder Risiko?*, 1 *Parlament – Parlement – Parlamento* 4, at 4 (2005).

⁶⁴ See A. de Weck, *Election, réélection et surveillance: rencontre des pouvoirs judiciaire et politique*, 4 *Justice – Justiz – Giustizia*, at 9 (2008), available at <<http://richterzeitung.weblaw.ch/content/edition.aspx?id=547>>.

ment is the rule.⁶⁵ In other cantons all judges are elected by plebiscite.⁶⁶ There is a leaning towards election by parliament, though.⁶⁷ At federal level as well as in most cantons, there is no self-recruiting system for judges, yet in two cantons, members of the courts of first instance are elected by the cantonal court.⁶⁸ In cantons where there are judicial councils, these bodies are involved in the selection process, but do not have the power to elect judges.⁶⁹ The executive branch does not take part in the process of the selection and election of judges. If judges are elected by parliament, the process of judicial selection is generally administered by a parliamentary judicial committee.⁷⁰ At federal level as well as in numerous cantons, vacant posts are publicly announced,⁷¹ yet there are still cantons where this is not the case. The rule of concordance among the political parties (*Konkordanz*), which is informally agreed upon by the relevant political actors and according to which seats are distributed on the basis of party strength, also applies to the selection and election of judges.⁷² At federal as well as at cantonal level, candidates for the bench are therefore commonly endorsed by a political party.⁷³ As a consequence, party membership or at least ideological

⁶⁵ In 18 cantons, cantonal judges are elected by parliament; see Zappelli, *Le juge et le politique* (note 42), at 86.

⁶⁶ For instance in Geneva, Basel-Stadt or Uri; see Zappelli, *Le juge et le politique* (note 42), at 86.

⁶⁷ See e.g. Deutsch/Wissmann (note 60), at 16; R. Schnyder, *l'elezione dei giudici in Ticino da parte del Gran Consiglio, un modo di procedere non senza problemi*, 1 *Parlament – Parlement – Parlamento* 21, at 21 (2009); Zappelli, *Le juge et le politique* (note 42), at 87.

⁶⁸ Article 131 section 4 Waadt Constitution; Article 7 section 4 *Gesetz über die Gerichtsbehörden des Kantons Wallis* (Wallis Law on Courts) 27 June 2000, 173.1 (Wallis). See Zappelli (note 25), at 332; Kiener (note 1), at 260.

⁶⁹ See *supra* B. I. 2. Judicial Council.

⁷⁰ For the procedure at federal level see Article 40a ParlG and Arts. 135-138 ParlG.

⁷¹ For the federal level see Article 40a section 2 ParlG; see also Zappelli (note 25), at 332.

⁷² See Kiener (note 1), at 269.

⁷³ See *id.*; Biaggini (note 22), Art. 188, at para. 13; N. Raselli, *Richterliche Unabhängigkeit unter Druck, Die Gefahren des geltenden Wahlsystems*, 2 *Justice – Justiz – Giustizia* (2) (2006), available at <<http://richterzeitung.web-law.ch/content/edition.aspx?id=171>>.

closeness to the party endorsing the candidate is the rule.⁷⁴ Only in the smallest cantons, where judges are elected by plebiscite and judicial election is considered to depend solely on the personality of the candidate, do the political parties seem to have little or no influence on the election of judges. Judges who owe their election to the support of a political party habitually pay a voluntary annual contribution which may amount to 5% of the judge's annual income.⁷⁵ There are hardly any mandatory regulations regarding minority and gender representation.⁷⁶ In practice, federal judges are, among other criteria, appointed according to linguistic criteria.⁷⁷ In bilingual or multilingual cantons, linguistic criteria matter as well, at least for judges applying for appeal courts.⁷⁸ Regional and gender criteria may also play a role, but are not formalised by the law either.⁷⁹ There is no formal training required (or offered) for appointed judges before they take the bench.⁸⁰

The process of judicial selection, in particular the rule of concordance, is mostly accepted, even among scholars, as a means of representing the foremost political tendencies within the confederation and the cantons,

⁷⁴ See Kälin/Rothmayr (note 17), at 177-180; Kiener (note 1), at 189 and 269.

⁷⁵ Zappelli, *Le juge et le politique* (note 42), at 90-91.

⁷⁶ For an example see U. Meisser, GR: keine stärkere Gewichtung sprachlicher Kompetenzen der Richter, 2 *Justice – Justiz – Giustizia*, at 5 (2009), available at <<http://richterzeitung.weblaw.ch/content/edition.aspx?id=634>>; see also N. Raselli, Bundesrichterwahlen und richterliche Unabhängigkeit, in: B. Luginbühl/J. Schmidt (eds.), *Diskriminierung und Integration, (Rechts-) Geschichten in einem sozialen System*, 33, at 35 (2006). There is no overall statistics on representation.

⁷⁷ Kiener (note 1), at 268; Ehrenzeller, Art. 168 BV, in: *St. Galler Kommentar* (note 3), at para. 15; Zappelli (note 25), at 332; Raselli (note 76), at 35.

⁷⁸ See Bern, Fribourg, Wallis or the Grisons; see e.g. Article 62 section 2 *Verfassung des Kantons Wallis* (Wallis Constitution) 8 March 1907, SR 131.232 (Switz.); see Kiener (note 1), at 268; Zappelli (note 25), at 330.

⁷⁹ See Kiener (note 1), at 268-269; Kiener, Art. 5, in: *BSK BGG* (note 14), at para. 26; W. Haller, in: J.-F. Aubert et al. (eds.), *Kommentar zur Bundesverfassung der Schweizerischen Eidgenossenschaft vom 29. Mai 1874, Art. 107/108*, at 22 (1987-1996); A. Fischbacher, *Verfassungsrichter in der Schweiz und in Deutschland: Aufgaben, Einfluss und Auswahl*, at 423 (2006); Zappelli (note 25), at 331.

⁸⁰ See also CEPEJ report (note 31), at 199; Zappelli, *Le juge et le politique* (note 42), at 92.

thus securing a broad representation of attitudes and perspectives within the judiciary and thereby strengthening the confidence which the courts must inspire in the public.⁸¹ But there is also severe criticism of applying the rule of concordance to the judiciary.⁸² And even those accepting the system of party endorsement strongly criticize the fact that judges formally need to be (or need to become) members of the political party by which they have been endorsed.⁸³ As a consequence, qualified candidates who do not want to commit themselves to a political party merely for career reasons have a very limited chance of being elected. And even the best qualified candidates who in fact are party members may be passed over because the vacant post is assigned to a less skilled person who happens to be a member of a political party actually underrepresented in the court concerned. Despite the crucial role of the political parties within the process of selection and election of judges, the legislator is not willing to regulate the role of the political parties. As a consequence, the procedure remains obscure for the public and for potential candidates, too.⁸⁴ However, there are some exceptions to this rule.⁸⁵

⁸¹ See H. Seiler, *Richter als Parteivertreter*, 3 *Justice – Justiz – Giustizia* (2006); for further details see Kiener (note 1), at 270-276; see also Zappelli (note 25), at 331.

⁸² Among others see M. Borghi, *Incostituzionalità dell'ingerenza dei partiti*, in: S. Bianchi et al. (eds.), *L'indipendenza del giudice nell'ambito della procedura di elezione*, in particolare nel Cantone Ticino, 61 (2004); M. Livschitz, *Die Richterwahl im Kanton Zürich*, at 256-292 (2001).

⁸³ Among others see Fischbacher (note 63), at 242-260, 278-282, 292-296 and 444-446; U. Häfelin/W. Haller/H. Keller, *Bundesstaatsrecht*, at 1711 (7th ed. 2009); Kiener (note 1), at 277; Kiener, Art. 5, in: *BSK BGG* (note 14), at paras. 23 and 28; Bosshart (note 54), at 58 and 71; K. Spühler, *Der Richter und die Politik: Die Wahlart der Richter und ihre Unabhängigkeit gegenüber den politischen Gewalten*, 1 *Zeitschrift des Bernischen Juristenvereins (ZBJV)* 28, at 31-33 (1994).

⁸⁴ For an example see Deutsch/Wissmann (note 60), at 17, referring to the Canton of Bern.

⁸⁵ According to Article 131 section 3 Waadt Constitution, the body responsible for the election pays heed to the balanced representation of the different political opinions (*Meinungsrichtungen*).

1. Length of Office and Reappointment

Switzerland is a significant exception to the principle of appointment for life for judges, as judges, including those of the Federal Supreme Court, are elected for a limited but renewable term of office, usually of between four and six years.⁸⁶ There is a slight tendency towards extending the length of judicial office within the cantons.⁸⁷ The principle of a limited term of office is meant to secure the continuous democratic legitimacy of the judiciary.⁸⁸ However, the requirement to be re-elected poses a certain threat to judicial independence.⁸⁹ Non-reappointment may by no means be used to “punish” a judge for his/her decisions as otherwise there is a danger that judges, towards the end of their term, might feel the need to consider the effects of their judgments upon their career.⁹⁰ In practice, although there is no right to reappointment, reappointment is the rule.⁹¹ At federal level, hitherto, a request for reappointment has never been definitely turned down.⁹² Within the cantons, denials of reappointment occasionally happen, but remain extremely rare.⁹³ In practice, judges are reappointed unless there are serious doubts about their ability to properly fulfil judicial functions. Changes in party strength after parliamentary elections which, according to the rule of concordance, formally lead to the overrepresentation of certain parties within the judiciary are not considered legitimate reasons for non-reappointment.⁹⁴ The criteria for reappointment are the same as

⁸⁶ For the federal level see Article 168 BV; Kley, Art. 9, in: BSK BGG (note 14), at para. 2; de Weck (note 64), at 42.

