Accountability of Local Governments – Legal Challenges

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Acronyms and Abbreviations

ACR	Annual Confidential Reports
ADB	Asian Development Bank
Art.	Article
BBl	Bundesblatt der Schweizerischen Eidgenossenschaft
BDC	Budget and Development Committee
BGE	Entscheidungen des Schweizerischen Bundesgerichts (amtliche Sammlung)
BGG	Bundesgesetz vom 17. Juni 2005 über das Bundesgericht (Bundesgerichtsgesetz; SR 173.110)
BPS	Basic Pay Scale
BSL	Budget System Law of 26 February 2002 and 19 December 2002 (Official Gazette of the Republic of Serbia Nos. 9/2002 and 87/2002)
BV	Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999 (SR 101)
BVR	Bernische Verwaltungsrechtsprechung
CCB	Citizen Community Boards
CCWR	Citizens' Campaign for Women's Representation
CESID	Centre for Free Elections and Democracy; Belgrade, Yugoslavia
cf.	Compare
CHF	Swiss Francs
CIDA	Canadian International Development Agency
cit.	Cited
DC	Deputy Commissioner

DCIC	District Citizen Information Centre
DCO	District Coordination Officer
DDC	District Development Committee
DDO	Drawing and Disbursing Officer
DO	District Officer
DSP	Devolution Support Program
DSP	Decentralisation Support Program
E.	Erwägung
ECHR	European Convention on Human Rights
ECP	Election Commission of Pakistan
ed.	Editor
EDO	Executive District Officer
EIROP	Essential Institutional Reform Operationalisation Program, Peshawar, Pakistan
EU	European Union
FILAG	Gesetz über den Finanz- und Lastenausgleich vom 27. November 2000 (BSG 631.1)
fn.	Footnote
FR	The North West Frontier Province Delegation of Powers under the Financial Rules and the Powers of Re-Appropriation Rules 2001 (Gazette Notification of 16 October 2001)
FRY	Federal Republic of Yugoslavia
FSC	Federal Shariat Court
GG	Gemeindegesetz vom 16. März 1998 (BSG 170.11)
GV	Gemeindeverordnung vom 16. Dezember 1998 (BSG 170.111)

ICCPR	International Covenant on Civil and Political Rights
ICG	International Crisis Group
IG	Gesetz über die Information der Bevölkerung vom 2. November 1993 (BSG 107.01)
IMWG	Intermunicipal Working Group
IREX	The International Research & Exchanges Board
IV	Verordnung über die Information der Bevölkerung vom 26. Oktober 1994 (BSG 107.111)
KV BE	Verfassung des Kantons Bern vom 6. Juni 1993 (BSG 101.1)
LCA	Law on Communal Affairs (Official Gazette of the Republic of Serbia, No. 17/97 and 42/98)
LFAI	Law on Free Access to Information of Public Importance (Official Gazette of the Republic of Serbia No. 120/2004)
LGO	The North West Frontier Province Local Government Ordinance 2001 (N.W.F.P. Ordinance No. XIV of 2001)
lit.	litera
LLE	Law on Local Elections of 13 June 2002 (Official Gazette of the Republic of Serbia No. 33/2002)
LPC	Law on Public Companies and Common Interest Activities (Official Gazette of the Republic of Serbia No. 25/2000 and 25/2002)
LSG	Law on Local Self Government of 26 February 2002 (Official Gazette of the Republic of Serbia No. 9/2002)
MDRB	Model District Government Rules of Business
MMA	Muttahida Majlis-e-Amal (United Council of Action; a coalition between religious-political parties in Pakistan)
MNA	Member of the National Assembly
MO	Municipal Officer

MPA	Member of the Provincial Assembly
MSP	Municipal Support Programme, Kraljevo, Serbia
n.	Number
nLSG	New Law on Local Self-Government of 29 December 2007 (Official Gazette of the Republic of Serbia No. 129/2997)
NRB	National Reconstruction Bureau
NUNS	Independent Association of Journalists of Serbia
NWFP	North-West Frontier Province
NWFP DRB	The North West Frontier Province District Government Rules of Business 2001 (dated Peshawar, 30 October 2001)
ODIHR	Office for Democratic Institutions and Human Rights
OECD	Organisation for Economic Cooperation and Development
op. cit.	Opus Cited
OrG	Gesetz vom 20. Juni 1995 über die Organisation des Regierungsrates und der Verwaltung (BSG 152.01)
OSCE	Organisation for Security and Co-operation in Europe
p.	Page
para.	Paragraph
PFC	Provincial Finance Commission
PO	Police Officer
s.	Section
SCTM	Standing Conference of Towns and Municipalities
SDC	Swiss Agency for Development Cooperation
SIGMA	Support for Improvement in Governance and Management in Central and East European Countries (joint initiative of

	EU and OECD)
SPS	Socialist Party of Serbia
SR	Systematische Sammlung des Bundesrechts
TAK	Tripartite Agglomerationskonferenz Bund - Kantone - Städte/Gemeinden
TIP	Technical Investment Proposal
TMA/UA	Tehsil Municipal Administration/Union Administration
TMO	Tehsil Municipal Officer
TO	Tehsil Officer
UNDP	United Nations Development Programme
VAT	Value Added Tax
Vol.	Volume
VRPG	Gesetz über die Verwaltungsrechtspflege vom 23. Mai 1989 (BSG 155.21)
ZBl	Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht
ZSR	Zeitschrift für Schweizerisches Recht

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- Constitution of the Islamic Republic of Pakistan of 1973 (Gazette of Pakistan, Extraordinary Part I, p. 195 et seqq, 12 April 1973)
- Legal Framework Order 2002 (Chief Executive's Order No. 24 of 2002; Gazette of Pakistan, Extraordinary Part I, p. 1031 et seq., 21 August 2000)
- The Constitution (Seventeenth Amendment) Act 2003 (Act No. III of 2003; Gazette of Pakistan, Extraordinary Part I, p. 149 et seq., 31 December 2003)
- Freedom of Information Ordinance 2002 (Ordinance No. XCVI of 2002)
- The North West Frontier Province Local Government Ordinance 2001 (N.W.F.P. Ordinance No. XIV of 2001)
- The North West Frontier Province Local Government Election Ordinance 2000 (N.W.F.P. Ordinance No. VI of 2000)
- The North West Frontier Province Local Government Election Rules 2000 (dated Peshawar, 5 October 2000)
- The North West Frontier Province Budget Rules of District Governments (DGs) and Tehsil Municipal Administration (TMAs) 2003 (dated Peshawar, 12 August 2003)
- The North West Frontier Province District Government Rules of Business 2001 (dated Peshawar, 30 October 2001)
- The North West Frontier Province Tehsil Municipal Administration Rules of Business 2001 (Peshawar, 4 September 2001)

- The North West Frontier Province Local Councils Model Conduct of Business and Meetings By-Laws 2001 (dated Peshawar, 30 October 2001)
- The North West Frontier Province Local Government Commission (Conduct of Business) Rules , 2003 (dated Peshawar, 29 September 2003)
- The North West Frontier Province Delegation of Powers under the Financial Rules and the Powers of Re-Appropriation Rules 2001 (Gazette Notification of 16 October 2001)

Serbia

- Constitutional Charter of the Union of Serbia and Montenegro of 4 February 2003 (Official Gazette of the Union of Serbia and Montenegro No. 1/03)
- Charter on Human and Minority Rights and Civil Liberties of 28 February 2003 (Official Gazette of the Union of Serbia and Montenegro No. 6/2003)
- Constitution of the Republic of Serbia of 28 September 1990 (Official Gazette of the Republic of Serbia No. 1/90)
- Constitutional Law on the Implementation of the [new] Constitution of the Republic of Serbia of 10 November 2006 (Official Gazette of the Republic of Serbia No. 98/2006)
- Law on Local Self-Government of 26 February 2002 (Official Gazette of the Republic of Serbia No. 9/2002)
- [new] Law on Local Self-Government of 29 December 2007 (Official Gazette of the Republic of Serbia No. 129/2997)
- [old] Law for the General Principles of Local Self-Government of 11 November 1999 (Official Gazette of the Republic of Serbia No 49/99)
- Law on Local Elections of 13 June 2002 (Official Gazette of the Republic of Serbia No. 33/2002)

- Law on Free Access to Information of Public Importance (Official Gazette of the Republic of Serbia No. 120/2004)
- Budget System Law of 26 February 2002 and 19 December 2002 (Official Gazette of the Republic of Serbia Nos. 9/2002 and 87/2002)
- Law on Public Companies and Common Interest Activities (Official Gazette of the Republic of Serbia No. 25/2000 and 25/2002)
- Law on Communal Affairs (Official Gazette of the Republic of Serbia, No. 17/97 and 42/98)
- Law on the Organization of Courts of 8 November 2001 (Official Gazette of the Republic of Serbia No. 63/2001)
- Statute of the Municipality of Kraljevo of 31 May 2002 (Official Gazette of the Municipality of Kraljevo No. 13/04)
- Decision on the Municipal Council of the Municipality of Kraljevo of 5th March 2004 (Official Gazette of the Municipality of Kraljevo No. 011-4/2004)
- Rules of Procedure on the Work of the Municipal Council of the Municipality of Kraljevo of 4th February 2004 (Official Gazette of the Municipality of Kraljevo No 06-5/2004-VII)
- Rules of Procedure of the Municipal Assembly of Kraljevo of 29 June 2004 (Official Gazette of the Municipality of Kraljevo No. 110-7/2004-I)
- Decision on a Civil Defence Attorney of the Municipality of Kraljevo of 24 February 2005 (Official Gazette of the Municipality of Kraljevo 011-4/2005-I)

Switzerland

- Bundesverfassung der Schweizerischen Eidgenossenschaft (Federal Constitution), adopted on 18 April 1999 (SR 101)
- Bundesgesetz über das Öffentlichkeitsprinzip der Verwaltung (Federal Public Transparency Act), adopted on 17 December 2004 (SR 152.3)
- Bundesgesetz über das Bundesgericht (Law on the Federal Supreme Court), adopted on 17 June 2005 (SR 173.110)
- Verfassung des Kantons Bern (Constitution of the Canton of Bern), adopted on 6 June 1993 (BSG 101.1)
- Gesetz über die Information der Bevölkerung (Public Information Act of the Canton of Bern), adopted on 2 November 1993 (BSG 107.01).
- Verordnung über die Information der Bevölkerung (Public Information Ordinance of the Canton of Bern), adopted on 26 October 1994 (BSG 107.111).
- Gesetz über die Verwaltungsrechtspflege (Law on Administrative Procedure of the Canton of Bern), adopted on 23 May 1989 (BSG 155.21)
- Gemeindegesetz des Kantons Bern (Law on Municipalities of the Canton of Bern), adopted on 16 March 1998 (BSG 170.11)
- Gemeindeverordnung (Ordinance on Municipalities of the Canton of Bern), adopted on 6 December 1998 (BSG 170.111)
- Gesetz über den Finanz- und Lastenausgleich des Kantons Bern (Law on Equalization of Finances and Charges of the Canton of Bern), adopted on 27 November 2000 (BSG 631.1).

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INTRODUCTION

1. Good governance, accountability and decentralisation

Over the past decade, accountability has become an important issue in the development context. Indeed, it has moved from a rather technical element (the term was mainly used with regard to bookkeeping and accounting in the 1980s)[1] to *the overarching principle of good governance.* UNDP, for example, stated, in its preliminary remarks to the Human Development Report 2002 ('Democracy in a Fragmented World'), the following:[2]

> 'It has become common in recent years to hear policy-makers and development experts describe good governance as the "missing link" to successful growth and economic reform in developing countries. But attention has focused almost exclusively on economic processes and administrative efficiency. The central message of this Report is that effective governance is central to human development, and lasting solutions need to go beyond such narrow issues and be firmly grounded in democratic politics in the broad sense. In other words, not democracy as practiced by any particular country or group of countries but rather a set of principles and core values that allow poor people to gain power through participation while protecting them from arbitrary, unaccountable actions in their lives by governments, multinational corporations and other forces. That means ensuring that institutions and power are structured and distributed in a way that gives real voice and space to poor people and creates mechanisms through which the powerful – whether political leaders, corporations or other influential actors – can be held *accountable* for their actions.'

THE WORLD BANK even dedicated its whole World Development Report of the Year 2004 ('making services work for poor people') to the topic of accountability:[3]

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1 MULGAN, p. 6, with reference to NORMANTON, E.L. (1966), *The Accountability and Audit of Governments*.

2 UNDP, HDR 2002, p. vi.

3 THE WORLD BANK, WDR 2004, p. 46.

> 'One size does not fit all' is a truism but not very helpful. Everyone wanting to improve services for poor people [...] asks: What size fits me? [...] To evaluate alternative arrangements for the provision of services requires an encompassing framework - to analyze which of the many items on the menu of service reform is right for the time, place, and circumstance. For any individual service transaction to be successful, there needs to be a frontline provider who is capable, who has access to adequate resources and inputs, and who is motivated to pursue an achievable goal. The general question: what institutional conditions support the emergence of capable, motivated frontline providers with clear objectives and adequate resources? The answer: successful services for poor people emerge from institutional relationships in which the actors are *accountable* to each other. (Please be patient, the rest of the Report works out exactly what that sentence means).'

The following excerpts from a recent publication of THE WORLD BANK on the topic show, that the concept has kept its important place in the governance-discussion until these days:[4]

> 'The dysfunctionality of public sector governance is considered to be the root cause of corruption, inefficiency, and waste in developing countries. This dysfunctionality is attributed to a lack of citizen empowerment to hold the government to account.'

The meaning of the concept is not very clear, however, as has been pointed out by many.[5] I argue that both, the popularity as well as the missing contours of the concept may be explained by the fact that it addresses fundamental questions in different academic disciplines. Simply put, we can discern two positions:

- The *economic view* presupposes that a good state is a state where services are delivered efficiently to the citizens. Accountability in this view is often equated with the problem of shaping incentives in a principal-agent-relationship, i.e. the question as to which incentives lead the public sector to fulfil its tasks efficiently. Two levels are distinguished, the macro- and the micro-level: whilst at macro-level the focus is on the management of the public sector (including financial control) and the main quests are the separation

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4 ANWAR SHAH, Overview, in: THE WORLD BANK, Performance Accountability, p. 1.

5 See, e.g., MULGAN, p. 5, GOETZ/JENKINS, p. 8, FLINDERS, p. 9, BEHN, p. 4.

of the strategic and operative levels and the steering with targets instead of budgets, at micro-level attention is paid to the phenomenon of 'demand'. Two channels are available here for influencing service delivery: on the one hand, competition between different service providers enables the 'clients' to change the provider if they are not satisfied ('exit') and, on the other hand, 'clients' can articulate their preferences with regard to service delivery ('voice').[6]

- The *political science view* is mainly interested in the question of how to control public power. Departing from the idea of 'sovereignty of the people', the argument is made that public power is legitimate only if it is exercised in the public interest and if it is made accountable to the people. The focus here is on one side on the control of power through the citizens and the civil society using elections and other means of participation or political influence ('voice') and on the other side on the issue of power control within the state through mechanisms such as the division of powers, 'checks and balances' and the rule of law.[7]

Both views converge in that they start from the assumption that accountability is inherently linked with a prior act of delegation as well as with regard to the important role that the local population, using its 'voice', is supposed to play, be it as a 'citizen' or as a 'client'. Moreover, during the last few years both views have come closer to each other as the economic view recognises more the central role of the political process[8] and the political science view considers the question of 'putting the incentives right' more as well. Furthermore, both views agree in principle on the process to embark on, at least in developing and transition countries: state power shall be decentralised to the local

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6 See, e.g., THE WORLD BANK, Governance and Development, Washington D.C., 1992. On the concepts of voice and exit see PAUL, SAMUEL. *Does voice matter? - For Public Accountability, Yes.* The World Bank Policy Research Working Paper 1388, Washington 1994.

7 See, e.g., SCHEDLER/DIAMOND/PLATTNER, Introduction, p. 5; O'DONNELL, Institutionalization of Mistrust, p. 43 et seq.

8 See, e.g., THE WORLD BANK, WDR 2004, p. 78 et seq.

level, as this enables the local citizenry to exert more 'client power' (economists) or to better control the rulers (political scientists).

It is estimated that in the year 2000, about 80% of developing and transition countries were experimenting with some form of decentralisation,[9] heavily supported – sometimes in the context of conditionality even pressured – through International Development Cooperation.[10] The success with regard to improving governance and, more generally, helping the poor, has been mixed, however.[11]

2. Why analyse the legal aspects of accountability?

The concept of accountability addresses not only fundamental questions in economics and in political science but also in jurisprudence. Indeed, the insight that state power must be accountable and that state power shall not be absolute power is the underlying idea of constitutionalism:

> 'That *political power* is to be accounted for is a *fundamental principle of the modern state based on the rule of law*. The triumphant success of constitutionalism was a triumphant success of this principle, namely of the idea

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9 WORK, ROBERTSON. Overview of Decentralisation Worldwide: A Stepping Stone to Improved Governance and Human Development, 2nd International Conference on Decentralisation, Federalism: The Future of Decentralizing States? 25 - 27 July 2002, Manila, Philippines, available at http://www.undp.org/governance/docs/DLGUD_Pub_overview-decentralisation-worldwide-paper.pdf, p. 9 (accessed 9 July 2009).

10 According to the Development Assistance Committee (DAC) of the OECD, over the past two decades of the 20th century, 'decentralisation and local governance support have become major fields within international development co-operation' (OECD/DAC, Lessons Learned on Donor Support to Decentralisation and Local Governance, DAC Evaluation Series, 2004, available at http://www.oecd.org/dataoecd/46/60/30395116.pdf (accessed 9 July 2009), p. 9).

11 See PRANAB BARDHAN/DILIP MOOKHERJEE, Decentralization, corruption and government accountability, in SUSAN ROSE-ACKERMAN (ed.), International Handbook on the Economics of Corruption, Cheltenham/Northampton Massachusetts 2006, p. 161 et seq., with references.

> that there ought to be no 'free', 'absolute' power of the state and of state organs.'[12]

Yet, the community of legal scholars is not participating substantively in the on-going discussion on how to enhance accountability in developing and transition countries. This is rather surprising, bearing in mind that the concept is now recognized as one of the most important elements of good governance and that – in a '*Rechtsstaat*' – the principles of good governance sooner or later need to be translated into legal rules. Of course this is not to say that good laws will automatically lead to good governance, but good governance simply is not possible without good laws. An enabling legal framework is – in other words – considered here as a necessary, though not sufficient condition for good governance.[13]

The main goal of this study is to develop a conceptual framework for dealing with the most important *legal* challenges resulting from the quest for accountability in the context of a decentralised (or non-centralised) state.

3. Approach and structure of the study

Accountability is a vague concept, and ideas of a good state diverge strongly. As a first step it is therefore important to clarify how the term accountability is to be understood in this study. It must also be clarified which basic model is to be used in the following as a premise for a good state. Hence, in Part 1 the most important elements of accountability will, at first, be theoretically deduced and demarcated. On the basis of this preliminary definition and drawing on a simplified

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12 SALADIN, Verantwortung, p. 91, translation by the author; see also KONRAD HESSE, *Die verfassungsrechtliche Stellung der politischen Parteien im modernen Staat*, VVdStRL H.17, Berlin - New York 1959, p. 11 et seqq., in particular p. 42: 'The Constitution does not know any power without accountability.' (translation by the author).

13 See, for a similar concept on the role of law in the development context OSCE/ODHIR, *Democracy and Human Rights Assistance, Programmes Funded Through Extra-Budgetary Contributions*, Warsaw, December 2004, p. 40 (under 'Legislative Reform Assistance Programme').

model of a 'good state' a framework for the investigation of the legal challenges, which result from the demand for accountability in a decentrally organised state, will be developed.

In *Part 2* the main features of the system of local self-government of three different countries will be introduced briefly. The developing country Pakistan and the transitioning country Serbia have for some years now been working towards decentralising the formerly centralised and authoritarian ruled state in order to – among others – promote accountability. The industrialised country Switzerland stands out with its historically grown, extraordinarily far-reaching degree of decentralisation (or, more precisely, of non-centralisation) and a traditionally strong position of municipalities. While Switzerland is praised on the one hand as a flagship model of a good state, on the other hand the voices of critics are growing louder who question the controllability of this incredibly complex system.[14]

In *Part 3*, the legal framework for local self-government in these three countries shall serve as basis for development and illustration of the challenges that result from the quest for accountability, using the framework developed in Part 1. The result of these investigations will be presented in an obviously very simplified, but in return clearly arranged, checklist and is acknowledged in the course of brief concluding remarks at the end of this study.

For a better understanding of the system of local self-government and the reform context, field studies were conducted in the North-West Frontier Province of Pakistan (2004)[15] and in the municipality of

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14 Cf. for example the remarks by the federal chancellor of the time ANNEMARIE HUBER-HOTZ of 22 February 2006 before the new Helvetic Society and Chambers of Commerce in Basel, entitled 'Demokratie Schweiz - Vorzeigeobjekt oder überholtes Modell?', accessible at: http://www.news.admin.ch/message/index.html?lang=de&msg-id=5834 (accessed 18 August 2009).

15 The field study was carried out in June 2004 in Islamabad and Peshawar, Pakistan, with the kind support of the Swiss Agency for Development Cooperation (SDC) in Islamabad and the (SDC and UNDP-financed) Essential Institutional Reform

Kraljevo, Serbia (2005)[16] The results of these field studies are incorporated in this study in the form of illustrations (in Part 3). The legal situation in force at the time of the field studies is used as premise throughout. Major changes in the legal frameworks since then – to the extent of being available – will be mentioned briefly in the footnotes. As far as Serbia is concerned official translations were available only for a few legal texts. Most texts were translated into English through the municipal support programme (MSP).[17] For both field studies, literature was only considered if and to the extent of them being available in English.

As far as Switzerland is concerned, the legislation in the canton of Bern will be analysed. Only the main features relevant to the subject matter shall be set out, however. It is neither possible nor expedient to illustrate every detail in the course of this study. In part, therefore, the legal situation is presented in a simplified way and only specific issues are considered in greater depth; there is in no way any intent of exhaustiveness.

Finally, it must be pointed out that this thesis does not intend to systematically and comprehensively deal with all questions associated with the term accountability. The aim, rather, is to *conceptually capture the central elements of the term accountability.* Reductions and simplifications are deliberately accepted. The illustrations serve the purpose of illustrating, testing and deepening the conceptual framework, but should not create the impression that this is a comprehensive work of comparative law.

Operationalization Program (EIRPO) in Peshawar. The author would like to take this opportunity to express her gratitude for the support received there.

16 The field study was carried out in July 2005 in Kraljevo, Serbia, with the kind support of the Municipal Support Programme (MSP) in Kraljevo and the Swiss Agency for Development Cooperation (SDC) in Belgrade. The author would like to take this opportunity to express her gratitude for the support received there.

17 Municipal Support Programme, Kraljevo, Serbia.

PART 1: ACCOUNTABILITY - A THEORETICAL APPROACH

I. STARTING POINT: DELEGATION

1. The principal and the agent

We all know from our everyday experience that sometimes we must rely on others to do things we cannot do for ourselves because we have neither the time nor the knowledge that would be necessary for doing those things ourselves. In these situations, we mandate somebody whom we think is able and trustworthy to act on our behalf and in our best interest. For example, we take our car to a mechanic to repair it when it is broken, we go to the doctor when we are ill, we mandate a lawyer when we have a legal problem or an architect when we want to build a house. We (as principals) *delegate* the fulfilment of a task to a specialist (an agent). For this purpose we grant him or her some *powers* (e.g. to take decisions and spend money on our behalf) and we expect – in return – that he or she will use those powers in our best interest.

Yet, considering that we have neither the time nor the knowledge to control every single step our agent is undertaking on our behalf, what guarantee do we have that the agent really does act in our interest rather than in his or her own? Of course, we can simply trust the agent. But there is no guarantee that that trust will be enough. In many cases, it will not. The rational conclusion is that safeguards must be put in place in order to minimise the risks arising from delegation.[18] Different possibilities are at our disposal:

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18 The perils arising from delegation have been discussed in the economic literature as 'agency problems'. Given the possibility that agents may have different preferences from those of the principals and that principals may have incomplete information about their agents, principals may not get what they want from their agents (agency loss). Agency theory has identified two situations leading to agency loss: the principal may mandate bad agents (adverse selection) and/or, once the

We can exert some *ex-ante* control, which might consist of developing special selection methods that help minimise the risk that we choose 'bad types' of agents, thereby enhancing our trust in them (the problem of choosing 'bad types' has been addressed within the agency-theory as the problem of 'adverse selection').[19]

Once we have chosen our agent, we can insist on having some *ex-post* safeguards to make sure the agent does not abuse our trust, i.e. to make sure that he or she acts in accordance with our instructions (the problem that the agent, once having been mandated, might be trying to pursue his own interests rather than those of the principal has been addressed within the agency-theory as the problem of 'moral hazard').[20]

An important way of protecting our interests once the agent has been mandated is the right to '*call*' the agent '*to account*'.[21] This calling to account embraces the duty of the agent to provide information and eventually to explain and justify what he has done;[22] it renders the agent's actions *transparent* and forms the essential basis of accountability. But accountability embraces more than just the pursuit of transparency. As MULGAN puts it, 'agents must not only be "called" to account; they must also be *"held" to account*. Accountability is incomplete without effective rectification [...]. The principal must be able to have *remedies or sanctions* imposed on the agent as a part of the right of authoritative direction that lies at the heart of the accountability relationship.'[23]

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agent has been mandated, the agent may take actions which the principal would not otherwise approve (moral hazard). See LUPIA, p. 49.

19 See fn. 18.

20 See fn. 18.

21 MULGAN, p. 9.

22 MULGAN, p. 9 and SCHEDLER, p. 15.

23 MULGAN, p. 9 (emphasis added). While most of the authors consider the element of 'sanctions' as part of the concept of accountability, some explicitly exclude it. See e.g. FLINDERS, p. 11 et seq., who defines accountability as 'the condition of having to answer to an individual or body for one's actions' while he considers 'the condition of having to provide an account to an individual or body for one's

2. Delegation, accountability and incentives – two clarifications

While some have the tendency to treat all problems arising from delegation as problems of accountability,[24] this study focuses only on the second category of problems that has been mentioned above, i.e. on the problems of how to control the agent once he has been mandated. This is not to say that the existence of ex-ante controls is not equally important, but adverse selection problems are not considered here as part of the accountability-problem because they do not capture the typical elements of accountability.

A further clarification needs to be made with regard to the relationship between accountability and incentives: the fact that the agent knows in advance that he or she will be obliged to give an account of what he has done, and that she will eventually have to suffer punishment, creates an incentive for the agent to act in the principal's interest. Accountability is therefore often equated with the problem of how to create incentives for the agent to act in the principle's interest.[25] Not all situations that create incentives for B to act in the interest of A should however be considered as mechanisms of accountability: Rather it can be said that *mechanisms of accountability are one of the possibilities in creating incentives for B to act in A's interest, amongst others*.[26]

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action with the possibility of personal blame and/or sanction for the content of that account' as definition of responsibility (p. 13).

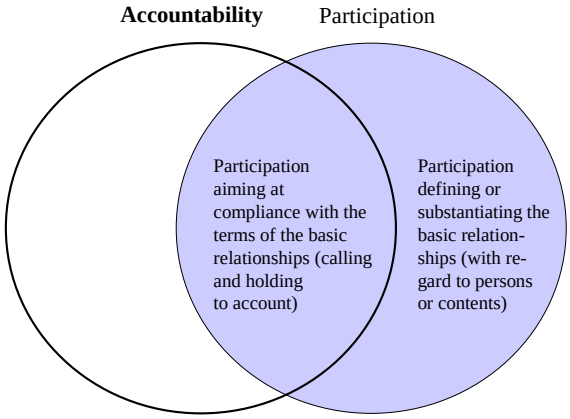
24 See, e.g. STRØM, p. 62 et seq.: 'Parliamentary accountability [...] refers to mechanisms by which agency loss may be contained [...] Strictly speaking, accountability focuses on the rights and sanctions (oversight) that the principal retains after he or she has contracted with the agent. Yet, in a broader sense principals can accomplish some of their control objectives even before delegating'.

25 See the references in: PRANAB BARDHAN/DILIP MOOKHERJEE, *Decentralization, corruption and government accountability*, in SUSAN ROSE-ACKERMAN, p. 161 et seqq.

26 Such as e.g. putting B in a situation of competition with a third party (C).

3. Accountability and participation

The understanding of accountability maintained here as a *means of ensuring compliance with rules defined in a 'basic relationship'*, i.e. the act where power has been delegated, allows accountability and participation to be conceptually distinguished: participation *can* be a mechanism of accountability insofar as it aims to ensure compliance. But it can also aim at substantiating the 'basic relationship' with regard to selection of agents (persons) or with regard to the content of the 'basic relationship' in more specific terms. In the second case, it is not a mechanism of accountability. A can meet his painter B to tell him that he wants his house to be painted red instead of green (as was agreed before). But he can also meet B to ask him why the house is painted red instead of green (as was agreed before). In the first case, A is substantiating the basic relationship, in the second case he is calling B to account.

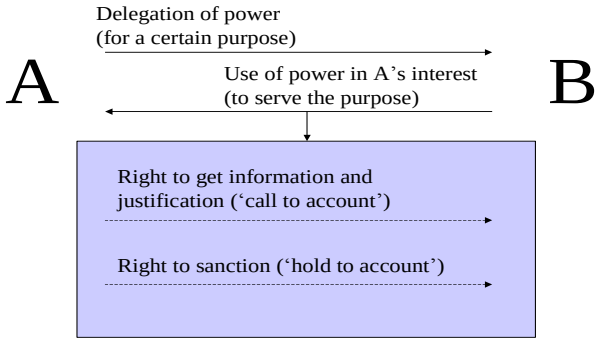


4. Accountability: a working definition

Accountability thus denominates a relationship between at least two subjects, A and B, where A has the *right to ask for information, justification and rectification* for what B has been doing, and B has the

corresponding duties of rendering an account and suffering punishment.[27]

It is evident that such a relationship can only exist where a prior act of delegation has taken place. Why should B otherwise accept the duties imposed on him? Accountability therefore *presupposes* a 'basic relationship' which is best conceived as a principal-agent relationship where A mandates B and therefore delegates power to B and B promises to use the delegated power in A's interest. But, as has already been said, accountability does not tackle all of the problems that might be related to such a delegation; in particular it does not tackle the problem of adverse selection. In addition, accountability is one possibility of creating incentives for B to act in A's interest, but not all incentives should be dealt with as issues of accountability.



This working definition is of course simplified; in practice, relationships of accountability can be much more complex. For example, if A wants to build a house but he has neither the time nor the knowledge to call the different builders to account, he might mandate a foreman with the task of controlling the builders on his behalf. In other words, A may delegate the task of calling the builders to account to a third person (C), who in turn is accountable to A for fulfilling this task

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27 This understanding of accountability is increasingly accepted in the development literature, see SCHEDLER, p. 13 et seq., GOETZ/JENKINS, p. 8 et seq.

according to the terms that govern the ‘basic relationship’ between A and C.

Many other constellations can be thought of, such as a contract between A and B for the benefit of a third party with the third party having the right to hold B to account, or the sub-delegation of some power by B to a third person with the third person being accountable to B. Moreover, A may choose to mandate more than one person with the fulfilment of different parts of the same task and at the same time with the tasks of holding each party accountable or vice versa. In all constellations, A will keep some (maybe only residual) mechanisms of accountability in his own hands, so as not to lose control over the delegated powers.

Finally, A does not need to be one single person. Many persons may delegate power to a few in order to achieve a common purpose. This constellation is dealt with in the next section.