⁸⁷ Zappelli, *Le juge et le politique* (note 42), at 89.

⁸⁸ See *supra* A. Introduction.

⁸⁹ Kiener (note 1), at 279-282, 285-289 and 257-258.

⁹⁰ *Id.*, at 286.

⁹¹ See *id.*, at 285; Zappelli, *Le juge et le politique* (note 42), at 90.

⁹² See Kley, Art. 9, in: BSK BGG (note 14), at para. 3; see also P. Zappelli, *Switzerland: L'indépendance des juges*, in: *Union Internationale des Magistrats* (ed.), *Traité d'organisation judiciaire comparée*, volume II, 491, at 498 (2004).

⁹³ See Kälin/Rothmayr (note 17), at 178; Kiener (note 1), at 285.

⁹⁴ See Kiener (note 1), at 273 and at 288; R. Kiener/B. Durrer/S. Faessler/M. Kruesi, *Verfahren der Erneuerungswahl von Richterinnen und Richtern des Bundes: Gutachten im Auftrag der Gerichtskommission der Vereinigten Bundesversammlung*, 3 *Verwaltungspraxis der Bundesbehörden (VPB)* 350, at 360 (2008) with further reference.

those for appointment.⁹⁵ Reappointments are decided upon by the same body as is responsible for the election of judges. There is no supervisory body monitoring the process of reappointment. At federal level, the reappointment procedure is somewhat simplified compared to the appointment process, as the names of the judges seeking re-election are officially recorded in the electoral lists; also, there are no preliminary screenings.⁹⁶ However, there are no judicial safeguards for Federal Supreme Court judges who have been denied reappointment, as decisions of the Federal Assembly are not subject to any review.⁹⁷ One might strongly argue that Switzerland thereby violates the right to an effective remedy as guaranteed in Article 13 ECHR and Article 2 section 3 ICCPR.⁹⁸ As for the cantonal judiciary, a judge may appeal to the Federal Supreme Court against non-reappointment for a violation of his/her voter's rights where re-election has been turned down by plebiscite.⁹⁹ The Federal Supreme Court has not yet decided whether there is a federal remedy where re-election has been denied by the cantonal parliament. In most cantons judges whose requests for reappointment have been rejected receive either severance pay or a pension.¹⁰⁰

In general, the reappointment process is perceived as fair. It is not always sufficiently transparent, though. Judges whose reappointment is put into question are more or less subtly forced to resign as the political parties which previously endorsed them now informally communicate that they will no longer do so. This approach may protect judges against unwanted publicity going along with non-reappointment, yet at the same time they are denied the opportunity to challenge the decision as the event occurs on an informal level. The Swiss system is even more

⁹⁵ Id. at 359-360.

⁹⁶ Article 136 ParlG; see Kiener/Durrer/Faessler/Kruesi (note 94), at 360.

⁹⁷ Article 189 section 4 BV; see Kiener (note 1), at 287-288, and W. Haller, Art. 189 BV, in: St. Galler Kommentar (note 3), at paras. 55-60.

⁹⁸ See Kiener/Durrer/Faessler/Kruesi (note 94), at 365-366. As to Article 13 ECHR (in conjunction with Article 10 ECHR) see e.g. ECtHR, *Wille v. Liechtenstein*, Judgment of 28 October 1999, RJD 1999-VII, paras. 71-78, regarding non-reappointment of a judge. On Article 2 section 3 ICCPR (in conjunction with Arts. 17, 25 lit. c. and 26 ICCPR) see e.g. HRC *Kazantzis v. Cyprus*, 7 August 2003, Communication No. 972/2001, para. 6.6, regarding non-appointment of a judge.

⁹⁹ Article 82 section c BGG; see BGE 131 I 366, cons. 2.1 at 367; G. Steinmann, Art. 82, in: BSK BGG (note 14), at para. 82.

¹⁰⁰ Zappelli (note 92), at 498.

questionable due to the fact that the power of reappointment in most cases is vested in the same body which is also in charge of the supervision of the judiciary and thereby competent to impose disciplinary sanctions. As disciplinary bodies tend to avoid formal disciplinary action and would rather advise a judge to resign, they indirectly deny the judges concerned the right to a fair procedure in which allegations must be formally disclosed and the right to be heard is guaranteed.¹⁰¹

III. Tenure and Promotion

1. Tenure

Judges serve a limited term of office with the possibility of re-election. Only in one canton (Fribourg) are judges elected for life (that is until reaching retirement age).¹⁰² At federal level, the term of office is six years.¹⁰³ In the cantons, the term of office is usually between four and six years, with a maximum of ten years (Ticino)¹⁰⁴ and a minimum of one year (Appenzell-Innerrhoden).¹⁰⁵ The number of terms is not limited. If re-elected, a judge may serve as many terms as applied for until reaching the formal retirement age (usually at 64 for women and at 65 for men;¹⁰⁶ at 68 for Federal Supreme Court judges¹⁰⁷). Throughout the

¹⁰¹ Kiener (note 1), at 287-289.

¹⁰² Article 121 section 2 Fribourg Constitution; see de Weck (note 64), at 42-49; Vallet (note 37), at 23; Zappelli, *Le juge et le politique* (note 42), at 99.

¹⁰³ Article 145 BV und Article 9 section 1 BGG (Federal Supreme Court); Article 9 section 1 VGG (Federal Administrative Court); Article 9 section 1 SGG (Federal Criminal Court).

¹⁰⁴ Article 81 section 1 Ticino Constitution.

¹⁰⁵ Article 20 section 2 *Verfassung für den Eidgenössischen Stand Appenzell I. Rh.* (Appenzell-Innerrhoden Constitution) 24 November 1872, SR 101.000 (Switz.), concerning members of the cantonal court.

¹⁰⁶ For the federal courts of first instance see Article 9 section 2 SGG and Article 9 section 2 VGG, in conjunction with Article 10 section 2 subsection a *Bundespersonalgesetz* (BPG) (Federal Law on Federal State Officials) 24 March 2000, SR 172.220.1 (Switz.) and Article 21 section 1 *Bundesgesetz über die Alters- und Hinterlassenenversicherung* (AHVG) (Federal Law on the Old-age and Survivors' Insurance) 20 December 1946, SR 831.10 (Switz.).

¹⁰⁷ Article 9 section 2 BGG; see Biaggini (note 22), Art. 145, at para. 4.

Confederation there are no probationary periods for judges during which they are assessed.

2. Promotion

Switzerland does not have a career judiciary; consequently there is no procedure for promotion to higher courts. As a result, judicial office at a first instance court is principally considered not as an office for the first part of a judge's professional life, but as an office for a lifetime. Federal judges are, however, also recruited from within the judicial system, notably among judges of the higher cantonal courts.¹⁰⁸ Whether this practice influences the independence of the higher cantonal courts (*tailored judgements*) one can only speculate. As candidates for the bench are commonly endorsed by a political party, the chance to be elected will primarily depend on party affiliation. It is, however, easily conceivable that a party, among other factors, will also consider a judge's general loyalty to the party mindset – a fact which at first sight is well able to jeopardize judicial independence. Yet, one must keep in mind that, in practice, the political parties will present only candidates with a moderate party profile, as otherwise their candidate will be rejected by the appointing body.

IV. Remuneration

1. Remuneration

As a general rule, judicial salaries in Switzerland are equivalent to those of civil servants in leading positions. Judges generally earn more than public prosecutors at the same stage of their career.¹⁰⁹ Federal Supreme Court judges are paid 80% of the remuneration of the members of the Federal Council, which is significantly more than any other Federal state official with the exception of the Head of the Federal Chancellery.¹¹⁰ Judges of the federal courts of first instance – the Federal Ad-

¹⁰⁸ See *supra* B. II. 1. Eligibility.

¹⁰⁹ See European Judicial Systems, table 93, at 189 (factor 1.2 at the beginning of their careers, and factor 1.8 at the end of their careers).

¹¹⁰ *Bundesgesetz über Besoldung und berufliche Vorsorge der Magistratspersonen* (Federal Law on Salaries and Pensions of Magistrates) 6 October 1989, SR 172.121 (Switz.); *Verordnung der Bundesversammlung über Besoldung und*

ministrative Court and the Federal Criminal Court – are paid like civil servants in leading positions.¹¹¹ At cantonal level, judges are generally well paid, too, although salaries differ from canton to canton. In the Canton of Bern, for example, members of the cantonal court and the administrative court respectively are scaled in the same (top) salary class as for instance university professors,¹¹² whereas first instance judges receive the same salary as leading state officials such as, for instance, the academic director of the state university. In short, judges are able to support themselves and their families on their salary.¹¹³ Salaries are paid on time and are adapted to inflation. Advancement in salary is generally automatic and based on neutral criteria such as the time served in office. As a consequence, judges of different ages working in the same court are not paid equally, a source of certain frustration for the younger judges mastering the same workload as their older, but better paid colleagues.¹¹⁴ There is no general system of paid leave. Judges need not have professional risk insurance as compensation for damage caused in the exercise of their office is secured by state liability.¹¹⁵

2. *Benefits and Privileges*

To the best of my knowledge, there are no benefits or privileges other than remuneration for judges. In particular, there is no productivity bonus system, for such a system is considered inconsistent with the prin-

berufliche Vorsorge von Magistratspersonen (Parliamentary Decree on Salaries and Pensions of Magistrates) 6 October 1989, SR 172.121.1 (Switz.). The gross salary in 2008 was about 227,000 Euro, the net salary about 212,000 Euro, see CEPEJ report (note 31), at 210; see also Kiener, Art. 5, in: BSK BGG (note 14), at para. 30.

¹¹¹ See *Verordnung der Bundesversammlung über das Arbeitsverhältnis und die Besoldung der Richter und Richterinnen des Bundesstrafgerichts und des Bundesverwaltungsgerichts* (Parliamentary Decree on Salaries and Pensions of Federal Judges) 13 December 2002, SR 173.711.2 (Switz.).

¹¹² Annex 1 *Personalverordnung des Kantons Bern* (PV) (Bern Law on State Officials) 18 May 2005, 153.011.1 (Bern).

¹¹³ On the admissibility of avocations for regular Federal Supreme Court judges see Article 7 BGG and Arts. 18–23 BGerR. See also *infra* D. I. Code of Ethics for Judges.

¹¹⁴ *Federal Supreme Court judges* are paid equally, regardless of age or time served in office.

¹¹⁵ See *infra* B. VIII. Immunity for Judges.

ciple of judicial independence. Presidents of higher courts usually receive an allowance for representation costs during their term of office,¹¹⁶ whereas federal judges are paid at least part of the costs of public transport. At the end, judges are regarded as public servants fulfilling their duties on behalf of the community, and they therefore have the same rights and duties as any other state official. If for instance the law provides for premiums like extra holidays or salary bonuses for officials who have served for a certain period of time, these provisions apply to judges as well.

3. Retirement

Judges may exercise their functions until they reach retirement age (in general mandatory at 64 for women and at 65 for men;¹¹⁷ certain cantons do not have a statutory retirement age, though¹¹⁸). After retirement, judges – according to the federal social security system which also applies to the cantons – receive a government pension¹¹⁹ as well as a pension (i.e. an occupational benefit plan) from their pension fund.¹²⁰ Both insurances are mandatory for judges while they are in service, with the exception of the Federal Supreme Court judges, who are subject to special legislation.¹²¹ The benefits paid by the different types of social security are in principle financed by contributions levied on income. As a

¹¹⁶ For the Federal Supreme Court see Article 1 section 3 Federal Law on Salaries and Pensions of Magistrates; for the Canton of Zurich see *Beschluss des Kantonsrates über die Festsetzung der Besoldungen der Mitglieder des Obergerichtes* (Zurich Law on the Salaries of Cantonal Court Judges) 22 April 1991, 212.53 (Zurich).

¹¹⁷ For the federal courts of first instance see Article 9 section 2 SGG and Article 9 section 2 VGG, Article 13 section 2 PatGG, all in conjunction with Article 10 section 2 subsection a BPG and Article 21 section 1 AHVG.

¹¹⁸ Federal Supreme Court judges retire at the age of 68, see Article 9 section 2 BGG. See also *supra* B. III. 1. Tenure.

¹¹⁹ Article 112 BV provides that the old-age, survivors' and disability insurance (so-called first pillar) must cover the basic needs in an appropriate way; see U. Kieser, Art. 112 BV, in: St. Galler Kommentar (note 3), at paras. 13-16.

¹²⁰ Article 113 BV provides that the occupational benefit plan (so-called second pillar), together with the old-age insurance (first pillar), must enable the insured person to maintain the previous standard of living in an appropriate way; see Kieser, Art. 113 BV, in: St. Galler Kommentar (note 3), at paras. 6-10.

¹²¹ See Parliamentary Decree on Salaries and Pensions of Magistrates.

rule, employers and employees contribute equally. In any case, judges after their retirement receive sufficient funds to be able to maintain their standard of living.¹²²

V. Case Assignment and Recusal

According to Article 30 section 1 Federal Constitution, courts must be established by law.¹²³ Pursuant to Federal Supreme Court case law, the jurisdiction of a court and its composition must be laid down in the law.¹²⁴ With regard to the assignment of cases to the judges, the statutory laws prescribe only the number of judges forming a judicial panel,¹²⁵ whereas the rules on case assignment are either formally delegated to court regulation¹²⁶ or left to the discretion of the presidents of the court or the court sections respectively. According to the administrative regulation of the Federal Supreme Court, for instance, cases are assigned to the seven court sections according to the subject matter concerned.¹²⁷ Within the competent court section, cases are assigned by the president according to the criteria established by law, for instance workload, language, sex or specialist knowledge of the judges.¹²⁸ This system is also common within the cantonal judiciary. As the presidents

¹²² As a general rule, judges receive a pension of about 60-70% of their former income depending on their length of office, family situation etc. Federal Supreme Court judges receive a pension of half of the salary of a judge in office, provided they have been in office for at least 15 years (Article 3 section 2 subsection c Parliamentary Decree on Salaries and Pensions of Magistrates).

¹²³ See Steinmann, Art. 30 BV, in: St. Galler Kommentar (note 3), at paras. 7-8.

¹²⁴ On the significance of this see BGE 129 V 196, cons. 4.1 at 198; see also Kiener (note 1), at 375-380; Steinmann, Art. 30 BV, in: St. Galler Kommentar (note 3), at paras. 7-8.

¹²⁵ See e.g. Article 20 BGG; Article 21 VGG; Article 27 SGG; see also Article 336 StPO.

¹²⁶ See e.g. Article 22 BGG; see also Article 24 VGG and Article 20 SGG.

¹²⁷ Article 26 and Arts. 29-35 BGerR. The same rules apply to the Federal Criminal Court, Article 10 *Reglement für das Bundesstrafgericht* (Administrative Regulation on the Federal Criminal Court) 20 June 2006, SR 173.710 (Switz.); see M. Féraud, Art. 22, in: BSK BGG (note 14), at paras. 2-5.

¹²⁸ See Article 40 BGerR; see Féraud, Art. 22, in: BSK BGG (note 14), at paras. 6-10.

thereby end up assigning the reporting judge as well as the panel of judges adjudicating the case, they may to a certain extent steer the outcome of the case, so that one may well argue that the appearance of judicial independence is subject to doubt.¹²⁹ Taking into account these concerns, the Federal Administrative Court introduced a random system of assignment.¹³⁰ Within the confederation as well as within the cantons, a case can be reassigned to another judge by decision of the president of the court or of the court section concerned if there are good reasons such as, for instance, the illness of the judge originally assigned to the case.¹³¹

According to Article 30 section 1 Federal Constitution, the parties to a case have the right to an independent and impartial court.¹³² The procedural laws specify the criteria on which judges may be challenged. As a rule, a judge is pre-empted from participating in a case when he/she has a personal interest in the outcome of the case, when he/she has been involved in the case in another position, when he/she has a close relationship or when he/she is closely related to one of the parties.¹³³ In addition, a judge may not participate in a case if there are other circumstances capable of arousing a legitimate and objectively justified suspicion of bias,¹³⁴ for instance, if a judge's remarks before or during the

¹²⁹ See Ch. Bandli, Zur Spruchkörperbildung an Gerichten: Vorausbestimmung als Fairnessgarantien, in: Mitarbeiterinnen und Mitarbeiter des Bundesamtes für Justiz (eds.), Aus der Werkstatt des Rechts, Festschrift für Heinrich Koller, 209 (2006); Biaggini (note 22), Art. 30, at para. 5; Kiener (note 1), at 376-378; J.-P. Müller/M. Schefer, Grundrechte in der Schweiz, at 935 (4th ed. 2009).

¹³⁰ Article 31 *Geschäftsreglement für das Bundesverwaltungsgericht* (Administrative Court Statute) 17 April 2008, SR 173.320.1 (Switz.); see Bandli (note 129), at 217.

¹³¹ But not in the case of schedule conflicts, see the decision of the Federal Supreme Court 6P.102/2005 cons. 2-4 (26 June 2006).

¹³² See R. Kiener, Garantie des verfassungsmässigen Richters, in: D. Merten/H.-J. Papier (eds.), Handbuch der Grundrechte in Deutschland und Europa, Band VII/2: Grundrechte in der Schweiz und in Liechtenstein, 701, at 703-706 (2007); Steinmann, Art. 30 BV, in: St. Galler Kommentar (note 3), at paras. 9-16.

¹³³ See Article 34 section 1 subsection a-d BGG; Article 38 VGG. Also see Article 47 section 1 subsection a-e Federal Code on Civil Procedure.

¹³⁴ See Article 34 section 1 subsection e BGG; Article 38 VGG. Also see Article 47 section 1 subsection f Federal Code on Civil Procedure. See also BGE 114 Ia 50, cons. 3b at 54-55; BGE 112 Ia 290, cons. 3a at 293; Kiener (note 1), at 68-84 and at 346.

proceedings support the conclusion that he or she has already formed an opinion on the outcome of the case.¹³⁵ A motion for recusal may be submitted by the litigants or by the judge concerned.¹³⁶ The recusal is decided upon by the college of judges assigned to the case, or alternatively by the superior authority in the case of a single-judge trial.¹³⁷ The judge concerned may not take part in the recusal procedure.¹³⁸ The decision on recusal may be challenged by the parties to the case but not by the judges involved.¹³⁹

VI. Judicial Conduct Complaint Process

There is a common understanding that every citizen may at any time file a supervision complaint (*Aufsichtsbeschwerde*) against any state official, even if there is no such provision in the law.¹⁴⁰ At cantonal level, most statutory procedural laws establish the right to a supervision complaint if a judge breaches his or her official duties.¹⁴¹ Supervision complaints do not serve to defend individual legal positions, but aim at protecting the public interest in the proper behaviour and functioning of the public authorities.¹⁴² A supervision complaint is generally made in order to provoke the supervisory authority to make use of its power of supervision and discipline.¹⁴³ The complainant may for instance require

¹³⁵ BGE 125 I 119, cons. 3a at 122. See also Steinmann, Art. 30 BV, in: St. Galler Kommentar (note 3), at paras. 10.