II. ACCOUNTABILITY IN A 'GOOD STATE' – A SIMPLIFIED MODEL

The debate about the 'necessary ingredients' of good governance, which has run throughout the past decade, has brought about one insight that seems to be uncontested today; namely that the state should ultimately be *accountable to the people*.[28]

1. Delegation of power from the citizens to the state

A system where the state is made accountable to its citizens presupposes – at a theoretical or fictive level[29] – a 'basic relationship' between citizens and the state. According to this fiction, sovereign citizens *delegate* decision making powers (including the power to tax them) to some abstract 'offices of the state' and, in a second step, choose persons to fill these 'offices of the state'. Of course this is a normative rather than a positive model,[30] yet it is *the underlying idea of constitutionalism*[31] and helps the foundations of the accountability of the state (as a whole) and particularly of the elected representatives to the people to be understood.

With regard to accountability, the thought of the people empowering 'the state' and choosing the persons that have the authority to act in the name of 'the state' has two implications:

- Since public power is considered a form of delegated power and not a result of the alienation of original authority by the people, there are

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28 See e.g., THE WORLD BANK, WDR 2004 and UNDP, HDR 2002.

29 That 'the enterprise of setting up a people' must be treated simply as a hypothetical rather than a historical condition was recognised already by ROUSSEAU. KANT called it 'merely an idea of reason' (cited by LOUGHLIN, p. 105 fn. 41 and 42).

30 See, e.g. GINSBURG, p. 23.

31 See, e.g., LOUGHLIN, p. 46: 'Constitutionalism rests on the principle that constituent power resides in the people, who delegate a limited authority to government to promote the public good. Governors are presented as servants of the people, who are required to account for the powers entrusted to them.'

inherent limitations to the exercise of such power.[32] The 'documents' that set out the terms of the 'basic relationships' (i.e. in a state, the constitution, laws, bye-laws, etc.) generate *and at the same time limit the power of the state.*[33]

- Since 'all sovereigns are suspicious of their servants, and the sovereign people are no exception to the rule'[34], those persons that are chosen to represent the state (the 'rulers') do not have a carte blanche; they do not have full discretionary power. Instead, the rulers on one hand have to abide by the inherently limited powers that have been delegated to their 'office' (and that are agreed on in the framework of the 'basic relationship'). On the other hand, even when acting within the limits of their 'office', the rulers – as they are acting as 'trustees' or 'mandatees' of the people[35] – must always serve some kind of 'public interest', howsoever this may be defined.

One way for the ruled to make sure that the rulers will stick to the terms and act in the public interest, is to insist on having some mechanisms of accountability. As I have shown above, this includes:

- the right to be informed and to ask for justification; a good state is a *transparent* state: the citizens as ultimate principals need to have the possibility to know what their agents are doing with the power that has been transferred to them, in order to decide whether their agents deserve further trust or not;
- the right of citizens as ultimate principals to sanction their agents in case they either do not stick to the terms of their office (i.e. they do not act according to the terms fixed in the 'basic relationship'; I will label this *legal accountability*), or they do not act in the public interest (I will label this *political accountability*).

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32 LOUGHLIN, p. 79 (citing LOCKE).

33 LOUGHLIN, p. 161 et seq.

34 BEHN, p. 82, citing WOODROW WILSON, *The Study of Administration*, p. 213 .

35 See, on this distinction, SALADIN, p. 50 et seqq.

There may be other ways, as mentioned above, which might consist of sophisticated selection procedures that maximise the chance of only publicly minded agents being selected, or of creating (besides the threat of sanction) other incentives that may help to keep the agents 'in line' with the public interest. Those other ways are important, but are not considered here as mechanisms of accountability.

2. Accountability and the 'division of powers'

The powers that are being transferred from the citizens to a state are immense. If all powers would be delegated to one single person representing the state, it would be quite naive to expect that this single person would stick to the rules defined in the 'basic relationship'. The rights to call and to hold this person or actor to account would become an illusion, as the agent would have far more powers than the principal and would therefore probably disregard his accountabilities without having to bear any consequences. The principle of division of powers, i.e. of distributing public power between more than one actor, is therefore considered here as a *pre-requisite* of any system promising state accountability, but not as a *mechanism of accountability*.[36]

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36 Agreeing with MULGAN, p. 20: 'Some analyses of government accountability include as 'accountability' mechanisms those institutional devices that limit public power, such as the separation of powers between executive, legislature and judiciary or the federal division of powers between national and state governments [...]. One can also add the key extra-governmental institutions of a democratically effective civil society which help to constrain governments, for instance competitive markets and interest groups, as instruments of accountability [...]. In this way, all constitutional checks and balances and all politically influential social institutions come to count as means of making governments accountable and the term 'accountability' threatens to extend its reach over the entire field of democratic institutional design [...]. Laws and institutions that control institutions by clearly defining the functions of particular agencies, by dividing and constraining their powers or by subjecting them to regulatory supervision, may include accountability mechanisms as part of their procedures for enforcement. But they are not to be identified with these mechanisms and do not rely solely on them for their effect [...]. Accountability, though vital, is only one part of the regulatory and controlling agenda.'

Actors can be mandated with not only exercising the assigned powers, but also with the possibility of further delegating some of the powers (under certain conditions) and of holding other actors accountable. As long as such instruments involve the typical external scrutiny and/or the possibility to sanction, they are considered here as mechanisms of accountability.

3. A one-tier-accountability-model

Assuming a model of division of powers between legislative, executive and judicative bodies, from the above (II. 1) mentioned contractarian perspective, a 'good state' – i.e. a state that is accountable to the people – can be analogised to a *chain of delegation* from the citizens to their representatives, from the representatives to the elected executive officials,[37] and from the latter to the bureaucracy which, it is assumed, should deliver the politically 'ordered' services to the citizens as 'clients'.[38] The lines of accountability in the simplified model run in the opposite direction, i.e. from the bureaucracy to the elected executive officials to the representatives to the people.[39]

Citizens may *delegate* not only decision-making and taxing powers to different organs and representatives, but *also (parts of) the task of calling and holding the agents accountable:*

- The task to check that the public powers are exercised within the limits of the different mandates – i.e. the task to check that the 'rules of the game' are respected (*legal accountability*) – is normally delegated to the judiciary, whereas

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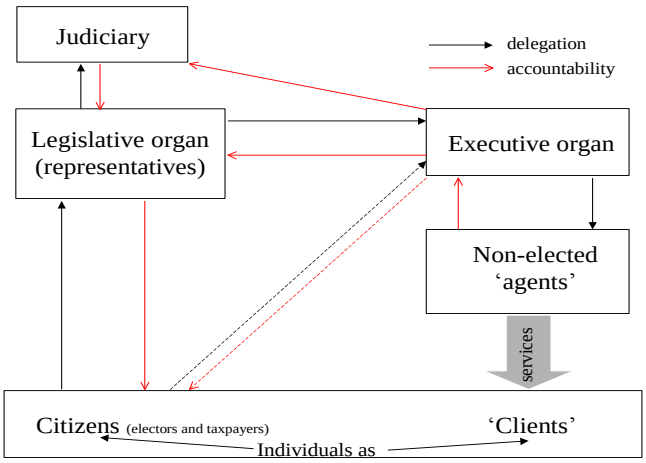
37 Some powers may directly be delegated from the citizens to the executive (e.g. by defining the mandate of the office of the executive in the constitution).

38 See MÜLLER/BERGMAN/STRØM, p. 20 et seq.; THE WORLD BANK, WDR 2004, p. 49; ADB et al., History, p. 25.

39 From a *legal* perspective, the 'chain of delegation' even holds in systems with direct election of the executive, as the mandate of the executive is continually being substantiated through the laws of the legislature (even if the persons to fill the office are elected directly by citizens).

- the right to hold the elected rulers politically to account (*political accountability*) rests (at least in a minimal sense) with the people, but parts of it can also be delegated (e.g. to the legislative organ).

Taking into account what has been said, a simplified model of delegation and accountability in a one-tier-state can be drawn:



Note that no direct delegation occurs between the bureaucracy and the citizens as 'clients'. Therefore, it is not appropriate to consider this relationship as one of accountability.[40] Citizens as clients do not have any instruments with which to *directly* hold the bureaucracy accountable. They can expect to get the politically 'ordered' services only if every single link in the chain of delegation remains in place, or when other circumstances, such as for example the competition between different providers of public services ('exit'), produce incentives for the bureaucracy to act in the interest of the citizens. Of course, citizens can 'help' other organs in the chain of delegation to impose accountability by raising their 'voice', e.g. by giving the elected executive officials feedback about the performance of the bureaucracy (hoping to convince the elected officials to hold the bureaucracy to

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40 This is contrary to the view of many, see, e.g., THE WORLD BANK, WDR 2004, p. 49.

account) or by referring their case to a court, which will then act (in the model as an agent of the legislative)[41] to hold the executive to account. Thus, while citizens can act as 'fire alarms'[42] in other accountability-relationships, they cannot directly hold the bureaucracy to account.

4. Accountability at the local level in a devolved system

Things get more complicated in a devolved political system[43], i.e. in the case where powers are divided not only horizontally between

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41 The judiciary could, alternatively, also be arranged as an agent of the citizenry.

42 Fire alarms in terms of MORENO/CRISP/SHUGART 'are third-party opportunities to reveal an agent's misdeeds to the agent's principal' (p. 96).

43 Decentralisation can occur in various forms or levels of intensity. A distinction can be drawn on the one hand between political, fiscal and administrative decentralisation, and between deconcentration, delegation and devolution on the other. These distinctions do not correspond to each other. According to SDC, Decentralisation and Local Governance, p. 4,

- '*political decentralisation* is the transfer of political power and decision-making authority to subnational levels such as elected village councils, district councils and state level bodies. Where such transfer is made to a local level of public authority that is autonomous and fully independent from the devolving authority, devolution takes place.
- *fiscal decentralisation* involves a level of resource reallocation to local government which would allow it to function properly and fund allocated service delivery responsibility, with arrangements for resource allocation usually negotiated between local and central authorities. The fiscal decentralisation policy would normally also address such issues as assignment of local taxes and revenue-sharing through local taxation and user and market fees.
- *administrative decentralisation* involves the transfer of decision-making authority, resources and responsibilities for the delivery of selected public services from the central government to other lower levels of government, agencies and field offices of central government line agencies. The most radical form of administrative decentralisation is devolution, with local government having full responsibility for hiring/firing of staff and assigning authority/responsibility for carrying our tasks. Deconcentration is the transfer of authority and responsibility from one level of the central government to another, with the local unit accountable to the central government ministry or agency which has been decentralised. Delegation, on the other hand, is the redistribution of authority and responsibility to local units of government or

different organs of one state level, but also vertically between different levels of the state. The local level usually does not function in isolation but within a framework of higher legislation, and the upper state tier not only defines the space of 'autonomy' within which the local level

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agencies that are not always necessarily branches, or local offices of the delegating authority, with the bulk of accountability still vertically directed upwards towards the delegating central unit.' (Emphasis added).

THE WORLD BANK defines the concepts of deconcentration, delegation and devolution as follows:

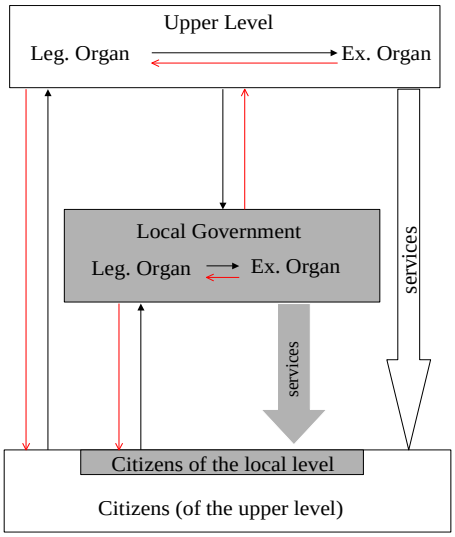
- 'Deconcentration - which is often considered to be the weakest form of decentralization and is used most frequently in unitary states - redistributes decision making authority and financial and management responsibilities among different levels of the central government. It can merely shift responsibilities from central government officials in the capital city to those working in regions, provinces or districts, or it can create strong field administration or local administrative capacity under the supervision of central government ministries.

- Delegation is a more extensive form of decentralization. Through delegation central governments transfer responsibility for decision-making and administration of public functions to semi-autonomous organizations not wholly controlled by the central government, but ultimately accountable to it. Governments delegate responsibilities when they create public enterprises or corporations, housing authorities, transportation authorities, special service districts, semi-autonomous school districts, regional development corporations, or special project implementation units. Usually these organizations have a great deal of discretion in decision-making. They may be exempt from constraints on regular civil service personnel and may be able to charge users directly for services.

- A third type of administrative decentralization is devolution. When governments devolve functions, they transfer authority for decision-making, finance, and management to quasi-autonomous units of local government with corporate status. Devolution usually transfers responsibilities for services to municipalities that elect their own mayors and councils, raise their own revenues, and have independent authority to make investment decisions. In a devolved system, local governments have clear and legally recognized geographical boundaries over which they exercise authority and within which they perform public functions. It is this type of administrative decentralization that underlies most political decentralization'
  (see http://www1.worldbank.org/publicsector/decentralization/admin.htm, accessed 9 July 2009, emphasis added).

works, but at the same time acts as a principal, delegating the fulfilment of some tasks to the local level.

Using the terminology that has been developed so far: while the 'offices' of local governments are created to some extent through the upper tier of government, they are filled with 'persons' by the local citizenry, and receive part of their mandate from them. Local governments therefore have more than one principal, and, accordingly, are supposed to be accountable in both directions, upwards and downwards. A good legal framework must take account of the additional challenges resulting from this constellation.



5. Analytical framework

Not every single mechanism of accountability contains all the elements that have been mentioned so far. What is important is that all mechanisms *together* form a *system* that fosters accountability. The pre-requisite 'division of powers', as well as the two dimensions of accountability ('calling to account' and 'holding to account'), can be

analysed both in the horizontal (i.e. within one tier) and in the vertical (i.e. between two tiers) dimension. Some abstract requirements for a system in which we can expect accountability of rulers to the ruled can now be formulated at this point.

So, summarising what has been elaborated so far: we (as principals) must know who is responsible for what; we must be informed about what the responsible office-holder (the agent) has done and eventually why; and we must be able to effectively sanction the behaviour of the office-holder (agent). If the office-holder knows that we know that he is responsible and that he will have to justify his acts and that he may be sanctioned in the case of misconduct, we can expect that he will act according to his mandate.

	Vertical dimension (between different state tiers)	**Horizontal dimension (between the 'actors' of one state tier)**
Division of powers between different actors		
Mechanisms to call to account		
Mechanisms to hold to account		

PART 2: LOCAL GOVERNMENT IN PAKISTAN, SERBIA AND SWITZERLAND

In this part the systems of local self-government of three countries shall be introduced. Pakistan is seen as a developing country and has attracted international attention with the radical process of decentralisation that it commenced in 2001. The formerly (as part of Yugoslavia) communist-governed Republic of Serbia has, in the course of its transition, simultaneously taken on reforms, also under the heading of decentralisation. Switzerland, finally, is seen as one of the world's most decentrally organised countries. In contrast to Pakistan and Serbia, the decentral structures have developed over centuries. Common to all three countries is that they all claim to be promoting local accountability by virtue of their decentral state structure.

I. PAKISTAN

Pakistan is a two-tier federal state composed of four provinces (Baluchistan, the North-West-Frontier, the Punjab and Sindh), the Islamabad Capital Territory and the Federally Administered Tribal Areas.[44]

Pakistan joined the decentralisation trend in 2001 and has undertaken a 'remarkably ambitious'[45] devolution process. One of the main objectives that was stated by the Government was to make the local bureaucracy – which was known for its abusive use of powers and rampant corruption – accountable to newly elected local governments and thereby to the local citizenry.

It is worth noting that the decentralisation reforms are part of a presidential plan to 'reinstore democracy'. Although the regulation of local government is, constitutionally, a responsibility of the provinces,[46] the (then) chief executive of the Republic of Pakistan, general Pervez Musharraf, in August 2001, in pursuance of the proclamation of emergency of 14 October 1999, introduced a new s. 140-A into the Constitution. This section obliged the provinces to establish a local government system and to 'devolve political,

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44 Section 1 of the Constitution of the Islamic Republic of Pakistan.

45 ADB et al., Overview, p. 1.

46 The Constitution of the Islamic Republic of Pakistan enumerates the subject-matters of federal and provincial laws in its federal legislative or concurrent legislative list. According to s. 142(c) of the Constitution, the subject matters that are contained neither in the federal legislative nor in the concurrent legislative list lie within the exclusive competence of the provincial assemblies. The Constitution, in its s. 32, contains only a 'principle of policy' which, according s. 30(2), is not binding, stating that 'the state shall encourage local government institutions composed of elected representatives of the areas concerned and in such institutions special representation will be given to peasants, workers and women.' As the subject-matter 'local government' is enumerated in none of the two legislative lists, in principle the provincial assemblies are competent to enact local government legislation.

administrative and financial responsibility to the elected representatives of the local governments.'[47]

1. Local government in Pakistan before devolution

a. Recent history of local government in Pakistan

As is the case elsewhere, local government institutions in Pakistan are age-old institutions. With the advent of the British rule, native institutions were replaced by local councils which reflected the Anglo-Saxon system of local government. In the area comprising Pakistan, local government legislation commenced in the middle of the nineteenth century.[48] At the end of the colonial system, Pakistan inherited the centralised British system, which had at the local level a deputy commissioner (DC) as an arm of the provincial government, who controlled not only the administration but also development, revenue and criminal justice at the local level.[49]

Since gaining independence the local government system underwent several changes and some experiences with locally elected local governments had already been made twice earlier, before the Local Government Plan 2000 was introduced:

- In 1959 the martial law government of *General Ayub Khan* announced the 'Basic Democracy' plan and in 1960 decreed a 'Municipal Administration Ordinance'. The ordinance provided for local councils where half of the members were elected and the other half were officially nominated.[50] The councils however, were placed under the control of bureaucrats ('directors' and 'assistant

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47 See s. 16 of the Legal Framework Order 2002.

48 HUSSAIN, p. 187.

49 INTERNATIONAL CRISIS GROUP, Devolution, p. 3.

50 International Crisis Group, Devolution, p. 3.

directors')[51] with the latter retaining the power to overrule council decisions and suspend the execution of the council's orders.[52]

The basic democracy system was abolished in 1971 and the years between 1971 and 1979 'constituted a kind of an interregnum for local government institutions'.[53] Although Prime Minister *Zulfikar Ali Bhutto* promulgated a People's Local Government Ordinance in 1975, elections were never held.[54]

- Elected local councils were reintroduced in 1979 under General *Zia-ul-Haq*. This was the first time in the history of Pakistan that all local councils (in urban as well as in rural areas) were elected on the basis of general adult franchise.[55] The elections were held on a non-party-basis. Since the local government systems were promulgated by each province, they differed in some respects. Basically, three tiers were established: the union councils, tehsil committees (or, for urban areas, town committees[56]), and zila (district) councils.[57] The main responsibility of the local councils was to manage small-scale public welfare and development activities (water supply, sanitation, maintenance and management of hospitals and schools) in their jurisdictions. The local councils were not, however, entrusted with general administration, law and order or policing. Instead such duties were retained by civil bureaucrats (commissioners and deputy commissioners).[58] According to its commentators, the system did not work well; the main problem being the still immense influence

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51 GHAUS-PASHA, p. 2.

52 INTERNATIONAL CRISIS GROUP, Devolution, p. 3.

53 HUSSAIN, p. 187.

54 INTERNATIONAL CRISIS GROUP, Devolution, p. 3.

55 HUSSAIN, p. 191.

56 The names differed according to the population of the town: town committees (population 5 – 30,000), municipal committees (population up to 250,000) and municipal/metropolitan corporations (major cities with populations higher than 250,000).

57 HUSSAIN, p. 191.

58 INTERNATIONAL CRISIS GROUP, Devolution, p. 4.

of the provincial bureaucracy over the politically elected local governments:

> 'According to [the elected representatives], it is very difficult to work within the district administration. All effective power not only does remain in the hands of Divisional (Deputy) Commissioners but rigid Directors of projects searching for funds and allocating resources tend to snub the assertive postures of members and office-holders of urban and rural councils. Thus, there is a strong need of radical change in the system favouring a non-bureaucratic personnel at responsible positions.'[59]

> 'In fact, the present existence of the district councils is virtually an ad-hoc arrangement. Its existence is a result of political needs of the government and not for providing a balance of participation. [...] . Following the famous rule that the one who controls the purse wields the power, it can be said that the bureaucracy's anomaly by having a control over development funds has neutralized the government moves towards expanding popular participation in rural development.'[60]

According to PARACHA, 'it would not be unfair to say that provinces controlled local governments'.[61] Senior appointments, resources, increases of the tax base; all were dependent on the decisions of the province. Besides that, the budgets of local councils had to be approved by the provincial government, who was entitled to make amendments and suggestions.[62]

In 1993, local councils were set aside by the interim government of *Moeen Qureshi* in order 'to ensure that the local government machinery could not be used for supporting candidates for elections to the national and provincial assemblies scheduled for mid-1993'.[63] Instead of the local councils, appointed administrators (the deputy commissioners) were installed once again.

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59 HUSSAIN, p. 249 et seq.

60 HUSSAIN, p. 254.

61 PARACHA, p. 11.

62 PARACHA, p. 11.

63 GHAUS-PASHA/UNDP, p. 2.

b. The 'quality of governance' before devolution

Before devolution, the local level was governed by the province which was present at different levels. Deputy commissioners administered the districts with hardly any limitations; the exception being the fact that they had to report to the (non-elected) provincial secretariat.[64] Not only did they collect the taxes and exercise police functions, they were also responsible for implementing the development budget and they acted as a local judge;[65] a function which enabled them to send people to prison for up to seven years.[66] Local councils were largely dysfunctional and subordinated to the local bureaucracy. According to several observers, this governance situation was problematic. Only two of them shall be cited here:

ZIA/AHMED/MIRZA describe the general governance situation in Pakistan in October 2000 as follows:[67]

> 'Political and economic power in Pakistan has always been highly centralized in the hands of a small elite from a feudal, industrial, bureaucratic, and military background, totally excluding historically disadvantaged groups. The functioning of governmental organs and institutions in the country has also been ineffective and non-responsive to the needs of a very diverse population. Corruption, nepotism, personalized decision-making, and politics of patronage have dominated the political scene; and accountability processes have been both ineffectual and selective. With the executive making all major legislative decisions and also using its power to legislate through ordinances, there has been a gradual erosion of parliamentary supremacy over the years, and the functioning of legislatures has largely been dictated by political exigency. Nor have governments been able to resolve or even establish credible processes towards

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64 CHEEMA/KHWAJA/QADIR, p. 16.

65 KEEFER et al., p. 10: 'The deputy commissioner controlled all executive, judicial and developmental functions in a district, while each sector of local administration (e.g. education) was managed by the parent provincial line department.' See also ADB et al., History, p. 5. ADB et al., Technical Considerations, provide an overview of the allocation of powers to the executive magistracy before devolution (p. 36 et seq.).

66 Interview with MUHAMMAD SALEEM KHAN, chief economist, planning and development department, Province of Peshawar, held in June 2004.

67 ZIA/AHMED/MIRZA, p. 11.

> the solution of key national issues, thereby engendering further tensions (for example, on issues of provincial autonomy). No serious efforts have been made to strengthen local government institutions, and local bodies have been frequently subjected to dismissal by provincial governments. The bureaucracy, politicized over the years, has exerted a strong influence on policymaking. However, its inability to efficiently deliver services has been of major concern, since this is the branch of government most directly concerned with the provision of services, facilities, and development programs to people on a day to day basis.'

THE NATIONAL RECONSTRUCTION BUREAU (NRB) in its Local Government Plan 2000, painted a similarly negative picture with regard to the then existing local government system:

> 'In the existing system of governance at the local level, the province governs the districts and tehsil levels. And the local governments for towns and cities exist separately from those of the rural areas. The provincial bureaucratic set-ups are the designated 'controlling authorities' of the local governments, and tend to undermine and override them, which breeds a colonial relationship of 'ruler' and 'subject'. The separate local government structures engender rural-urban antagonism, while the administration's role as 'controlling authorities' accentuates the rural-urban divide. These two structural and systemic disjoints, coupled with the absence of horizontal integration and the consequent inadequacy of functional coordination between the line departments at the division, district, and tehsil levels, lead to inefficiency and corruption, and are the root causes of the crisis of governance at the grass root level. This crisis appears to have been addressed through over-concentration of authority, particularly in the office of the Deputy Commissioner, which besides creating the potential for abuse of authority, diffuses operational focus and results in the expedient handling of routine functions through crisis management.'[68]

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68 GOVERNMENT OF THE ISLAMIC REPUBLIC OF PAKISTAN, Local Government Plan 2000.

2. The Local Government Plan 2000 and the enactment of the (Model) Local Government Ordinance

In March 2000, the current president Pervez Musharraf announced the *Local Government Plan 2000* that had been developed by the national reconstruction bureau (NRB).[69]

The plan proposed far-reaching reforms of the local government system.

The new system, as highlighted by NRB,

> '[would be] designed to ensure that the genuine interests of the people are served and their rights safeguarded through an enabling environment, people's participation, clear administrative responsibilities without political interference and making it answerable to the elected head of the district. At the same time it [would promise] checks and balances to safeguard against abuse of authority'.[70]

The plan (with some important changes)[71] was implemented with the enactment of a (Model) Local Government Ordinance which the provincial governors (elected assemblies were not in place at that time) were then to promulgate for their respective jurisdictions in 2001. A change of the 1973 Constitution, adopted by the federal parliament in December 2003, protected the newly introduced structure of devolution

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69 The national reconstruction bureau NRB operates as part of the prime minister's secretariat and is supposed – besides other functions – to 'generate fundamental thought on promoting good governance to strengthen democracy through the reconstruction of institutions of State related to all aspects of governance and social welfare' as well as to 'provide support to the Federal Government and Provincial Governments in implementation of local government system', see http://www.nrb.gov.pk/about_nrb/nrb_01.htm (accessed 8 July 2009).

70 GOVERNMENT OF THE ISLAMIC REPUBLIC OF PAKISTAN, Local Government Plan 2000, p. 1.

71 The two most important changes were (1) that the district nazim according to the plan should have been elected in direct elections whereas under the LGO he is indirectly elected by the union councillors and (2) that the district coordination officer, i.e. the administrative head of the district, was to be appointed by the district nazim (the mayor) whereas under the now existing system he is appointed by the provincial government. Both changes have been criticised massively by ICG (ICG, Devolution, p. 10 et seq.).

against any amendments or repeals for six years, except with the approval of the president.[72]

In 2008 a change of government took place at the federal level. To date (June 2009) there are signs that Musharraf's local government system will remain in place: 'The NEWS', a Pakistani daily newspaper, reported on 2 June 2009 that the new government (president Asif Zardari and prime minister Yousuf Raza Gilani) and the four provinces are willing to go ahead with the existing local government system, 'bringing in improvements rather than scrapping it'.[73] Only the most basic features of the new local government system are presented in this part while relevant details will be discussed within the legal analysis (Part 3), as far as is necessary.

a. Devolution of political power

The system (similar to the one Zia-ul-Haq had implemented in 1979) provides for three tiers of local government, with elected councils and mayors (nazimeen) at the *union*, the *tehsil* (or town) and *district* level. The union level (comprising on average of 25000 citizens) forms the backbone of the entire structure: it is the only level where all elections are *direct*. The citizens of the union elect their union councilors (19 per union), the union nazim (mayor), as well as the union naib nazim (deputy mayor, who is at the same time the speaker of the union council). All union naib nazimeen of a tehsil or town then become ex officio members of the tehsil or town council, whereas all union nazimeen of the district become ex officio members of the district council. The union councilors are the electoral college for the *indirect* election of the district and the tehsil nazimeen and naib nazimeen (run on joint tickets). All councils have reserved seats for women (33 per cent), peasants and minorities. These seats are filled at the union level through direct election and at tehsil and district level through indirect elections by all union councilors in the respective jurisdiction. The

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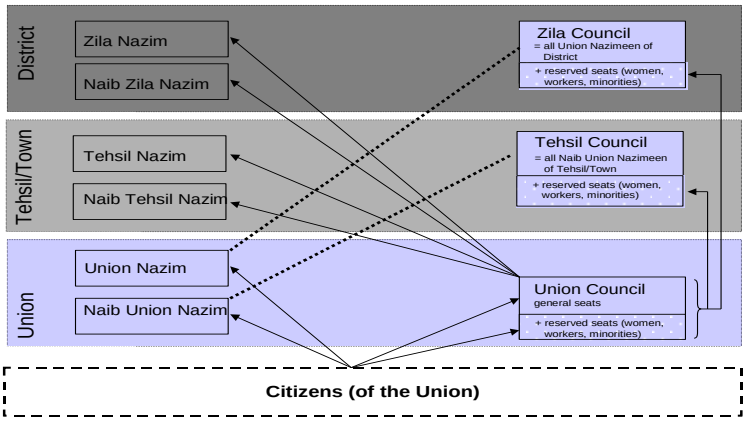
72 The Constitution (Seventeenth Amendment) Act 2002.

73 See http://www.pakdevolution.com/news_detail.htm#news1 (accessed 2 June 2009).

terms of office are four years for all tiers, with a two-term limit for nazimeen and naib nazimeen. Elections are to be held on a non-party-basis.



b. Deconcentration of parts of the provincial administration to the different local government levels

Parts of the provincial administration have been deconcentrated to the district, tehsil and union levels. The first schedule of the NWFP Local Government Ordinance 2001 (LGO)[74] lists the offices that have been deconcentrated from the provincial departments to the district level. Some of them have then been further deconcentrated to the tehsil and union levels.

Districts remain responsible mainly for primary and secondary education, literacy, dispensaries, district hospitals, district roads and transport. *Tehsils* carry out the functions of the offices previously run by the local government and rural development department, public health engineering department, and the housing and physical planning department at regional, zonal, circle, divisional, district, tehsil and lower levels. The water and sanitation agencies have also been decentralised to the tehsil level (see s. 15 and 52 LGO). *Unions* are

74 N.W.F.P. Ordinance No. XIV of 2001.

assigned functions such as the collection and maintenance of statistical information for socio-economic surveys, needs assessments and proposals for union-wide development, the registration and issue of birth certificates, death and marriage certificates, the establishment and maintenance of libraries, the provision and maintenance of public sources of drinking water, the maintenance of street lighting as well as the regulation of grazing land and many more (see s. 76 LGO).

The administration at local government levels is structured in a similar way at district and tehsil levels: the offices are formed into 'groups of offices', each of which is headed by a district officer (DO) in the districts and by a municipal officer (MO) in the tehsils. All groups of offices together are headed by a district coordination officer (DCO) in districts and by a tehsil municipal officer (TMO) in the tehsils. The union administration is comprised of three secretaries.

The office of the former deputy commissioner has been abolished and its powers have been divided among the district and session judge[75] (all magisterial powers), the district nazim, the district police officer and the district coordination officer.[76]

While under the previous system the deputy commissioner, as head of the local administration, reported to the provincial government, the DCO, EDO and the union secretaries are supposed to be answerable to the elected respective nazim, who, in turn, is supposed to be answerable to the respective council. However, most of the staff in the districts (and to a lesser extent in the tehsils) are still hired and paid for by the province and not by the respective local government tier.[77]

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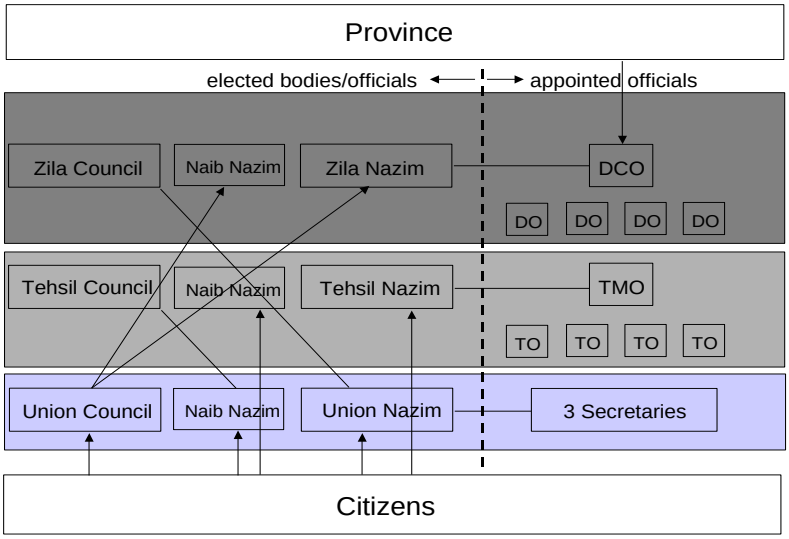
75 The term district and session judge is used to describe the same person who exercises criminal and civil jurisdiction as the head of the district subordinate judiciary (ADB et al., Technical Considerations, p. 43).