¹³⁶ Kiener (note 1), at 363-371; see e.g. Article 35 and 36 section 1 BGG.

¹³⁷ See e.g. Article 37 section 1 BGG.

¹³⁸ See e.g. Article 37 section 1 BGG.

¹³⁹ See e.g. Article 92 section 1 BGG.

¹⁴⁰ For the Confederation see Article 129 ParlG; for an example see the decision of the Federal Supreme Court 12T_4/2008 (16 February 2009).

¹⁴¹ See e.g. § 108 section 1 *Gerichtsverfassungsgesetz des Kantons Zürich* (Zurich Law on the Organization of the Judiciary) 13 June 1976, 211.1 (Zurich); Article 18 Bern Law on the Organization of the Civil and the Criminal Courts; Article 101 *Gesetz über die Verwaltungsrechtspflege* (VRPG) (Bern Law on Administrative Procedure) 23 May 1989, 155.21 (Bern).

¹⁴² See O. Zibung, Art. 71, in: B. Waldmann/Philippe Weissenberger (eds.), *VwVG: Praxiskommentar zum Bundesgesetz über das Verwaltungsverfahren*, at para. 18 (2009).

¹⁴³ Hauser/Schweri (note 12), § 108, at para. 3.

disciplinary action, but not the formal repeal of a judgment.¹⁴⁴ In any case, a judge may initiate a supervision complaint at his or her own initiative in order to be cleared of allegations. The complaint is reviewed by the body responsible for the supervision of the court concerned. According to statutory law, this will be either the president of the court, the superior court or – with regard to the highest courts – the federal or the cantonal parliament acting through its supervisory committees.¹⁴⁵ Where there are signs of misbehaviour or dysfunction, the supervising body opens an investigation. Due to the informal character of the remedy, there is no time-frame in which to reply to the complaint. Also, the complainant does not have the formal status of a party to the procedure and therefore does not have a right to be informed about its outcome. If serious complaints against a judge accumulate, they may lead to the opening of disciplinary action. Furthermore, a procedure may result in the conclusion that the shortcomings alleged exist and that specific counter-measures have been taken; it may also result in the conclusion that allegations against a judge have been dismissed. There are no strict rules on informing the public of the results of an investigation; in practice, results are made public if there is a general interest in the case. Where such institution exists, complaints against judges may also be addressed to the ombudsman's office.¹⁴⁶ Apart from complaints initiated by individuals, the supervisory body is obliged to open an enquiry *ex officio* if there are serious indications of misbehaviour of a judge,¹⁴⁷ for example, by unduly delaying proceedings. As part of quality control policies certain courts started satisfaction surveys among court users such as litigants or lawyers.¹⁴⁸ These surveys are often initiated by court presidents and are not conducted on a regular basis.

¹⁴⁴ Id.

¹⁴⁵ See Article 40a ParlG; R. Kiener/B. Durrer/S. Faessler/M. Kruesi, Verfahren der Amtsenthebung von Richterinnen und Richtern der erstinstanzlichen Gerichte des Bundes: Gutachten im Auftrag der Gerichtskommission der Vereinigten Bundesversammlung, 3 VPB 316, at 331 (2008).

¹⁴⁶ For an example see § 89-§ 94 a *Verwaltungsrechtspflegegesetz* (VRG) (Zurich Law on Administrative Procedure) 24 May 1959, 175.2 (Zurich).

¹⁴⁷ Hauser/Schweri (note 12), § 108, at para. 47.

¹⁴⁸ For an example see S. Wyler, Gute Noten für Berner Gerichte, Der Bund, at 39 (6 April 2001).

VII. Judicial Accountability: Discipline and Removal Procedures

1. Formal Requirements

Despite their independence judges have a series of responsibilities which may lead to disciplinary proceedings if they are not fulfilled. However, in Switzerland disciplinary proceedings do not play the same role as in other judicial systems. The limited tenure of Swiss judges and their re- or non-reappointment already serve as an important basis for judicial accountability. In this respect the Swiss judicial systems differs from jurisdictions which provide for life tenure where disciplinary proceedings are the only option for removing judges from office for misconduct. Once more the standards within Switzerland vary considerably: Federal Supreme Court judges by constitutional provision are elected for a term of office of six years¹⁴⁹ during which they can be neither sanctioned nor removed from office, as the statutory law does not provide any disciplinary sanctions for them.¹⁵⁰ Theoretically, non-re-election for vital reasons is the only way of ensuring that Federal Supreme Court judges maintain a professionally and personally satisfactory profile.¹⁵¹ In practice, should there be distinct signs of infraction of judicial responsibilities, the court president or the parliamentary supervisory committee discusses the issue with the judge concerned. As an *ultima ratio* in exceptional circumstances, the judge is informally asked to resign but can by no legal means be forced to do so. As for the federal courts of first instance, the law does not determine any disciplinary sanctions apart from removal.¹⁵² The removal procedure is initiated by the parliamentary supervisory committee – based on its own perceptions or on notification by a third party – and is ended by a parliamentary decree.¹⁵³ These procedures are restricted to the most serious derelictions of judicial duties (e.g. repeated omission of an official act prescribed by law, obvious or repeated abuse of authority, obvious and

¹⁴⁹ Article 145 BV; Article 9 section 1 BGG.

¹⁵⁰ See Biaggini (note 22), Art. 145, at paras. 3 and 5.

¹⁵¹ Non-reappointment for other than *vital reasons* means a serious threat to judicial independence; see Kiener (note 1), at 288.

¹⁵² Article 10 VGG; Article 10 SGG, Article 14 PatGG.

¹⁵³ Article 40a ParlG; Article 10 VGG; Article 10 SGG, Article 14 PatGG. See Kiener/Durrer/Faessler/Kruesi (note 94), at 331; P. Tschümperlin, Die Aufsicht des Bundesgerichts, 105 Schweizerische Juristen-Zeitung (SJZ) 233, at 237 (2009).

clear partiality and severe infractions of the dignity of office).¹⁵⁴ Within the cantons, there is too broad a variety of disciplinary and removal procedures to describe in a few sentences. In a considerable number of cantons disciplinary or removal procedures do not exist.¹⁵⁵ In certain cantons, there are no specific disciplinary procedures, but judges may be dismissed either by parliamentary decree or by the decision of a judicial authority on offences regulated by statutory law. In a few cantons there are disciplinary sanctions, reprimand being the most common sanction imposed on a judge.¹⁵⁶

2. *Disciplinary Proceedings*

The formal procedures for disciplinary actions and the removal of judges are regulated by law. As a rule, the supervisory body is also in charge of disciplinary proceedings. Depending on the pertinent law, this body is either a judicial authority – like the president of the court –, a judicial council, or the parliament. The investigation is conducted by the disciplinary body, or in the case of parliaments by a parliamentary committee.¹⁵⁷ However, for reasons of confidentiality and professionalism the investigation is often assigned to a third party like for instance a former judge or a university professor, particularly in cantons where the (non-standing) parliament is in charge of the supervision of judges. Should there be no specific rules on disciplinary proceedings allegations of misconduct are investigated by analogy with the pertinent statutory laws on administrative procedure.

¹⁵⁴ Deliberately or grossly negligent severe infraction of judicial duties (Article 10 subsection a VGG; Article 10 subsection a SGG, Article 14 subsection a PatGG), such as, for example, the repeated omission of an official act prescribed by law, obvious or repeated abuse of authority, obvious and clear partiality or severe infraction of the dignity of office (see Article 65 section 2 *Gerichtsorganisationsgesetz des Kantons Jura* (Jura Law on Judicial Organization) 23 February 2000, 181.1 (Jura)). See EJPD, Bundesamt für Justiz, Amtspflichten der Richterinnen und Richter der erstinstanzlichen Bundesgerichte: Gutachten vom 13. Oktober 2007, 3 VPB 306, at 313-314 (2008).

¹⁵⁵ See Kiener (note 1), at 287-289.

¹⁵⁶ See e.g. Arts. 45 and 45a *Personalgesetz* (Bern Law on State Officials) 16 September 2004, 153.01 (Bern).

¹⁵⁷ At federal level, see e.g. Article 40a ParlG on the judicial committee; see also Kiener/Durrer/Faessler/Kruesi (note 94), at 329-342.

3. *Judicial Safeguards*

Judges involved in disciplinary or removal procedures have the right to a fair trial, notably the right to be heard (Article 29 Federal Constitution).¹⁵⁸ At federal level, there are no judicial safeguards for judges of the federal courts of first instance being removed from office, as decisions of the Federal Assembly are not subject to any remedy.¹⁵⁹ Switzerland may thereby violate the right to a remedy pursuant to Article 13 ECHR and Article 2 section 3 ICCPR as well as the right to equal access to public service pursuant to Article 25 lit. c ICCPR.¹⁶⁰ At cantonal level, a judge may challenge the decisions of the cantonal disciplinary authority in the Federal Supreme Court.¹⁶¹

4. *Sanctions and Practice*

As a matter of fact, the primary and – in the Federation as well as in many cantons – only disciplinary sanction is non-re-election after the judge's term of office has ended. With regard to judicial independence (Article 191c Federal Constitution) and the constitutional principle of proportionality (Article 5 section 2 Federal Constitution) this situation may lead to disturbing results. On the one hand, for minor offences non-re-election is obviously disproportionate and at the same time infringes the principle of judicial independence. On the other hand, as there are no proportionate sanctions available, the violation of judicial duties often enough remains unsanctioned, for the disciplinary bodies tend to accept judges whose ability properly to fulfil judicial functions is subject to doubt, rather than risk an infringement of the principle of an independent judiciary as such.

¹⁵⁸ Kiener/Durrer/Faessler/Kruesi (note 94), at 324-326 and at 336-342.

¹⁵⁹ Article 189 section 4 BV; see Kiener (note 1), at 287-288, and Haller, Art. 189 BV, in: St. Galler Kommentar (note 3), at paras. 55-60.

¹⁶⁰ Kiener/Durrer/Faessler/Kruesi (note 94), at 328-329. See also *supra* B. II. 3. Length of Office and Reappointment.

¹⁶¹ Article 83 section g BGG; Article 113 BGG.

VIII. Immunity for Judges

Judges do not enjoy absolute immunity, but are protected in several respects. As for proprietary liability, the state is liable for damage that a federal judge, in the exercise of his or her office, unlawfully caused to a third party.¹⁶² In their private life, however, federal judges are – like every citizen – subject to civil action and civil liability.¹⁶³ With regard to criminal prosecution, federal judges are immune: criminal proceedings for official actions are begun only after the federal parliament has given its approval.¹⁶⁴ As for non-official actions, criminal proceedings may be initiated but with the written consent of the judge, or after the assembly of his fellow judges has given its approval. If consent is denied, the public prosecutor's office may appeal to the Federal Assembly.¹⁶⁵ In recent decades, though, the immunity of a Federal Supreme Court judge has never been challenged.¹⁶⁶ According to Article 347 section 2 subsection b Federal Criminal Code, the cantons have the competence to create immunity mechanisms for cantonal judges. There is no synopsis on the existence of such mechanisms at cantonal level. As a rule, judicial immunity relates only to judges serving in courts of appeal and is limited to official actions.¹⁶⁷ For crimes related to non-official actions, cantonal judges are not granted immunity, and district judges do not enjoy immunity at all. Generally immunity from criminal prosecution is lifted if the initiation of criminal proceedings seems objectively justified and does not simply appear to be an act of revenge by a troublemaker or a strategic manoeuvre by a political party.¹⁶⁸

¹⁶² Article 146 BV; Article 3 section 1 *Verantwortlichkeitsgesetz* (VG) (Federal Law on the Responsibility of the Confederation, State Authorities and State Officials) 14 March 1958, SR 170.32 (Switz.).

¹⁶³ Fischbacher (note 63), at 181.

¹⁶⁴ Article 14 section 1 VG; Article 347 section 1 StGB.

¹⁶⁵ Article 11 BGG; Article 12 VGG; Article 11 SGG, Article 16 PatGG.

¹⁶⁶ In 1987, a petition by citizen *Karel Rychetsky* asking to withdraw the immunity of two Federal Supreme Court judges was turned down by the Federal Assembly, see petition 87.260, AB-N 1987 IV p. 1759, AB-S 1988 II p. 418, AB.N 1988 III p. 1465.

¹⁶⁷ For the Canton of Zurich see Article 44 section 3 *Verfassung des Kantons Zürich* (Zurich Constitution) 27 February 2005, SR 131.211 (Switz.); e.g. *Hauer/Schweri* (note 12), at 142, para. 12.

¹⁶⁸ See C. Huerlimann, *Die Eröffnung einer Strafuntersuchung im ordentlichen Verfahren gegen Erwachsene im Kanton Zürich*, at 120-121 (2006).

IX. Associations of Judges

The freedom of association laid down in Article 23 Federal Constitution also applies to judges.¹⁶⁹ There are several national associations for judges in Switzerland, the most prominent being the Association of Swiss Judges (*Schweizerische Richtervereinigung SRV*) with about 500 members.¹⁷⁰ More specialized with regard to the professional background of their members are the Swiss Association of Commercial Judges (*Schweizer Verband der Richter in Handelssachen SVRH*)¹⁷¹ and the Swiss Association of Justices of the Peace and of Mediators (*Schweizerischer Verband der Friedensrichter und Vermittler*).¹⁷² The Swiss Group of Magistrates for Mediation and Conciliation (*Schweizerische Richtervereinigung für Mediation und Schlichtung*) is a national section of the Group of European Magistrates for Mediation (GEMME). Furthermore, there are several national network organisations, such as the Conference of first instance courts (*Konferenz der erstinstanzlichen richterlichen Behörden*) or the Conference of district court presidents and investigating judges (*Konferenz der Gerichtspräsidenten und Untersuchungsrichter*). At cantonal level, there are only a few cantonal or regional associations.¹⁷³ There are no specific laws or regulations concerning these associations. The associations are non-partisan, nor are they unions.¹⁷⁴ The main objectives of these associations are the safeguard and promotion of judicial independence and the development of the administration of justice. In addition, they aim at cultivating personal relations among judges.¹⁷⁵ The associations organize widespread

¹⁶⁹ Kiener (note 1), at 188.

¹⁷⁰ Association suisse des magistrats de l'ordre judiciaire, Associazione svizzera dei magistrati, available at <<http://www.svr-asm.ch>>.

¹⁷¹ Schweizer Verband der Richter in Handelssachen, available at <<http://www.handelsrichter.ch>>.

¹⁷² Schweizerischer Verband der Friedensrichter und Vermittler, available at <<http://www.friedensrichter-vermittler.ch>>.

¹⁷³ E.g. *Verband Bernischer Richter und Richterinnen VBR* (Canton of Bern Association of Judges), *Association des magistrats du pouvoir judiciaire de Genève* (Canton of Geneva Association of Judges), *Associazione dei magistrati ticinesi* (Canton of Ticino Association of Judges and Prosecutors) or *Zentral-schweizerische Vereinigung der Richterinnen und Richter ZVR* (Association of Judges of Central Switzerland).

¹⁷⁴ Zappelli (note 92), at 502.

¹⁷⁵ See e.g. Article 2 of the Statute of the Swiss Association of Judges.

activities. They regularly hold seminars and conferences; at times, they launch studies among their members, referring to questions like working conditions or remuneration. They establish study groups and they actively take part in the consultation procedure on federal or cantonal draft laws. The Association of Swiss Judges is regularly consulted by the federal legislator on issues relating to procedural law and to other matters concerning the judiciary.¹⁷⁶ The same is true for the cantonal and regional associations, which are consulted by the cantonal legislator on cantonal or regional draft laws and on other issues regarding the judiciary. Membership of the associations is voluntary. An estimated 30 to 40% of Swiss judges are members of at least one association. We suggest that one reason for this comparably low figure is that membership is of no relevance to the career of a judge; furthermore, Swiss judges generally do not perceive themselves as members of a social class, a view shared (and probably even expected) by the public. Associations of judges are funded by membership fees and earnings from seminars or conferences. They do not receive any financial or material support from the state.

X. Resources

Switzerland is one of the European countries with the highest budget allocations to the courts per inhabitant.¹⁷⁷ On average, 70% of the costs are linked to the remuneration of judges and court staff, whereas 30% are allocated to computerization, justice expenses, investments in new buildings and maintenance, as well as to the advanced training of judges and staff.¹⁷⁸ The number of staff is set either by statutory law or by decision of the body responsible for the administration of the judiciary (which can be the cantonal court, the parliament or the executive).¹⁷⁹ At the Federal Supreme Court, for instance, the 38 judges are assisted in their work by a staff of 280 people.¹⁸⁰ Court rooms, offices, libraries

¹⁷⁶ See *Bundesgesetz vom 18. März 2005 über das Vernehmlassungsverfahren* (VIG) (Federal Act on the Consultation Procedure) 18 March 2005, SR 172.061 (Switz.).

¹⁷⁷ 104 EUR per inhabitant or 0.22% per capita GDP in 2008, see CEPEJ report (note 31), at 15-29.

¹⁷⁸ CEPEJ report (note 31), at 25.

¹⁷⁹ See Zappelli (note 92), at 497.

¹⁸⁰ Geschäftsbericht des Bundesgerichts, at 10 (2008), available at http://www.bger.ch/gb-bger2008_d.pdf. At the Federal Administrative Court, the

and information technology are equipped and maintained within the limits of the court budget.¹⁸¹ The level of computerization for the direct assistance of judges and court staff is very high throughout the confederation,¹⁸² and even small district courts in rural areas are fully computerized. In short, the resources provided for maintenance, equipment, staffing etc. are adequate, and office and court room facilities are of such a standard that they provide an adequate working environment for judges and staff.¹⁸³

C. Internal and External Influence

I. Separation of Powers

In spite of their independence judges do not operate in a vacuum. In Switzerland, the judiciary is part of the system of separation of powers with its elements of checks and balances determined by the federal and cantonal constitutions.¹⁸⁴ According to Article 144 section 1 and 2 Federal Constitution, the Federal Supreme Court judges may not at the same time be members of the House of Representatives (*Nationalrat*), of the Senate (*Ständerat*) or of the Federal Government (*Bundesrat*), and full-time Federal Supreme Court judges may not hold another office in the confederation or in a canton.¹⁸⁵ Due to the strong impact of the democratic principle though, the legislative branch is predominant

ratio is 74 judges and 280 members of staff, at the Federal Criminal Court, 15 judges and 35 members of staff.