76 ADB et al., History, p. 5.

77 See for more details below, Illustration 20.



c. Citizen participation and monitoring

The LGO introduces, as a novelty, citizen community boards (hereafter: CCBs). A CCB is a non-elected voluntary organisation, consisting of at least 25 members. It can, in principle, be established for a variety of purposes including initiating and improving development projects, establishing cooperatives, setting up monitoring bodies that oversee police and other service providers, and reinforcing the capacity of monitoring committees at the behest of the concerned council. At least twenty-five per cent of the total development budget of each tier of local government must be earmarked for projects identified by CCBs, and each CCB has to make a cash contribution of twenty per cent in order to tap into these funds for a specific project. Moreover, CCB-funds cannot be re-appropriated for other activities. If unused at the end of the fiscal year, they must be carried forward to subsequent financial years.[78]

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78 See Arts. 63 - 65 LGO.

d. Local government finance

Local governments do have some (although limited) taxing powers. Most of the funds are transferred from the province.[79] These transfers have been made subject to rules for the first time under the LGO. A provincial finance commission (PFC) shall make recommendations to the governor of the province for a formula of distribution between the province ('province retained') and the local governments ('provincial allocable') and between the different (district, tehsil, union) tiers of local government (s. 120-D(2,a) LGO). The local governments shall receive not less than thirty-five per cent of the estimated provincial proceeds (s. 120-D(2,b) LGO). The award of the provincial finance commission was, however, not yet fixed when the field study was carried out.

The financial room for manoeuvre for the local governments is and will remain very limited, as about eighty per cent of the current expenditures of districts are establishment charges which, while incurred by the district, cannot be altered by them (because the number and staff, as well as the salaries are fixed by the province).[80] Furthermore, there is a large backlog of uncompleted development schemes which have been devolved to the local governments and which local governments are required to complete.[81] A further constraint on the local development budget results from the obligation to use at least twenty-five per cent of the money for CCB-projects.[82]

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79 See, e.g., KEEFER, according to whom 98 per cent of funding for local governments is projected to come from revenues authorised and collected by higher level governments (p. 13).

80 KEEFER, p. 20. The situation is somewhat less acute at the tehsil level because tehsils can, to a certain extent, hire and fire (and change the wages of) their own personnel.

81 ADB et al., History, p. 34.

82 See on the restricted financial discretion at local level KEEFER, p. 12 et seq., ADB et al., History, p. 32 et seq., INTERNATIONAL CRISIS GROUP, Devolution, p. 18 et seq.

e. Local government development planning

The LGO introduces a bottom up methodology with regard to local government development planning: informally, the CCBs (and village councils) shall identify local development priorities to the union councillors. Municipal and development needs are to then be communicated to the tehsil and district levels respectively. The tehsil and the district administration and planning offices shall in the end prioritise development initiatives based on locally identified priorities commensurate with financial capacity. This agreed 'development inventory' becomes part of the tehsil and district budgets and the respective councils 'are responsible for passing these budgets'.[83]

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83 GOVERNMENT OF THE ISLAMIC REPUBLIC OF PAKISTAN, Local Government Plan 2000, p. 28. See, for more details, below, p. 184.

II. SERBIA

The Republic of Serbia was – at the time the field study was carried out – a member state of the state union Serbia and Montenegro.[84] The competences of the state union were rather narrow[85] and did not include the regulation of local self-government. This remained in the competence of both republics.

The territorial structure of the Republic of Serbia as well as its framework for local government were set out in the Constitution of the Republic of Serbia of 1990,[86] i.e. the Constitution that had been enacted under the socialist and autocratic rule of the Milosevic regime. The adoption of a new Constitution of the Republic of Serbia has been continually postponed since 2002 and only succeeded in late 2006.[87] According to its Constitution of 1990, the Republic of Serbia was (and still is) a unitary state with two levels of political units: the central state and the municipalities, and with two autonomous provinces, covering only a part of the territory: Vojvodina and Kosovo & Metohija.[88]

When the field study was carried out, i.e. in 2005, the Republic of Serbia was undertaking a transition process from socialist and autocratic rule of the Milosevic regime to a democratic state. Besides

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84 Article 2(1) of the Constitutional Charter of the Federal Republic of Yugoslavia of 4 February 2003 (Official Gazette of the State Union Serbia and Montenegro No. 1/03). On 21 May 2006, Montenegro held a referendum to seek full independence from the state union of Serbia-Montenegro. The state union effectively came to an end after Montenegro's formal declaration of independence on 3 June 2006 and Serbia's formal declaration of independence on 5 June.

85 See the enumeration in Art. 77 of the Constitutional Charter.

86 Adopted on 28 September 1990 (Official Gazette of the Republic of Serbia No. 1/90).

87 The new constitution was adopted by the national assembly of the Republic of Serbia at a special session on 30 September 2006 and endorsed by referendum on 28 and 29 October 2006.

88 On 17 February 2008, the Parliament of Pristina declared the Province of Kosovo&Methoija to be independent from Serbia. The municipality of Kraljevo, where the field study has been carried out, lies in the centre of the Republic of Serbia, in neither of the (then) two autonomous provinces.

other reforms, decentralisation reforms were introduced in order to enhance the accountability of the state.

1. Local government in the Republic of Serbia before the reforms

a. Pre-Yugoslavia

The concept of self-government had an important role in the battle faced by the Serbs to win independence from the Ottoman power. But although Serbia was fighting for internal self-government within the Ottoman Empire, its leaders in both uprisings,[89] princes and later kings, endeavoured to prevent decentralisation and local self-government and tried to transform the local bodies – which existed throughout the Ottoman oppression in districts (nahija) – into state organs with no or a very restricted domain of independent competences.[90]

In 1905, under the lead of the House of Karađorđević the Kingdom of Serbia adopted a Law on Communes and a Law on Organisation of Regions and Districts. These laws expressly provided for local representative organs (regional assemblies and regional councils, district councils and district assemblies and communal councils), yet they were all under severe surveillance of the regional and district chiefs. This state remained until the First World War; that is, until the establishment of the Kingdom of Serbs, Croats and Slovenes in 1918.[91]

b. First Yugoslavia (Kingdom of Serbs, Croats and Slovenes, later Kingdom of Yugoslavia)

In 1921, the Vojvodian Constitution stipulated under Art. 95 that administration should be conducted through ‘governing and self-

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89 The first uprising took place 1804–1813 and was led by Karađorđe Petrović; the second uprising occurred 1815–17 and was led by Miloš Obrenović. As a result of the second uprising, the Serbian principality had ‘some degree of territorial unity and administrative autonomy (COX, p. 43).

90 STANOVČIC, Self-Government, p. 255, fn. 35.

91 STANOVČIC, Self-Government, p. 256, fn. 36.

governing organs' in counties, regions, districts and communes. In 1922 a Law on General Administration and a Law on County and District Self-Government were passed. The latter ensured that county and district assemblies be elected by a general, equal, direct and secret-ballot election. It was not until 1926 and 1927 however, that elections according to the law were held for some cities and counties, whilst those for the district assemblies were not held at all. On 6 January 1929, King Alexander abolished the Constitution, dismissed the people's assembly and introduced dictatorship. County assemblies and county councils, as well as communal administrations were also dismissed. King Alexander reorganised the territorial structure of the country. In October 1929, a law on the name and division of the Kingdom was passed, which divided the Kingdom of Yugoslavia into nine provinces.[92]

The 1931 Constitution, decreed by King Alexander, granted the provinces a double role: they had to administer units of the central power and self-government units. Communes were also stipulated as self-governing bodies. A Law on Communes was not passed until 1933 however, with the intention of creating big communes with a communal council, communal administration and a president with an honorary function. The Law also provided for local elector meetings.[93] Yet this law remained unfulfilled, as King Alexander was assassinated in Marseille in 1934. Internal tensions grew, and in 1941, the German armed forces (*Wehrmacht*) invaded the Kingdom of Yugoslavia.[94]

c. Second Yugoslavia (Socialist Federal Republic of Serbia)

The Constitution of 1946 proclaimed a federal structure of the state 'but factually a system where the final word was that of a single political party (the communist party, renamed in 1952 as the leage of communists). The party had the political and ideological monopoly and

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92 STANOVČIC, Self-Government, p. 258.

93 STANOVČIC, Self-Government, p. 259.

94 COX, p. 82.

control over the basic economic decisions and resources.[95] After the breakaway from the Soviet sphere, under *Josip Broz Tito*, the decentralisation path was taken and the communes (the number of which was reduced and competences were extended) became the basic units of local self-government. But even under this Yugoslav way of decentralised communism, municipalities did not have a substantive role of their own to play. According to STANOVČIC,[96]

> '[...] the two last decades of the Yugoslav state were featured by the system of decentralization of power to the member republics within which decentralization was nominally preached, although all the decisions were under the control of the republic's and province's party leaders. Then, many authors estimated that decentralization was purposely favoured as a means of atomization and fragmentation of the society for its easier control – according to the principle of pitting some groups against another inside all micro communities with the purpose "divide and rule".'

d. Federal Republic of Yugoslavia (Serbia and Montenegro)

After the collapse of the Socialist Federal Republic of Yugoslavia, a predominantly centralised system of administration of public services was in place in Serbia and Montenegro. THE STANDING CONFERENCE OF TOWNS AND MUNICIPALITIES summarises the 'inherited state' of local government with the following words:

> 'Local authorities were rendered totally powerless, not to mention impoverished. They were fully deprived not only of their property, but of their basic competence in many significant areas as well (elementary and secondary education, basic healthcare, a range of social services, incentives for economic development, offering concessions, public order and peace, etc.). According to the logic of such a system, full financial centralisation was conducted as well. Local governments were entitled to less than 20% funds from original resources. Their budgets were dramatically reduced, while the state levies amounted to about 80% of the local budget funds. The system of state levies was also not made objective, so there was a lot of room left for political speculations and various forms of benefits intended for the authorities true to the centre, or, as opposed to that, limitations imposed to the municipalities and towns with

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95 STANOVČIC, Self-Government, p. 259.

96 STANOVČIC, Self-Government, p. 260.

> opposition authorities. The will of central organs was of crucial importance for financial survival of local authorities.'[97]

The Federal Republic of Yugoslavia was considered as one of the most highly centralised states of its time,[98] with the president of one of the big urban districts of Serbia expressing this fact in the following terms: 'local government had no important powers and no resources, and their authority could be reduced to making decisions as to whether streets should be cleaned from one end or the other'.[99] According to DINKIC, this centralised system 'lack[ed] a mechanism to motivate improvement in local administration. Public services were riddled with corruption. [...] and users of the system could not influence it'.[100] The government of the Federal Republic of Yugoslavia, in its paper entitled 'Breaking with the Past', gave some examples of what such corruption looked like at the local level:

> 'In order to obtain a new telephone line, an official in the telephone company might charge a special fee. Illegal hookups were common. Bribes were also paid to link newly-built apartments and houses to existing heating systems and to obtain permits for the adaptation of existing facilities. Beginning in 1996, some municipalities out-sourced public transport to private providers, and there have been alleged "kickbacks" for arranging these concessions, in addition to apartments and vehicles.'[101]

> 'In hospitals, informal payments for medical care and pharmaceuticals were common, and [the situation] was exacerbated by the scarcity of medicines and equipment during the sanctions. At universities, students used connections to become state sponsored (instead of fee paying), and to pay professors for grades. The elected municipal authorities responsible for this system have been voted out of office, but the bureaucracy they created still remains.'[102]

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97 SCTM, Manual, chapter I 'Inherited state and expectations from local government reforms'.

98 RAICEVIC, p. 9.

99 Cited by STANOVČIC, Decentralisation, Regionalism and Autonomy, p. 136.

100 DINKIC, p. 82 et seq., see also FRY, Breaking with the Past, Vol. II, p. 73.

101 FRY, Breaking with the Past, Vol. II, p. 73 et seq.

102 FRY, Breaking with the Past, Vol. II, p. 74.

One can conclude, as STANOVČIC has, that 'during the last two hundred years, many territorial administrative units have existed at various levels in Serbia, from the village to the province: under the Turkish rule, in the Independent Kingdom of Serbia, the former Kingdoms of Yugoslavia and communist Yugoslavia. With a few exceptions, it could be said that *almost all divisions into smaller territorial units have depended on the central government* which has named officials at various levels.'[103]

2. Transition reforms 2002 and later

Since 2000, the Republic of Serbia has been undergoing a transition process which is intended to lead to accession into the European Union. On 14 February 2002, the republican assembly passed a new Law on Local Self-Government (hereafter: LSG).[104] The ultimate goal of the local self-government reform, in the words of the government, was 'to create conditions for effective and accountable local government open to citizens' participation in the governing of their community.'[105]

As starting points in the preparation of this new Law, the following ideas were taken into consideration in particular:

> '*citizens* as exponents of sovereignty are the main source of authority in local communities and they have a non-transferable right to manage public operations in their community;
>
> *establishing and abolishing local government units* is regulated by law and it is obligatory to include citizen opinions in all changes, such as establishment, abolishment or joining the existing local government units;
>
> *competences of towns and municipalities* should further be divided into original and delegated; however, the scope of original competences is to be extended considerably, while on delegating operations by the Republic it is necessary to provide for participation of municipalities and towns, and to regulate each delegated competence by corresponding laws (for instance, the areas of

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103 STANOVČIC, Decentralisation, Regionalism and Autonomy, p. 133 (emphasis added).

104 Official Gazette of the Republic of Serbia No. 9 of 26 February 2002.

105 SCTM / MINISTRY OF JUSTICE AND LOCAL SELF-GOVERNMENT, Handbook, p. 9.

> education, healthcare, social police, agriculture, economy, management, etc.), in order to avoid disorder and chaos in work;
>
> *direct citizens' participation in decision-making in local communities* (citizen initiatives, meetings of citizens, referendum, etc.) and forms of territorial government have great impact and are to be more thoroughly regulated by law in order to introduce the principle of subsidiarity;
>
> *an undeniable and adequate financing system* that would guarantee towns and municipalities financial autonomy and undisrupted functioning was among the most important expectations from the new law'. **106**

The new Tadic/Kostunica government, which took over power in 2004, followed the path of reform. With its administrative reform plan, it affirmed that it was willing to follow the path of democratic transition even more intensively than its predecessors. The main objectives of the public administration reform, as pointed out by the GOVERNMENT OF THE REPUBLIC OF SERBIA in 2004 were: 'creation of a democratic state based on the rule of law, accountability, transparency, effectiveness and efficiency, and creation of a public administration directed towards the citizens, capable of offering high quality services to the citizens and private sector against payment of reasonable costs.' **107** In addition, the Tadic/Kostunica government supported the idea of decentralisation since it considered decentralisation as a means to achieve the stated objectives, which the following excerpt from its reform strategy shows:

> 'The distribution of power between the central and sub-central (local) levels of power represents one of essential prerequisites for the general society democratization. The possibility of active participation of citizens in the creation of public policies is much higher if the important issues that influence directly on their daily lives and work, are decided upon at the local level. Therefore, the decentralized power can be better and more informed on the needs and requests of individuals and that can produce better quality in meeting the public needs and to the comprehensive development of the local environment. This creates conditions for increased responsibility of those who bring and implement

106 SCTM, Manual, chapter I.

107 GOVERNMENT OF THE REPUBLIC OF SERBIA, Strategy, p. 24.

> decisions, and it reduces the possibilities of their transformation into alienated centres of power'.[108]

Recently, the system of local self-government was revised. Following the adoption of the new Constitution in 2006, the parliament of the Republic of Serbia in 2007 changed three acts related to decentralisation: the Law on Territorial Organisation, the Law on Local Self Government (hereafter: nLSG) and the Law on Local Elections.[109] In the following, the main features of the system will be presented as it existed when the field study was carried out (i.e. in 2005).