¹⁸¹ Zappelli (note 92), at 497.

¹⁸² CEPEJ report (note 31), at 87.

¹⁸³ See also Zappelli (note 92), at 497.

¹⁸⁴ Among others, see Biaggini (note 22), Vorbemerkungen zu Art. 143-191c; R. J. Schweizer, Vorbemerkungen zur Justizverfassung, in: St. Galler Kommentar (note 3), at 2752, paras. 10-15.

¹⁸⁵ These incompatibilities also apply to the judges of the Federal Criminal Court and the Federal Administrative Court (see Article 6 SGG and Article 6 VGG) as well as to the cantonal judiciary (see e.g. Article 42 section 1 *Verfassung des Kantons Zürich* [Zurich Constitution] 27 February 2005, SR 131.211 [Switz.]).

over the other branches of government.¹⁸⁶ As a rule, the parliaments exercise high supervision (*Oberaufsicht*) of the judiciary,¹⁸⁷ whereas supervision of the courts of first instance is administered either by higher courts¹⁸⁸ or by judicial councils, provided that such bodies exist.¹⁸⁹ In addition, most judges are elected (and re-elected) by parliament (if not by popular vote),¹⁹⁰ and the main budgetary power is vested in the legislative branch.¹⁹¹ If any, the executive branch has only limited formal influence on the judiciary, notably in cantons where court budgets are administered by the ministry of justice. In theory, undue influence can occur in the context of any of these functions. This is hardly ever the case in practice, though. Neither the legislative nor the executive branch has the power to overrule judicial decisions or to interfere with judicial proceedings, as high supervision is restricted to the formal administration of justice and clearly does not refer to judicial decisions.¹⁹² However, the fact that judges in Switzerland are elected for a limited term of office after which they need to be re-elected poses a certain threat to ju-

¹⁸⁶ According to Article 148 section 1 BV, the *Bundesversammlung* (the Federal Assembly) is the highest federal authority; see e.g. J.-F. Aubert, *Die schweizerische Bundesversammlung von 1848 bis 1998* (1998), or U. Zimmerli, *Bundesversammlung*, in: D. Thürer/J.-F. Aubert/J. P. Müller (eds.), *Verfassungsrecht der Schweiz*, 1027, at 1028-1029, para. 2 (2001).

¹⁸⁷ For the federal courts see Article 169 section 1 BV; for an overview see Tobler (note 34), at 7690-7726; Béguelin/Hess/Schwab (note 34), at 7625-7640. See also Mastronardi, Art. 169 BV, in: St. Galler Kommentar (note 3); A. Tobler, *Die parlamentarische Oberaufsicht über die eidgenössischen Gerichte: Eine aktuelle Untersuchung der Geschäftsprüfungskommission des Ständerates*, 3 *Parlament – Parlement – Parlamento* 13 (2002).

¹⁸⁸ For the Federation see Article 15 section 1 subsection a BGG, Article 3 SGG (Federal Criminal Court), Article 3 VGG (Federal Administrative Court), Article 3 PatGG (Federal Patent Court) and *Aufsichtsreglement des Bundesgerichts* vom 11. September 2006 (AufRBGer) (Federal Supreme Court Regulation on the Supervision of Courts of First Instance) 11 September 2006, SR 173.110.132 (Switz.).

¹⁸⁹ See *supra* B. I. 2. Judicial Council; see also Zappelli (note 92), at 492.

¹⁹⁰ See *supra* B. II. 2. The Process of Judicial Selection.

¹⁹¹ See *supra* B. I. 1. Organs in Charge of the Administration of the Judiciary.

¹⁹² Article 26 section 4 ParlG; see Kiener (note 1), at 299-300; Mastronardi, Art. 169 BV, in: St. Galler Kommentar (note 3), at para. 20.

dicial independence, and even more so if the electing body is also vested with the power of supervision.¹⁹³

II. Judgments

1. Basis

Judgments are based on law, according to the rule of law enshrined in Article 5 section 1 Federal Constitution.¹⁹⁴ In addition, Article 191c Federal Constitution states that in their adjudicative activity judicial authorities are independent and subject only to the law.¹⁹⁵

2. Practice

There are no overall statistics on acquittals. The annual report of the Federal Supreme Court contains elaborate statistics on the number of appeals dismissed for formal and for material reasons and on the number of appeals approved.¹⁹⁶ Similar statistics are published in the annual reports of the cantonal courts.¹⁹⁷

3. Structure

Whereas the formal requirements of a decision are governed by statutory procedural law,¹⁹⁸ the law does not determine how a judgment is to be written. However, the right to be heard as guaranteed in Article 29 section 2 Federal Constitution according to the established Federal Su-

¹⁹³ Kiener (note 1), at 285-289 and at 257-258. See *supra* B. II. 3. Length of Office and Reappointment.

¹⁹⁴ Biaggini (note 22), Art. 5, at paras. 7 and 12; Y. Hangartner, Art. 5 BV, in: St. Galler Kommentar (note 3), at paras. 5-29.

¹⁹⁵ See Steinmann, Art. 191c BV, in: St. Galler Kommentar (note 3).

¹⁹⁶ Geschäftsbericht des Bundesgerichts (note 180), at 18-31.

¹⁹⁷ See e.g. Geschäftsbericht des Obergerichts des Kantons Bern, at 22 (2008), available at <http://www.jgk.be.ch/site/og_geschaeftsbericht2008.pdf>.

¹⁹⁸ According to Arts. 34-35 VwVG for instance, public law decisions must be issued in written form and must be reasoned; furthermore, they must include instruction on the right to appeal. See also Article 238 ZPO and Article 357 StPO.

preme Court case law embodies the right to a reasoned judgment.¹⁹⁹ The Federal Supreme Court has developed differentiated standards on how a judgment must be reasoned in order to comply with the requirements laid down by the constitution. Notably, courts are obliged to consider the substantial arguments brought forward by the litigants and must disclose all arguments relevant for the decision.²⁰⁰ These standards are usually duly followed in practice. If a judgment is not reasoned in accordance with the requirements laid down by the constitution, it may be challenged in any proceedings for infraction of Article 29 section 2 Federal Constitution.²⁰¹

4. *Public Access*

Public access to judgments is determined by statutory procedural law in accordance with the requirements of international law (Article 6 section 1 ECHR, Article 14 section 1 CCPR) and federal constitutional law (Article 30 section 3 Federal Constitution).²⁰² As a minimum, court rulings (the title of the judgment and the judgment itself, but not the grounds of the decision) must be displayed to the public for 30 days at the court registry.²⁰³ Furthermore, the courts are formally obliged by

¹⁹⁹ Among others see R. Kiener/W. Kälin, *Grundrechte*, at 425-426 (2007); Müller/Schefer (note 129), at 885-892.

²⁰⁰ Among others see BGE 129 I 232, cons. 3.2 at 236; BGE 126 I 97, cons. 2a at 102; M. Albertini, *Der verfassungsmäßige Anspruch auf rechtliches Gehör im Verwaltungsverfahren des modernen Staates: eine Untersuchung über Sinn und Gehalt der Garantie unter besonderer Berücksichtigung der bundesgerichtlichen Rechtsprechung*, at 360-369 (2000); Kiener/Kälin (note 199), at 421; Müller/Schefer (note 129), at 868-869.

²⁰¹ For an example see BGE 131 II 271, cons. 11.7.1 at 303.

²⁰² For an overview see H. Aemisegger, *Öffentlichkeit der Justiz*, in: P. Tschannen (ed.), *Neue Bundesrechtspflege, Auswirkungen der Totalrevision auf den kantonalen und eidgenössischen Rechtsschutz*, 375, at 379-393; U. Saxer, *Vom Öffentlichkeitsprinzip zur Justizkommunikation*, I *Zeitschrift für schweizerisches Recht (ZSR)* 459 (2006); Steinmann, *Art. 30 BV*, in: *St. Galler Kommentar* (note 3), at paras. 28-40.

²⁰³ Article 30 section 3 BV; for the Federal Supreme Court see Article 59 section 3 BGG and Article 60 BGerR; for the Federal Administrative Court see Article 42 VGG. See also BGE 133 I 106, cons. 8.1-8.2 at 107-108; Biaggini (note 22), *Art. 30*, at para. 20; S. Heimgartner/H. Wiprächtiger, *Art. 59*, in: *BSK BGG* (note 14), at paras. 30-34 and 76-82.

statutory procedural law not only to grant individual notice of their activities, but also to inform the public in an active manner about their jurisdiction.²⁰⁴ Consequently, both the federal courts and a number of cantonal courts have set their proper information standards, either in administrative regulations on court organization²⁰⁵ or in specific administrative information regulations (*Informationsreglemente*).²⁰⁶ The Federal Supreme Court and the Federal Administrative Court publish all material decisions on the court website, whereas the Federal Criminal Court publishes a selection of leading decisions.²⁰⁷ The online databases of these three courts offer advanced research tools which enable the user to search both within the integral text and through meta-data such as key words or legal norms.²⁰⁸ Access is not restricted to specific users and is free of charge. In addition, the Federal Supreme Court database offers an expert search tool that is subject to a charge. Furthermore, both the Federal Supreme Court and the Federal Administrative Court publish a selection of leading cases in their official print journals which are available on subscription.²⁰⁹ At cantonal level, the standards vary considerably. Most cantonal courts publish a selection of their decisions on the court website.²¹⁰ In certain cantons, there are specialized journals

²⁰⁴ Article 27 section 1 BGG (Federal Supreme Court); Article 29 section 1 VGG (Federal Administrative Court); Article 25 section 1 SGG (Federal Criminal Court), Article 25 PatGG (Federal Patent Court); for the cantons see Article 54 section 1 ZPO. See P. Tschümperlin, Art. 27, in: BSK BGG (note 14), at paras. 2-3.

²⁰⁵ For the Federal Supreme Court see BGerR; for the Federal Criminal Court see *Reglement für das Bundesstrafgericht*.

²⁰⁶ For the Federal Administrative Court see *Informationsreglement für das Bundesverwaltungsgericht* (Administrative Court Information Statute) 21 February 2008, SR 173.320.4 (Switz.).

²⁰⁷ For the Federal Supreme Court see Article 59 section 3 BGG and Article 59 BGerR; for the Federal Administrative Court see Arts. 5 and 6 *Informationsreglement für das Bundesverwaltungsgericht*. For the publication practice of the Federal Supreme Court see P. Tschümperlin, *Öffentlichkeit der Entscheidungen und Publikationspraxis des Schweizerischen Bundesgerichts*, 99 SJZ 265 (2003).

²⁰⁸ For the Federal Supreme Court see <<http://www.bger.ch>>, for the Federal Administrative Court see <www.bundesverwaltungsgericht.ch>, for the Federal Criminal Court see <<http://www.bstger.admin.ch>>.

²⁰⁹ For the Federal Supreme Court see Article 58 BGerR; for the Administrative Court see Article 7 *Informationsreglement für das Bundesverwaltungsgericht*.

²¹⁰ See also Zappelli (note 92), at 497.

subject to subscription publishing a selection of leading cantonal court decisions,²¹¹ while other cantonal courts publish their leading decisions in their annual reports.²¹²

If there are court proceedings, they are open to the public.²¹³ Courts usually publish the dates of court proceedings on their websites.²¹⁴ The media and the public may attend the proceedings, but do not have access to the files²¹⁵ and may be excluded if substantial public or private interests are at stake.²¹⁶ However, not all judicial decisions are delivered in a court setting with the judges hearing the case publicly. While this is generally the case with criminal proceedings²¹⁷ and civil law proceedings,²¹⁸ the Federal Supreme Court and the federal courts of first instance typically decide by written proceedings;²¹⁹ the same is true for the cantonal administrative courts.²²⁰ Court proceedings are by excep-

²¹¹ See e.g. Bernische Verwaltungsrechtssprechung BVR, available at <<http://www.ebvr.ch>>, publishing scholarly papers on administrative law matters along with selected decisions of the Bern Administrative Court.

²¹² For instance the Zurich Court of Cassation or the Zurich Administrative Court.

²¹³ Article 59 BGG. For the cantons see Article 54 section 2 ZPO and Article 67 section 1 StPO. See also Biaggini (note 22), Art. 30, at paras. 17-18; Heimgartner/Wiprächtiger, Art. 58, in: BSK BGG (note 14), at para. 6 and Heimgartner/Wiprächtiger, Art. 59, in: BSK BGG (note 14), at para. 35.

²¹⁴ Zappelli (note 92), at 503. The Federal Supreme Court ruled that it is constitutional to inform the public via the press of these dates, see decision 1P.347/2002, cons. 3.2 (25 September 2002).

²¹⁵ Zappelli (note 92), at 503.

²¹⁶ See e.g. Article 59 section 2 BGG (Federal Supreme Court). For the cantons see Article 54 section 3 and 4 ZPO (civil procedure); Article 68 section 1 StPO (criminal procedure). See also Heimgartner/Wiprächtiger, Art. 59, in: BSK BGG (note 14), at paras. 53-75.

²¹⁷ For the cantons see Article 67 section 1 StPO; for the Federal Criminal Court see Article 30 SGG.

²¹⁸ Article 54 ZPO.

²¹⁹ Article 58 BGG (Federal Supreme Court); Article 40 section 1 VGG (Administrative Court); Article 30 SGG (Federal Criminal Court).

²²⁰ E.g. Article 31 Bern Law on Administrative Procedure; see also Article 54 ZPO and Arts. 67-70 StPO.

tion held if the law requires or if the court decides to debate in public.²²¹ In practice, there are hardly any impediments to public and media access.²²² Journalists accredited to the court have special rights such as access to rooms generally not open to the public, or privileged access to the database of the court; in addition, they are actively informed by the courts about the dates and issues of impending court hearings or they receive abstracts of the facts of the case, etc.²²³ If a case attracts considerable public attention the number of visitors may be restricted,²²⁴ although in exceptional cases courts can temporarily move to provisional court premises in order to meet the demands of the media and the public. The media are generally not allowed to take pictures or to broadcast during court proceedings.²²⁵

III. Improper Influence on Judicial Decisions

From an outside perspective there is no evidence that judicial decisions have been unduly influenced by senior judges, prosecutors, government officials or private interests. It can happen, though, that politicians in public critically comment on judicial decisions, and on a few occasions following a specific trial politicians have openly announced that they would oppose the re-election of the judges involved.²²⁶ Since judges in

²²¹ Article 58 section 1 BGG; Heimgartner/Wiprächtiger, Art. 58, in: BSK BGG (note 14), at paras. 6-31 and Heimgartner/Wiprächtiger, Art. 59, in: BSK BGG (note 14), at para. 41.

²²² F. Zeller, *Zwischen Vorverurteilung und Justizkritik: Verfassungsrechtliche Aspekte von Medienberichten über hängige Gerichtsverfahren* (1998); see also M. Heer/A. Urwyler (eds.), *Justiz und Öffentlichkeit – Justice et public* (2007).

²²³ See e.g. *Richtlinien betreffend die Gerichtsberichterstattung am Bundesgericht* (Federal Supreme Court Guidelines for the Media) 6 November 2006, SR 173.110.133 (Switz.), or Arts. 12-16 Administrative Court Information Statute; the cantonal court guidelines for the media are published in Heer/Urwyler (note 222), at 149-258.

²²⁴ Article 68 section 1 subsection b StPO.

²²⁵ Article 62 BGerR (Federal Supreme Court); Article 16 *Reglement für das Bundesstrafgericht*; Article 69 StPO; Heimgartner/Wiprächtiger, Art. 59, in: BSK BGG (note 14), at paras. 48-51.

²²⁶ For examples see Biaggini (note 22), Art. 88, at para. 13; Zappelli, *Le juge et le politique* (note 42), at 117.

Switzerland do not have life tenure, such behaviour endangers judicial independence, notably if it stems from members of parliament, as in the Federation and in a great number of cantons the parliament is the body responsible for the re-election of judges. There are no signs that such incidents have had a chilling effect on the judges involved; however, media and scholars have critically commented on these threats to judicial independence.²²⁷ Although media reporting of a trial can be intensive, it is widely considered as fair. Hitherto, no court proceedings have ever been declared void due to unfair media coverage.

In recent decades, to the best of my knowledge, there has been only one conviction of a judge for corruption (Article 322ter Federal Criminal Code).²²⁸ *Ex parte* communication is formally forbidden by the statutory procedural law.²²⁹ The right to a fair trial (Article 29 Federal Constitution) and the right to an independent and impartial court (Article 30 section 1 Federal Constitution) are additional factors precluding improper influence on judicial decisions.

IV. Security

Although the standards of court security differ considerably among the courts, security is in general regarded as sufficient by the judges. While access to the federal courts and to most cantonal courts is guarded, in certain district courts the entrance is supervised, but by the registry, and visitors are only controlled by face check. As a rule, security guards or registrars are informed about the daily schedule of the court and the names of the parties who will seek entry during the day. In district courts, security gates, access badges and video surveillance are still not standard, although these safety measures are becoming more frequent. In many court buildings, there is no separate entrance for judges and

²²⁷ Among others see Kiener (note 1), at 285-287; Biaggini (note 22), Art. 88, at para. 13; Zappelli, *Le juge et le politique* (note 42), at 117-121; R. Kiener, *Sind Richter trotz Wiederwahl unabhängig?*, 5 *Plädoyer* 36 (2001); see also D. Strelbel, *Die Politiker richten es selber*, 11 *Die Weltwoche* (2003) (24 March 2003).

²²⁸ See *Corte delle Assise correzionali di Lugano ex parte Franco Verda* (27 July 2002).