3. Basic features of the new local government system

a. Institutional/political structure of local governments

The institutional structure of local governments is stipulated in the LSG. According to its Art. 25, each municipality has three organs: the municipal assembly, the president of the municipality and the municipal council:

- The *municipal assembly* is the representative organ 'performing principle functions of local government' (Art. 26 LSG). Its members are elected by the citizens in direct elections by secret ballot and for

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108 GOVERNMENT OF THE REPUBLIC OF SERBIA, Strategy, p. 24 et seq. The other remaining guiding principles, according to the government's reform strategy are: de-politisation, professionalisation, rationalisation, and modernisation (*Ibid*).

109 Official Gazette of the Republic of Serbia, No. 129/2007. For an overview of the thereby introduced novelties see DEJAN VUČETIĆ, *The Most Important Changes in Serbian System of Territorial Decentralization*, Facta Universitatis, Series: Law and Politics, Vol. 5, N§ 1, 2007, p. 39 - 46. In connection to the questions of interest here, the most important changes to be mentioned are:

- The now indirect election of the president of the municipality by the municipal assembly (Art. 191(4) Constitution, Art. 43 nLSG);
- The newly divided executive responsibility between the president of the municipality and the municipal council (Art. 43 nLSG) as well as a general strengthening of the position of the municipal council at the expense of the president of the municipality (Art. 46 nLSG).

a four year term.[110] The municipal statute can fix the number of members of the municipal assembly between a minimum of nineteen and a maximum of seventy-five (Art. 27 LSG).[111] The municipal assembly may establish permanent or ad hoc working groups (Art. 34(1)(1) LSG) and it elects its president from amongst the members of the assembly (Art. 36(1) and (3) LSG).

- The *president of the municipality* is the main executive organ in the municipality (Art. 40(1) LSG: 'The president [...] shall have executive powers in the municipality'). He is elected for a period of four years, by direct and secret ballot (Art. 40(2) LSG).[112]
- The *municipal council*, finally, 'shall be a body co-ordinating the functions of the president of the municipality and the municipal assembly and shall have a controlling/supervising function over the administration' (Art. 43(1) LSG). It shall have no more than eleven members who are elected by a majority vote of the members of the municipal assembly, following the recommendation of the president of the municipality. If the recommendation of the president for the election of the same member of the municipal council has been rejected twice, the municipal assembly may adopt a decision on the election of a member of the municipal council without such recommendation (Art. 43(5) LSG). The president is acting as the chair of the municipal council (see Art. 40(7) LSG) and the deputy president of the municipality is also an ex officio member of the municipal council (Art. 43(3) LSG).
- The *municipal administration* is organised as a 'single unit' with a 'head of administration' responsible for the management of this unit

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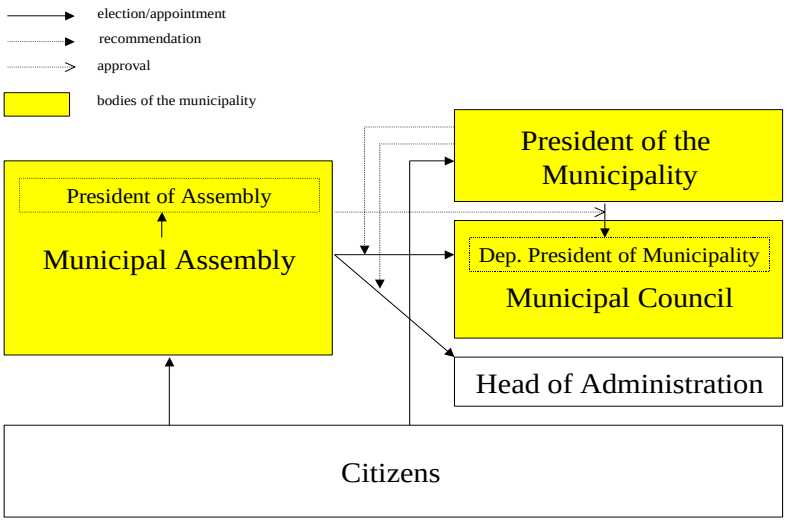
110 The electoral process is governed by a separate law, the Law on Local Elections of 13 June 2002 (Official Gazette of the Republic of Serbia No. 33/2002, hereafter: LLE), Arts. 11 - 53. Councillors are elected in proportional vote (see art. 8 LLE). See, for more details on the election process → Illustration 19).

111 According to Art. 18 of the Statute of the Municipality of Kraljevo of 31 May 2002 (Official Gazette of the Municipality of Kraljevo No. 13/2004), its Municipal Assembly has 70 members.

112 The election process is governed by the Law on Local Elections (LLE), Arts. 54 - 63.

(Art. 49 and 50 LSG). Municipalities with more than 50,000 inhabitants may establish different administrative departments, whereby each of these departments shall then be managed by a head of administration department (Art. 49 and 51 LSG). The 'head of administration' (or, as the case may be, the heads of administration departments[113]) shall be appointed by the municipal assembly, following the recommendation of the president of the municipality. According to Art. 53 LSG, the head of administration 'shall be accountable to the municipal assembly and the president of municipality for his/her work and the work of the department'. Within the administration, organisational units may be formed. The head of administration appoints the managers of these units (Art. 49 and 52 LSG).



113 In the following, it will be assumed that the administration is organised as a single unit and therefore only the head of administration will be mentioned.

b. Direct citizens' participation

The LSG provides three instruments of 'direct citizens' participation', the details of which need to be regulated more closely by the municipal statutes:

- The *citizens' initiative* (Art. 66 LSG): this instrument enables (not less than ten per cent of the) citizens to propose to the local assembly an 'act that will regulate a particular issue within the primary jurisdiction, a change of statute or other acts and call a referendum' (paragraph 1). The assembly shall hold a debate on the proposal and give a reasoned reply to the citizens within a timeframe of sixty days (paragraph 2).
- The *citizens' meeting* (Art. 67 LSG): such a meeting can be held in part of the territory of a local self-government (paragraph 1). The citizens shall debate and make proposals or requests regarding issues within the jurisdiction of the local self-government bodies (paragraph 2). The proposals or requests shall be submitted to the local assembly or particular bodies or services of the local government, which shall present their stand to the citizens (paragraph 3).
- The *referendum* (Art. 68 LSG): a local assembly may call a referendum on an issue within its jurisdiction using its own initiative or on request of (at least ten per cent of) the citizens. The proposal is adopted if the majority of votes cast are in its favour, provided that more than half of the total number of residents have voted (paragraph 3). According to Art. 69 LSG, a referendum can also be held in parts of the territory.

c. Municipal service delivery

The general terms and the way of delivering public services by municipalities are regulated in the *Law on Communal Affairs* (hereafter: LCA).[114] According to this Law, a public utility is delivered by a public utility company, another company or an entrepreneur (Art. 3

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114 Official Gazette of the Republic of Serbia, No. 17/97 and 42/98.

LCA). The municipalities are to provide the conditions for public utilities' delivery and development (Art. 2 LCA).

The Law defines the public utilities which municipalities are responsible for. These are at least the following:

- water purification and distribution;
- purification and drainage of atmospheric and waste water;
- production and delivery of vapour and warm water;
- transport of passengers in public transportation;
- maintenance and cleanliness in towns and settlements of the municipality, arrangement and maintenance of parks, green and sports areas;
- maintenance of streets, roads, public light and other public areas in towns and settlement, maintenance of solid waste dumps, arrangement and maintenance of cemeteries and burying.

The municipal assembly may determine other activities of local interest as public utilities (Art. 4 LCA). It defines, besides other things, the conditions and the way of entrusting public utilities' delivery, standards and the way of controlling public utilities' delivery (see Art. 12 LCA).[115] The municipal administration (i.e. the 'communal inspector') is responsible for supervising the delivery of public services (Art. 25 LCA).

Additional provisions that are relevant for municipal service delivery can be found in the *Law on Public Companies and Common Interest Activities* (hereafter: LPC).[116] This law mainly sets out the minimal standards with which public companies must conform, but also their internal structure and their relations with the founding community, e.g., of interest to us here, the local government.

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115 When enacting these provisions, it must take into account the requirements set out in the LPC (see next paragraph).

116 Official Gazette of the Republic of Serbia No. 25/2000 and 25/2002.

d. Local government finance

As it has already been mentioned before, during the 1990s Serbian municipalities were stripped of their revenues, their functions, and their property.[117]

In 2001, the Republic of Serbia started assigning new revenue sources to local levels, even before a new law on local self-government had been adopted and also before a new attribution of responsibilities had been decided. This led to the rather unusual situation that local governments in Serbia suddenly disposed of considerable financial means without bearing the duty to fulfil additional tasks.[118] In 2002, with the enactment of the LSG, new tasks were assigned to the municipalities. The law, for the first time, provided municipalities with the right to establish rates for a part of their own income independently.[119]

This situation changed some years later when Serbia reformed its tax system. In 2004, the payroll tax (which was a municipal tax that accounted for approximately 20 per cent of municipal revenues), was abolished. At the same time, the value added tax (as a central state tax) was introduced. To compensate municipalities for the loss in payroll tax revenues, as a provisional solution, the Annual Budget Law regulated that the local government units were entitled to an additional 25 per cent share of the wage tax.[120]

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117 LEVITAS/VASILJEVIC, p. 3.

118 UNDP, Fiscal Decentralisation, p. 171 (stating that 'the general observation regarding the Serbian system of fiscal decentralization is that it has inverse sequencing').

119 SCTM, Manual, chapter II, under 'System of financing'. For details regarding the then valid system of municipal finance, see UNDP, Fiscal Decentralization, p. 173 et seqq.

120 STIPANOVIC, BRANISLAV. *Local Government Finance System and Fiscal Equalization in the Republic of Serbia*, The Fiscal Decentralization Initiative for Central and Eastern Europe (undated), p. 7, accessible at: http://www.skgo.org/upload/SITE/Publikacije/PublikacijePrtnera/FDI/FE_Serbia.pdf (accessed 4 September 2009).

Thus, when the field study was carried out, a stable system of municipal finance was not in place. Municipalities depended on grants, transfers and shares of national taxes which were set annually in the Budget Law. 'As a result', LEVITAS concludes, 'the primary sources of local government revenue were open to both bargaining and uncertainty. At the same time, Serbian local governments had few true own tax powers and thus limited ability to increase their revenues. Taken together, these structural weaknesses have meant that Serbian local governments have looked historically first to the national government to improve their finances.' **121**

121 LEVITAS, Case of Nis, p. 2. In 2007, a new Local Government Finance Law was passed. 'On the one hand, the law defined the most important local government transfers and tax shares in framework legislation. This has radically reduced the bargaining and uncertainty that surrounded the most important local government revenues. On the other hand, the Law made the property tax a local government own revenue and obliged municipalities to take over the tax's administration by 1 January 2009. As a result, many municipalities are now setting up local tax departments to administer the property tax as well as other own revenues that had previously been administered for them by the Republic Tax Offices of the national government.' *(Ibid.)*

III. SWITZERLAND

Some time ago, Switzerland was labelled as 'a special case of a highly miniaturised and extremely federalist state' (*Sonderfall eines hochminiaturisierten Extremföderalismus*), because the Swiss regional and local authorities (*Gebietskörperschaften*) are fairly small but at the same time enjoy internationally uniquely far-reaching powers.[122] However, in the context of the Swiss system it can hardly be spoken of decentralisation: From a historical perspective, Swiss federalism should rather be seen as 'a form of non-centralization'.[123] Municipalities to a large extent pre-existed the cantons.[124] And the latter, when founding the Swiss federal state in 1848, entrusted the central state with only modest powers; they kept 'a considerable degree of autonomy for the 'member states' in order to protect their cultural (i.e. linguistic and religious) differences.'[125] It is against this background that it is hardly surprising that in Switzerland the trend tends to be going towards centralisation.[126]

1. Historical development of local government in Switzerland at a glance

a. Middle ages and early modern period

Swiss municipalities have their roots in various forms of organisation, mainly in co-operative associations, but also ecclesiastical

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122 BLÖCHLINGER, Baustelle Föderalismus, p. 30, 31.

123 LINDER, Handbook, p. 25.

124 SEILER, Gemeinden, p. 492; HORBER-PAPAZIAN, p. 228.

125 LINDER, Handbook, p. 16.

126 See, e.g., BLANKART, CHARLES B. *The Process of Government Centralisation, A Constitutional View*, Constitutional Political Economy 11 (2000), p. 27 – 39; SCHALTEGGER, CHRISTOPH A./FELD, LARS P. *Die Zentralisierung der Staatstätigkeit in einer Referendumsdemokratie: Evidenz aus der Schweiz*, in: Politische Vierteljahresschrift, 44. Jg. (2003), Heft 3, p.p. 370 - 394.

organisations which can be traced back to the 12th century[127] and in some cases to pre-Christian times.[128] In the countryside farmers got together to settle among themselves how to regulate the use of agricultural and grazing land and the maintenance of common infrastructure; in the cities and towns craftsmen organised themselves in guilds; in the Alps the joint use of the Alps had to be regulated, and along the mountain passes local sumpter co-operatives took care of the transport business.[129] With time these associations were able to wrench more and more power from landlords and aristocratic or episcopal nobility as the case may be. The collective problems that arose were addressed either under the scope of the existing structures of the yielding feudal order, or through 'municipal' structures, in the form of municipal assemblies and councils. The assemblies enjoyed their greatest autonomy in the 14th to 16th century.[130]

In the early modern period the trend towards oligarchy under the 'ancien régime' gradually lead to a restriction of municipal assemblies; in some places they were even abolished completely. In some cities the work of councils was declared a secret matter and 'accountability of the 'gracious gentlemen' (*gnädige Herren*) toward the public was denied'.[131] However, WILHELM OECHSLI retrospectively pointed out in 1903 that local self-government even under the aristocratic system preserved itself as an important element of freedom. GASSER attributes this to the fact that the establishment (*Obrigkeit*), due to the lack of a standing army and a paid bureaucracy, did not represent 'true gentlemen aristocracy' (*wirklicher Herrenadel*). Instead they had to 'base their regiment', so GASSER maintains, 'on the perpetual trust and

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127 STEINER, Hist. Lexikon, sub. 'Gemeinde, 1. Mittelalter und frühe Neuzeit, 1.1 Entstehungsgeschichte.'

128 This applies in particular to the early beginnings of rural municipalities, cf. FRIEDERICH, Gemeinderecht, p. 136 para. 1.

129 STEINER, Hist. Lexikon , sub 'Gemeinde, 1. Mittelalter und frühe Neuzeit, 1.1 Entstehungsgeschichte.'

130 WÜRGLER, Hist. Lexikon, sub. 'Gemeindeversammlungen.'

131 STEINER, Hist. Lexikon, sub. 'Gemeindebehörden, 1. Mittelalter und frühe Neuzeit.'

the administrative cooperation of the people'.[132] SEILER, too, underscores that the Swiss municipalities retained a considerable degree of local self-government during this period in comparison to other states.[133]

b. Helvetic Republic and Act of Mediation (1798 - 1814)

During the French Revolutionary Wars of the 1790s, the troops of Napoleon Bonaparte enveloped Switzerland on the grounds of 'liberating' the Swiss people from their system of government which was deemed as feudal, at least in the subject territories (*Untertanengebiete*). In 1798 the old Swiss Confederation (*alte Eidgenossenschaft*) collapsed and the Helvetic Republic, 'One and Indivisible', was proclaimed.[134] The new regime abolished cantonal sovereignty and feudal rights. The occupying forces established a centralised state based on the ideas of the French Revolution with an authoritarian administrative system following the example of the French directorial constitution.[135]

Under the influence of the principle of equality proclaimed in the French Revolution, the municipality of residence (*Einwohnergemeinde*) – a new territorial public corporation (*Territorialkörperschaft*) which associated all Swiss residents of a certain territory (*Einwohnerprinzip*) – was created. This is seen as the beginning of the modern municipal system.[136] The municipalities of residence were among other things responsible for peace and order, road construction and lighting, fire

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132 GASSER, Gemeindefreiheit, p. 92 (translations by the author).