²²⁹ “*Verbot des Berichtens*”, see e.g. § 84 *Gerichtsordnung des Kantons Schwyz* (Schwyz Law on the Organization of the Judiciary) 10 May 1974, 231.110 (Schwyz); § 129 *Zurich Law on the Organization of the Judiciary*; Hauser/Schweri (note 12), § 129.

court staff. If there is evidence that a party to a case may be violent, the police are present during trial, in plain clothes if appropriate. Most courts, offices and registries are equipped with alarm systems such as security buttons directly linked to the local police. Only in a few cantons are judges instructed how to behave in emergency situations or how to deal with aggressors. During their career most Swiss judges are sooner or later subject to threats, although a considerable number of judges reported to the author that they had never been threatened at all. Serious threats hardly ever occur and in small court districts and rural areas do not seem to happen at all. No physical assaults have been reported. However, there seems to be a certain tendency towards annoying or defaming judges, for instance by e-mails or telephone calls to their homes, by letters to the editors of local newspapers or by e-mail campaigns addressed to members of parliament (i.e. the body responsible for the supervision of judges). If serious threats occur, the police are informed and decide together with the judge concerned on the measures to be taken. In the very few incidents reported, offenders were arrested, or criminal proceedings were opened. In particular cases, judges were placed under police protection.

D. Ethical Standards

I. Code of Ethics for Judges

With the exception of the code of conduct adopted in the canton of Basel-Landschaft²³⁰ there are no codes of ethics for judges, either at cantonal or at federal level.²³¹ This fact does not put judicial independence into question as there are numerous statutory provisions for the safeguarding of judicial conduct and ethics. Above all, the statutory procedural laws regulate the situations in which a judge must withdraw from

²³⁰ *Verhaltenskodex der Richterinnen und Richter des Kantonsgerichts des Kantons Baselland*, available at <<http://www.baselland.ch/fileadmin/baselland/files/docs/gerichte/verhaltenskodex.pdf>>. See S. Gass, *Richterethik/Richterdeontologie – Überlegungen zu einer Rechtstheorie*, in: *Deutscher Richterbund* (ed.), *Justiz und Recht im Wandel der Zeit. Festgabe 100 Jahre Deutscher Richterbund*, 125-148 (2009).

²³¹ Zappelli (note 92), at 501.

a case.²³² These laws also set the basic rules of judicial conduct, such as for instance the duty to act in good faith.²³³ Furthermore, the law defines the standards on which additional occupation, such as working as a lawyer, trustee or notary, is incompatible with the judicial function²³⁴ and it sets out the activities which have to be disclosed by a judge when taking office, like for example being a member of the board of administration of a public or private corporation.²³⁵ In addition, the federal courts and most cantonal courts have passed administrative regulations on court organization matters which, among other questions, regulate the standards of decent attire of judges sitting in court²³⁶ or the procedures to be followed if conflicts occur among the judges or between judges and their staff.²³⁷

II. Training

Judges are not offered any institutionalised formal training on ethical standards before or after taking office.

²³² For the federal level see e.g. Article 34 BGG; for the cantons see Article 47 ZPO and Article 54 StPO.

²³³ Article 52 ZPO; Article 3 section 2 subsection a StPO.

²³⁴ See e.g. § 9 section 1 *Gerichtsorganisationsgesetz des Kantons Aargau* (GOG) (Aargau Law on Judicial Organization) 11 December 1984, 155.100 (Aargau): “[...] judges omit avocations that compromise the fulfilling of their official duties or that are suitable to jeopardize the confidence in their judicial independence. Notably, working as a lawyer, trustee or notary is forbidden.”

²³⁵ See e.g. § 3a Zurich Law on the Organization of the Judiciary or § 35 *Gerichtsorganisationsgesetz des Kantons Basel-Landschaft* (GOG) (Basel-Landschaft Law on Judicial Organization) 22 February 2001, 170 (Basel-Landschaft).

²³⁶ See e.g. Article 36 Administrative Court Statute; Article 15 Criminal Court Statute; Article 15 *Geschäftsreglement des Obergerichts des Kantons Bern* (Bern Cantonal Court Statute) 9 December 1996, 162.11 (Bern).

²³⁷ See e.g. Article 24 BGerR; Article 16 *Geschäftsreglement für das Bundesverwaltungsgericht*.

E. Supreme Court

One of the main concerns about the judicial independence of the Federal Supreme Court is the fact that Federal Supreme Court judges are elected for a period of only six years (Article 169 Federal Constitution), after which they are subject to re-election. Even though hitherto only once has a Federal Supreme Court judge applying for re-election been rejected by the Federal Assembly,²³⁸ judicial independence may be jeopardized by the possibility of not being re-elected and its influence on the decision-making process. However, the fact that the Federal Supreme Court does not have the competence to declare void statutory laws passed by the Federal Assembly²³⁹ may at least defuse the main threats to judicial independence which go along with the limited term of office.

F. Conclusion

In the past few years, judicial independence in Switzerland has been strengthened insofar as the principle of the separation of powers has been remodelled by diminishing the influence of the other branches of government on the judiciary, notably with regard to self-administration of the judiciary. Nevertheless, from an outside perspective, judicial independence may still seem frail, mainly because a considerable number of the judges are elected by popular vote. Furthermore, Swiss judges in fact are endorsed by a political party and do not have life tenure as they are elected for only a limited period of time. Where judges are elected by parliament, the system of a limited term of office is even more questionable due to the fact that the parliament in most cases is also in charge of the supervision of the judiciary and thereby competent to enact disciplinary sanctions. However, this system is deeply rooted within the Swiss constitutional design with its predominant emphasis on democratic accountability.²⁴⁰ Furthermore, there is a common understanding, also among legal scholars and judges, that in practice judicial inde-

²³⁸ The judge concerned immediately applied for the vacant seat in the by-election and was in fact elected in the next General Assembly plenary session a few weeks later, see Kiener (note 1), at 286, with further reference.

²³⁹ See Article 190 BV.

²⁴⁰ See also Zappelli, *Le juge et le politique* (note 42), at 110.

pendence in Switzerland is not put into question.²⁴¹ This view is shared by international surveys. According to the World Economic Forum's latest competitiveness report, for example, Switzerland's public institutions are rated among the most effective and transparent in the world (ranked 4th); the report explicitly stresses factors like an independent judiciary, a strong rule of law and strong accountability of the public sector.²⁴² According to the Global Corruption Report by Transparency International (2007), focusing on Corruption and Judicial Systems, Switzerland belongs to the world's top ten countries with regard to *de facto* judicial independence.²⁴³ Still, the Swiss judicial system is hardly appropriate to be taken as a role model for other countries, as it is narrowly intertwined with the specific and unique characteristics of the Swiss model of direct democracy, notably with regard to the selection, election and supervision of judges.

The most pressing issue of judicial independence remains the fact that judges are elected for only a limited period of time, after which they have to run for re-election.²⁴⁴ The remedial measures to be taken are available, as it would suffice to amend the Federal Constitution and the cantonal constitutions by introducing unlimited terms of office for

²⁴¹ Kälin/Rothmayr (note 17), at 180; see also P. Albrecht, Richter als (politische) Parteivertreter? 3 Justice – Justiz – Giustizia (2006), available at <<http://richterzeitung.weblaw.ch/content/edition.aspx?id=191>>; H. Seiler, Richter als Parteivertreter? 3 Justice – Justiz – Giustizia (2006), available at <<http://richterzeitung.weblaw.ch/content/edition.aspx?id=193>>; P. Abravanel, La déontologie du juge, 4 Aktuelle juristische Praxis (AJP/PJA) 421 (1995); P. Abravanel, Indépendance de la justice et efficacité du système judiciaire, 87 SJZ 274 (1991); Zappelli, Le juge et le politique (note 42), at 115-121.

²⁴² X. Sala-i-Martin/J. Blanke/M. Drzeniek Hanouz/T. Geiger/I. Mia/F. Pua, The Global Competitiveness Index: Prioritizing the Economic Policy Agenda, in: World Economic Forum (ed.), The Global Competitiveness Report 2008-2009, 3, at 11.

²⁴³ S. Voigt, Economic growth, certainty in the law and judicial independence, in: D. Rodriguez/L. Ehrichs (eds.), Global Corruption Report 2007 – Transparency International – Special Focus: Corruption in Judicial Systems, 24, at 25 (2007).

²⁴⁴ Kiener, Wiederwahl (note 227), at 37-40; Biaggini (note 22), Art. 188, at para. 13; Schweizer, Vorbemerkungen zur Justizverfassung, in: St. Galler Kommentar (note 3), at para. 14; S. Gass, Wie sollen Richterinnen und Richter gewählt werden? Wahl und Wiederwahl unter dem Aspekt der richterlichen Unabhängigkeit, 5 AJP/PJA 593, at 606-607 (2007); Raselli (note 76), at 39-41.

judges.²⁴⁵ Last but not least, the fact that judges in practice need to be, or after their election need to become, members of the political party endorsing them is considered among scholars and judges more and more incompatible with judicial independence.²⁴⁶

²⁴⁵ The Fribourg Constitution was amended accordingly in 2004, see Article 121 section 2 Fribourg Constitution; Zappelli, *Le juge et le politique* (note 42), at 97 and 99.

²⁴⁶ See, among others, T. Balmelli, *Quelques remarques sur l'exigence de réformer les procédures de désignation des juges: La controverse des contributions financières réclamées par les partis*, 3 *Justiz – Justice – Giustizia* (2006), available at <<http://richterzeitung.weblaw.ch/content/edition.aspx?id=192>>; N. Queloz, *Compléments récents apportés au droit pénal suisse de la corruption et développements relatifs aux relations entre juges et partis politiques*, 3 *Justiz – Justice – Giustizia* (2006), available at <<http://richterzeitung.weblaw.ch/content/edition.aspx?id=213>>.