133 SEILER, Gemeinden, p. 492 para. 1.

134 FANKHAUSER, Hist. Lexikon, sub. 'Helvetische Republik, 1. Entstehung und staatliche Organisation, 1.1 Die politische Umwälzung.'

135 FANKHAUSER, Hist. Lexikon, sub. 'Helvetische Republik; 1. Entstehung und staatliche Organisation, 1.2. Verfassung.'

136 See MICOTTI/BUETZER, p. 19. CARONI, however has proven that already the co-operative associations in the middle ages were based on the residency principle and it was only from the 16th century onwards that a gradual shift to the *Bürgerprinzip* took place, according to which membership of a municipality was based on personal attributes (having the municipality or fellowship right) or a proprietary entitlement (e.g. land), see p. 34 et seqq., p. 46 et seqq.

protection and night watch, various policing duties, markets and pubs, weights and measures, affairs concerning civil and marital status and military quartering; however, they stood under the direct supervision of agents of the central state.

Aside from the new municipalities of residence, the historically grown municipal structures (*Burgergemeinden*), which associated certain persons only (*Bürgerprinzip*), were left untouched (so-called municipal dualism; *Gemeindedualismus*). The latter retained their jurisdiction over the administration of their property. One of their main tasks was also the care of the poor.

If the beginnings of the modern municipality are seen in the Helvetic constitution, this is to be understood primarily in *structural* terms: for the first time the entire territory of Switzerland was divided into public corporations, which were mandated to carry out public tasks. In *substance* the municipalities (temporarily) lost their function as self-governing bodies and withered instead to mere administrative units within a hierarchic organisation.[137]

The experiment of founding the Helvetic Republic on the principle of bureaucratic subordination was, however, a miserable failure – in the view of GASSER – as it 'originated from the completely un-Swiss-like aspiration of defying the conservative sense of justice and the local self-responsibility of the people'.[138] Following the withdrawal of French troops in 1802, the Helvetic Republic collapsed due to internal tensions

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137 LADNER/STEINER, Hist. Lexikon, sub. 'Gemeindebehörden, 2. 19. und 20. Jahrhundert, 2.1. Helvetik und Mediation.' Under the then existing legislation, the constitutive meeting (which consisted of at least 100 citizens) passed the municipal constitution and selected the delegates (*Wahlmänner*). The constitutive meeting was called by the prefect who on his part was appointed by the directorate (i.e. by the highest political executive organ of the Helvetic Republic). The prefect appointed sub-prefects in the districts. The latter appointed (national) agents for the administration of villages or town districts, as the case may be. The agents were charged with executing the orders of higher instances, as well as preserving the public peace (*ibid.*).

138 GASSER, Gemeindefreiheit, p. 93, translation by the author.

and even an armed conflict (*Stäcklikrieg*) between centrists and federalists.[139]

With the Act of Mediation (*Mediationsakte*), the Helvetic Republic was abolished and the confederation was newly conceived as a federal state. The earlier municipal organisation on the basis of the 'citizenship principle' (*Bürgerprinzip*) was in part re-established (e.g. in the canton of Bern[140]), in other places the Helvetic municipal dualism remained in place.[141] In some cantons (namely in the canton of Grisons) the municipalities found back to their old autonomy very quickly. [142]

c. Restoration and Regeneration period (1814 - 1848)

After the collapse of the Mediation Constitution circumstances in the cantons developed differently: further cantons from 1814 onwards returned to the pre-revolution system with all its inequalities (restoration). Mainly the cantons that were newly created in the course of the Act of Mediation (Aargau, Thurgau, St. Gallen und Waadt) resisted the creation of new local and personal privileges. Generally, the municipality of residence (*Einwohnergemeinde*) was able to sustain itself alongside the *Burgergemeinde*.[143]

In the regeneration period, the state theorist LUDWIG SNELL,[144] formulated the postulate *for free municipalities as an element of the*

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[139] PAHUD DE MORTANGES, p. 160.

[140] The law of 20 June 1803 provided: 'an Platz der Munizipalitäten und Gemeindskammern werden die vor der Revolution üblich gewesenen Stadträte und Gemeindsvorgesetzten nebst den nach den Bedürfnissen des Orts weiter erforderlichen Beamten eingeführt, mit denjenigen Rechten und Pflichten, die denselben zugekommen sind oder obgelegen haben' (quoted according to FRIEDERICH, Gemeinderecht, p. 137 para. 5).

[141] LADNER/STEINER, Hist. Lexikon, sub. 'Gemeindebehörden, 2. 19. und 20. Jahrhundert, 2.1. Helvetik und Mediation.'

[142] *Ibid.*

[143] LADNER/STEINER, Hist. Lexikon, sub. 'Gemeindebehörden, 2. 19. und 20. Jahrhundert, 2.2. Restauration und Regeneration.'

[144] Following BENJAMIN CONSTANT and HEINRICH FRIEDRICH KARL VOM UND ZUM STEIN.

vertical separation of powers.[145] The idea of municipal self-government was then increasingly being integrated into the regenerated constitutions of the cantons,[146] while in other cantons the Helvetic system with agents appointed by higher state levels was maintained. Especially in Western Switzerland the centralised conception continued to remain in place; in the other regions, considerable autonomy of the municipalities was often re-established.[147] Some cantons had a hybrid system.[148]

d. Federal state (from 1848)

In 1848 the Swiss federal state was founded 'without administrative centralisation, within the framework of a system scaled from bottom to top.'[149] 'The legal system of the cantons' remained 'in place within the boundaries of the possible':[150] The Federal Constitution of 12 September 1848 only curtailed the right of cantonal freedom of organisation insofar as cantons were obliged to stipulate, in their constitutions, the exercise of political rights in line with republican, optionally representative or direct democratic, forms. In relation to the arrangements at municipal level, the cantons remained to a large extent at liberty.[151] Despite the municipalities being seen as a creation of

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145 LADNER/STEINER, Hist. Lexikon, sub. 'Gemeindebehörden, 2. 19. und 20. Jahrhundert, 2.2. Restauration und Regeneration.'

146 In particular the cantons Thurgau and St. Gallen.

147 SEILER, Gemeinden, p. 492, para. 1.

148 In Zurich for example the municipal assembly and the district council were elected indirectly by delegates of the people, but the chairmen were appointed by the governing council (*Regierungsrat*). Cf. on all this LADNER/STEINER, Hist. Lexikon, sub. 'Gemeindebehörden, 2. 19. und 20. Jahrhundert, 2.2. Restauration und Regeneration.'

149 GASSER, Gemeindefreiheit, p. 93.

150 GASSER, Gemeindefreiheit, p. 93.

151 LADNER/STEINER, Hist. Lexikon, sub. 'Gemeindebehörden, 2. 19. und 20. Jahrhundert, 2.3. Bundesstaat.'

cantonal law, the federal court protected the autonomy afforded to municipalities under cantonal law.[152]

In the completely revised Federal Constitution of 29 May 1874 the system of the Federal Constitution of 1848 was maintained. However, under Art. 43(3) all Swiss residents (and this was new) were explicitly put on equal footing with citizens of the municipalities.[153] For the first time therefore all (male – women had to remain patient for around another 100 years until they were to be able to enjoy the same rights)[154] held the same participatory rights at municipal level.

It is only since the enactment of the completely revised Federal Constitution of 18 April 1999 that the municipal level is explicitly mentioned with its own heading 'municipalities' in the Constitution[155] and that, thereby, the historically grown, tripartite arrangement of the Swiss state is made visible.[156] Also the protection of municipal autonomy is now explicitly guaranteed – however still only 'in accordance to cantonal law' (Art. 50(1) BV). Under para. 2 and 3 of the same provision the federation shall take account in its activities of the possible consequences for the municipalities. In doing so, finally, it shall take account of the special position of the cities and urban areas as well as the mountain regions.

If the Federal Constitution, aside from Art. 50 BV mentioned above, makes reference to the municipal level only in passing,[157] then this should not lead to the conclusion that the municipalities do not perform an important function in the federal state. To the contrary:

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152 Cf. BGE 2, 455. Also LADNER/STEINER, Hist. Lexikon, sub. 'Gemeindebehörden, 2. 19. und 20. Jahrhundert, 2.3. Bundesstaat.'

153 Under exclusion of the properties belonging to *Burgergemeinden* and the right to vote in affairs of the *Burgergemeinden*.

154 MICOTTI/BÜTZER, p. 22.

155 Even if the chapter has only one provision, Art. 50 BV.

156 REGULA KÄGI-DIENER, St. Galler Kommentar BV, Art. 50, para. 4.

157 See for instance Art. 128 BV (regarding direct taxes).

Municipalities indisputably occupy an important place in the federal system, both in theory and in practice:[158]

- All cantons have divided their territory into municipalities and these perform (often under the scope of cantonal laws) a fair amount of public tasks locally.[159] On the whole the municipalities execute about a third of the entire public spending and they also generate around a third of the entire public revenue (cf. on this below, point 3.d).
- Case law and legal scholarship recognise municipalities as 'basic cells' (*Urzellen*) of Swiss democracy[160] or – in other words – as a 'central structural principle in the Swiss state system and constitutors of Swiss democracy'.[161] According to empirical research the populations' identification with its own municipality, especially assessed against the criteria of political trust and the satisfaction with local politics, is relatively high.[162]

At the same time municipalities are increasingly reaching the limits of their capacities. The increasing complexity of tasks, but also the growing level of citizens' expectations pressure for greater effectiveness and efficiency, and resource problems are said to be responsible for this.[163] The de-localisation of the population, which goes hand in hand with the 'mobile society' of today, calls the traditionally grown structures increasingly into question as well.[164]

The municipalities are trying to respond to these upcoming challenges with various reforms. Some of the most common reforms at municipal level according to LADNER/STEINER are new public management

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158 See, e.g., FRIEDERICH, p. 139 para. 9; HORBER-PAPAZIAN, p. 243.

159 FRIEDERICH, p. 139 para. 9.

160 BGE 103 Ia 468, p. 474, Commune di Lugano.

161 SALADIN, Kommentar aBV, Art. 3, para. 253.

162 FRIEDERICH, p. 140 with reference to LADNER/BÜHLMANN.

163 HORBER-PAPAZIAN, p. 243.

164 Cf. on this for instance MOOR, p. 16.

reforms, reforms of the political systems, inter-municipal cooperation and the merging of municipalities.[165]

2. Basic features of the system of local government in Switzerland

The Swiss federal state is composed of 26 at least in principle 'sovereign' cantons.[166] The municipalities are the lowest level in the three-tiered Swiss state. The Federal Constitution guarantees the cantons their autonomy to regulate the organisation of their territory according to their own needs, within the framework of the Federal Constitution and other federal laws (*cantonal freedom of organisation; kantonale Organisationsautonomie*).[167] This autonomy includes the regulation of local self-government.

While the sovereignty of the cantons is expressly mentioned in the Federal Constitution, the same principle does not apply to the municipalities. Municipalities are institutions of cantonal law. Their political organisation and the scope of their jurisdiction as well as the extent of their citizens' political rights depend (at least in part) on the respective cantonal laws. The 26 existing cantonal laws on municipalities differ greatly from one another. While some cantons grant their municipalities a large area of discretion, others prescribe in detail the municipalities' competences as well as the manner in which these powers are to be exercised.

Against this background it appears comprehensible that the Swiss municipalities are characterised, at the foremost, by their diversity:[168] Large differences exist not only with regard to the size of the

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165 LADNER/STEINER, Wandel, p. 233.

166 According to Art. 3 of the Federal Constitution, 'the cantons are sovereign insofar as their sovereignty is not limited by the Federal Constitution; they shall exercise all rights which are not transferred to the Confederation'.

167 Article 47(2) BV.

168 On the diversity of Swiss municipalities from a political-science perspective see HORBER-PAPAZIAN, p. 229 et seq.

municipalities,[169] but also for example with regard to their socio-economic structure, the political structures and modes of citizen participation, the administrative structures and the financial capacity of the municipalities. In the course of the following simplified presentation only a few common key points of the complex field of local government shall be presented.

a. Political/institutional organisation of local government

Common to all municipalities is their democratic organisation:[170] All Swiss municipalities have at least[171] one legislative and one executive organ:

As far as the *legislative organ* is concerned, the cantonal laws, in most cases,[172] provide for two different models: a traditional or ordinary and an extraordinary or parliamentary model.[173]

- In the *traditional or ordinary model* there is no representative organ, e.g. no parliament. The legislative organ is formed through the general meeting of all citizens, the *municipal assembly (Gemeindeversammlung),* which means that it is congruent with the electorate. As a rule, the citizens exercise their powers in the municipal assembly at least twice a year. This model is considered as the most direct form of democracy, because all citizens can actively take part in political debates and in the decision-making processes over matters concerning the municipality.[174]

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169 In 2004 the largest municipality (Zurich) had 345,236 residents while the smallest municipality at the time (Corippo, TI) only had 17 residents, see HORBER-PAPAZIAN, p. 229.

170 LADNER/STEINER, Hist. Lexikon, sub. 'Gemeindebehörden, 2. 19. und 20. Jahrhundert, 2.3. Bundesstaat.'

171 Some cantons also provide for a mandatory organ responsible for financial auditing, see for instance, regarding the canton Bern, Art. 72 GG.

172 See fn. 175.

173 MICOTTI/BÜTZER, p. 25 et seqq.

174 The ordinary model does not, however, exclude other instruments of direct democracy such as initiative and referendum besides the municipal assembly.

- In the *extraordinary or parliamentary* model, the legislative organ is formed by a *municipal parliament* composed of members elected by the citizens of the municipality (usually in proportional representation elections). This model of indirect democracy is often complemented by a variety of additional instruments of direct democracy (see lit. b below). In general, the extraordinary model is practised in large municipalities. The minimal number of citizens required for opting for the parliamentary model varies from canton to canton, ranging from 300 to 2000 residents.[175] Today, one fifth of the Swiss municipalities (comprising the majority of the Swiss population) are organised according to the parliamentary model.[176]

The highest organ of all municipalities (also of those with a parliament) is the electorate which expresses its will (within the scope of elections, but also in the course of adopting substantive decisions) either in municipal assemblies or at the ballot box.

Both in the municipal assembly system as well as in the parliamentary system the municipality is led by a city or municipal council (*executive organ*) with on average five to seven members, headed by the president of the city or municipality. The council functions according to the collegiality principle (*Kollegialitätsprinzip*). The executive is usually[177] elected by the electorate either under the first past the post system or under proportional representation.

Commissions are drawn on for preparatory, in part also for co-decision functions. There are legislative commissions (these work at the hand of municipal assemblies or the parliament) as well as commissions of the executive branch. The commissions are composed – depending on their task – either according to political or professional criteria. Prevalent are

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175 MICOTTI/BÜTZER, p. 27 (the cantons of Geneva and Neuenburg prescribe a mandatory municipal organisation with a parliament for all municipalities, thus also for very small municipalities).

176 MICOTTI/BÜTZER, p. 27.

177 An exception for example is the canton Neuenburg: here the members of the executive are elected indirectly, i.e. by the (in every municipality mandatorily existing) parliaments.

audit (also financial audit), tax, social care and school commissions, as well as – more recently – commissions in the areas of traffic, local planning, and environmental protection. Often, ad-hoc commissions are appointed for individual projects; this allows more citizen-friendly and broadly based decisions to be made.[178]

b. Citizens' participation

Opportunities for participating also vary from canton to canton and within a canton even from municipality to municipality. The Swiss system, in comparison to systems abroad, stands out due to its heavy reliance on instruments of direct democracy. Most if not all Swiss municipalities provide for several instruments that grant citizens the right to directly participate in the decision-making processes on important political and economic issues. Thus, in Swiss municipalities,[179] the power to rule is not completely transferred to the elected representatives, but is shared amongst the elected representatives (or, as the case may be, the municipal assembly), and the citizens. The two main instruments for direct citizens' participation (referendum and citizens' initiative) shall briefly be characterised here:[180]

With a *referendum* the citizens may - under certain conditions - sanction or reject a decision taken by a municipal organ (normally the parliament, exceptionally the municipal council or the municipal assembly) by popular vote. The instrument exists in various shapes and forms. The function of the referendum differs according to how the process leading to a popular vote is being introduced:

- In its most extensive form, the referendum is *prescribed by law*, i.e. the municipal statute or the cantonal law on municipalities define

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178 LADNER/STEINER, Hist. Lexikon, sub. 'Gemeindebehörden, 2. 19. und 20. Jahrhundert, 2.3. Bundesstaat.'

179 The same is true for the cantons and the federation which are all also functioning according to a system of semi-direct democracy, i.e. a system with elected representatives, coupled with direct democratic rights for the citizens.

180 For a comprehensive account of the instruments of direct democracy at municipal level cf. a study by MICOTTI/BÜTZER.

some issues that are in any case subject to the referendum with no special initiation by citizens being necessary (*compulsory referendum*). The Law on Municipalities of the Canton of Bern, e.g., provides in its Art. 23 that the citizens mandatorily decide on the adoption and amendments of the municipal statute, on changes of the local tax rate and on the introduction of a procedure to found a new municipality, to abolish an existing municipality or to change boundaries of a municipality. As a rule, municipalities provide for additional compulsory competences of citizens, especially in the domain of public spending powers.[181] The function of the compulsory referendum is to ensure effective citizens' participation with regard to particularly important issues so as to reach the highest possible degree of legitimacy.

- We refer to a *facultative referendum* if a certain part of the electorate can introduce it by collecting a sufficient number of signatures. In this case, the referendum is primarily an instrument of *retrospective control* of the decisions rendered by the elected representatives (or, as the case may be, the municipal assembly) as a group of citizens can initiate a process aimed at preventing the representatives from passing a decision that does not have the support of the majority of the electorate. In addition, the institution of the referendum also plays an important *preventive role* to the extent that the representatives, while rendering their decisions, will anticipate the danger of a referendum and therefore will not easily adopt a solution that would clearly not be supported by the majority of the electorate.
- Where a municipal organ can decide by itself whether it wants to put a decision to the citizens' vote or not, we speak of a *plebiscite (Behördenreferendum*). The function of this instrument is fundamentally different from the above mentioned peoples'

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181 The statute of the city of Bern, e.g., provides that the electorate is obliged to decide individual investment items of the capital budget of more than CHF 7 million, notwithstanding provisions of other regulations passed by the electorate (Art. 36(f) of the Municipal Statute of the city of Bern of 3 December 1998 (Systematische Sammlung des Stadtrechts Bern 101.1)).

> referendum where either the statute or the citizens decide whether or not an issue is to be put to a popular vote. In the case of the plebiscite, citizens' participation in fact remains restricted to cases where the competent municipal body expects the voters to approve its decision. Thus, the referendum serves purely political goals such as gaining legitimacy for a disputed decision or teaching the opposition a lesson.

While a referendum might be characterised as a veto right of the citizens (which primarily aims at keeping the status quo), the *initiative* allows citizens to impose *a change to the status quo*: with this instrument, a certain percentage of citizens may propose to adopt a certain decision or legal act and ask for a popular vote in case the competent organ (most often: the municipal parliament) is opposed to it. Thus, the citizens' proposal will be adopted if either the competent organ or the electorate accepts it.

A comparable function to the initiative in assembly municipalities relates to the *right to present motions (Antragsrecht).* Every person who has the right to vote is entitled in municipal assemblies not only to speak and vote on matters on the agenda, but also (within the jurisdiction of the municipal assembly) to present motions. The motions may relate either to matters which are on the agenda, or they may bring completely new issues on the agenda of a following municipal assembly.[182]

To sum up, we can say that citizens in Swiss municipalities, besides the election of persons to municipal offices, dispose of a range of possibilities to directly influence local politics: they may prevent elected organs from adopting general acts or concrete decisions that are not approved by the majority of citizens (by using the referendum) and they may take action if the elected organs remain passive (by launching an initiative or using their right to present a motion). However, it must be added that the opportunity of intervention with instruments of direct democracy is generally limited to 'important' questions.

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182 Provided an application is declared significant by the municipal assembly.

c. Municipal tasks

The allocation of tasks and responsibilities between the cantons and their municipalities is also regulated neither consistently from canton to canton nor unvaryingly in temporal terms. Identifying the areas of intervention of the municipalities and their (legislative and executive) powers is therefore very difficult. Generally, municipalities perform a range of tasks that are assigned to them by the respective canton (delegated tasks). Besides this, according to the concept of general residual powers they may perform other tasks concerning the local level which the superordinate legislation does not reserve for the canton or federation (own powers).[183]

According to HORBER-PAPAZIAN, municipal tasks include 'the management of the municipal heritage, the planning and management of municipal finances, the collection of municipal taxes, the granting of the right of citizenship, the organization of the municipal administration, policy relating to sport, culture, youth, the elderly and local management, the construction and management of school buildings, public and school transport, preschool and after-school child-care, school cafeterias, early-childhood structures, local police with responsibility for basic public safety, the construction of municipal roads and the promotion of the local economy and tourism'.[184] The municipal decision-making powers usually are more restricted in other areas where municipalities are implementing cantonal or even federal policies 'such as policy on political asylum (provision of accommodation centres), the environment (waste management, water treatment), health (home care, fighting addiction, health promotion), the

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[183] HORBER-PAPAZIAN, p. 238; GRODECKI, p. 37 et seq. The distinction between delegated tasks and own powers, although it is still widely applied in cantonal legislation, is actually outdated. The distinction (prior to 1967) used to serve the purpose of defining the sphere of municipal autonomy. Under previous case law by the federal supreme court a municipality was only deemed autonomous within its own powers, but not to the extent that delegated tasks were performed. Today, however, the federal supreme court uses the criteria of the 'relative considerable freedom of choice' in determining the sphere of autonomy (→Illustration 2), see also GRODECKI, p. 28.

[184] HORBER-PAPAZIAN, p. 239.

administrative and commercial police, construction and civil protection (construction of shelters, fire prevention)'.[185]

d. Local government finance

Again, the system of local government finance depends on the respective cantons which regulate the financial room for manoeuvre of their municipalities by establishing budget principles, uniform accounting models, taxation rules and debt limits.[186] But in general, Swiss municipalities do have the right to raise their own taxes provided that neither the canton nor the federation are exclusively responsible. They commonly also levy taxes on income and wealth of persons, profit and capital of enterprises and capital gains (see, e.g. Art. 113 of the Constitution of the canton Bern). For these taxes, however, municipalities only have tax flexibility, i.e. they must apply the cantonal laws and limit their decision to setting the annual tax rate. Finally, an important part of municipal income is raised in form of user charges.

According to the figures published by the Swiss department of finance in 2009 the municipalities accounted for around one third of public expenditures of all state levels in 2007. During the same period, they also collected about one third of the public income.[187] Municipal income is made up of around 50 per cent tax revenue, about 25 per cent fees, and other income.

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185 *Ibid.*

186 DAFFLON, p. 16.

187 EIDGENÖSSISCHES FINANZDEPARTEMENT, *Öffentliche Finanzen 2009, Bund, Kantone, Gemeinden*, Taschenstatistik, April 2009, accessible at: http://www.bfs.admin.ch/bfs/portal/de/index/news/publikationen.Document.119996.pdf (accessed 11 August 2009).

PART 3: ACCOUNTABILITY OF LOCAL GOVERNMENTS - LEGAL CHALLENGES

In this part the requirements that result from the theoretical accountability framework (Part 1, see p. 22) for the legislation concerning local self-government shall be examined in greater depth. On the basis of practical examples (illustrations from the countries introduced in Part 2) it will be shown how the legislation can promote – but also undermine – accountability in every category. In the process it will become apparent that on the one hand the demand for accountability forms the common denominator of key principles of public law and that on the other hand not much is gained with the general commitment to these principles; it is rather the legal arrangement in detail that is decisive.

I. DIVISION OF POWERS

That public power needs to be divided between different actors is an old and important insight of state theory: 'the accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny'.[188] Although the idea of division of powers is generally associated with names such as MONTESQUIEU, LOCKE, THE FEDERALISTS etc., it can be traced back to the Greeks and even further. As RIKLIN demonstrates, the idea was already inherent in the concept of the 'mixed constitution'[189]. The first bequeathed theory of such a form of government is consigned by PLATON (427 – 347 AD).[190]

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188 JAMES MADISON, The Federalist Papers, No. 47. See also: CHARLES LOUIS DE SECONDAT MONTESQUIEU: 'Lorsque dans la même personne ou dans le même corps de magistrature, la puissance législative est réunie à la puissance exécutrice, il n'y a point de liberté; parce qu'on peut craindre que le même sénat ne fasse des lois tyranniques pour les exécuter tyranniquement. ... Tout serait perdu si le même homme, ou le même corps des principaux, ou des nobles, ou du peuple, exerçaient ces trois pouvoirs: celui de faire des lois, celui d'exécuter les résolutions publiques, et celui de juger les crimes ou les différends des particuliers'. (11th book, chapter VI); JOHN LOCKE: 'For he being supposed to have all, both legislative and executive, power in himself alone, there is no judge to be found, no appeal lies open to anyone, who may fairly and indifferently, and with authority decide, and from whence relief and redress may be expected of any injury or inconveniency that may be suffered from him, or by his order' (Second Treatise of Civil Government, chapter VIII).

189 'Mixed constitution and division of powers are different perceptions of the same phenomenon. The same purpose is attributed to both, namely the prevention of power concentration to thwart the abuse of power, tempering power and protecting freedom. Both call for the distribution of sovereign powers on to multiple bearers of power and the participation of various social forces […]. ' (p. 366 et seq., translation by the author). RIKLIN defines the term 'mixed constitution' as 'a political system, which on the basis of pluralism connects democratic, oligocratic and/or monocratic structures with each other' (p. 11, translation by the author).

190 RIKLIN, p. 45 and 350, noting that already MOSES for Israel in the 13th century, LYKURZ for Sparta in the 8th century and SOLON for Athens in the 6th century BC 'in fact, or according to legend [created] local communities, which were subsequently interpreted as mixed constitutions' (translation by the author).

The realisation that public power needs to be divided has led to different theories[191] that, in part, postulate detailed requirements for the organisation of the state.[192] The idea of division of powers, however, shall in this context not be understood as a diagrammatic plan that can be readily applied to any specific circumstances, but rather, it ought to be viewed in broad terms as a general postulate for the limitation of power and as an instrument for enabling an organisation based on the division of labour, or as BÄUMLIN put it: as a postulate for the 'dispersion of partial duties and their allocation to various legal instances'.[193] This postulate needs to be complemented, however, with another important realisation of state (and organisational) theory, namely that *functions (i.e. responsibilities) must be clearly assigned* to the different actors, because 'if many people are accountable, no one is accountable. Where no one person is clearly obliged to answer to the public, each person can pass the buck and shift the blame to someone else'.[194] From what has been said it also results that the clearly attributed responsibilities must be respected by other actors, i.e. that there be *no interference*.[195] It is apparent that the achievement of both, the division of powers as well as the clear assignment of functions, would be rendered meaningless if interference of other actors would be allowed.

While state theory places considerable significance on the demand for *a horizontal division of powers*, as advocated for instance by LOCKE and MONTESQUIEU, a decentralised state also displays *a division in vertical*

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191 These theories shall not be reproduced here. Cf. for a current account of the various theories RIKLIN and MÖLLERS.

192 The term 'state' is, in the following, to be taken to include all levels of state within the decentalised state, inclusive of the municipal level.

193 BÄUMLIN, p. 228 (translation by the author). For the emphasis of precisely this aspect cf. recently also RIKLIN and MÖLLERS.

194 MULGAN, p. 195.

195 O'DONNELL uses the term ‚encroachment' (New Democracies, p. 41). This requirement is not meant to be understood as a rejection of the cooperation of powers. A cooperation is quite conceivable, but here too the individual contributions of the jointly operating powers must be disclosed clearly and must be protected from infringements of other powers.

terms.[196] The additional vertical dimension of the division of powers is indeed an aspect that is believed to foster accountability of the state as a whole. In the words of STANOVČIC, writing in the Serbian context and of GLAUS, writing in the Swiss context:

> 'Local government also means decentralisation and not merely deconcentration of power. If it is genuine, the central government loses its absolute domination and its right and ability to interfere in local affairs. Just as the horizontal division of power is seen as a guarantee of freedom and obstacle to every kind of absolutism, so local government can in theory be seen as a system of the vertical division of power which serves the same purpose. Local self-government has a similar role today in the process of democratic transformation of post-communist societies.'[197]

> 'This freedom of the members or of the municipalities, respectively, in the framework of a whole or the canton or the state, respectively, aside from the classical horizontal division of powers effectuates a vertical division of powers and thereby significantly contributes to a balance of state power. It is a safeguard against unitarism and centralism and ultimately against the constitution of man in bondage.'[198]

Parting from the model developed in Part 1, a legal framework promising accountability to the citizens in the context of decentralisation must be built on the idea of division of powers. In fact, the legal framework must meet the following criteria in both dimensions, i.e. horizontally and vertically:

- The legal order provides for multiple offices of the state. These offices enable their actors to pursue their own interests. This is possible only, if every actor can form his own will and make his own decisions. Only if these conditions are met, is power divided amongst the actors;
- Each office has a clearly demarcated sphere of responsibility. Responsibility in this context means a right and also a duty to perform attributed tasks. Such a responsibility can only be assumed

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196 Vertical and horizontal divisions of powers aside, further dimensions are conceivable. RIKLIN mentions e.g. temporal division and social division (p. 408).

197 STANOVČIC, Decentralisation, Regionalism and Autonomy, p. 128.

198 GLAUS, p. 14.

realistically to the extent that one has a certain degree of discretion in discharging the duties, as well as the necessary funds for performing the duties (or the ability to generate these funds independently).

- Interference is not allowed. It is obvious that both, division of powers and a clear assignment of responsibilities are rendered meaningless if interference of other actors is tolerated. It is only a functioning legal protection against interference that ensures that the idea of dividing powers is not only afforded the weight of a mere concept, but of a legally enforceable instrument.

1. Vertical dimension

Dividing powers in vertical terms means establishing a multi-level state (versus a unitary state). From a public law perspective this concerns the principle of decentral (in the extreme case, federal) organisation of the state. This presupposes the recognition of local government as a *distinct local sphere* with *legally defined powers* (lit. a) and *legal mechanisms to fend off interference into the local sphere* (lit. b).

a. Local government as a distinct sphere with legally defined powers

Vertical division of powers requires the recognition of a local sphere of interest (separate from the state and endowed with legal capacity) with its own power base, which is enabled to form its own will and, accordingly, to hand down binding decisions and to bear responsibility for these locally.[199]

Such a *sphere must be constituted by the legal system, i.e. it must be established as a legal subject that may be assigned powers (in terms of* FÜGEMANN*: Zuordnungssubjekt)*[200] *and must be equipped with the relevant structures for forming and making decisions*. This can be done

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199 This requirement for vertical division of powers is only met by (political) decentralisation, but not with (administrative) deconcentration.

200 See FÜGEMANN, p. 20.

at various regulatory levels and with a binding effect of varying degrees upon the superordinate state levels. A comfortable legal protection of its existence seems to be a central element for the evolvement of the local sphere and therefore for the de-facto division of powers. It would therefore stand to reason to stipulate the recognition of the local sphere at the constitutional level; constitutions are generally only alterable under strict conditions and as such would provide the best possible legal protection. The particulars, e.g. the specific arrangement of decision-making structures are usually codified in a law on local self-government.[201]

The recognition of local interests and the existence of local structures are necessary though not sufficient conditions to reach a vertical division of powers. Power is only then truly separated when the local structures are endowed with a clearly demarcated sphere of responsibilities (rights and duties), i.e. with own public tasks (for which they are locally accountable) and the necessary funds for the discharge of those tasks (or the possibility of generating these funds).

Regarding the question 'which tasks for which level?' the *principle of subsidiarity* may serve as a guideline. According to this principle, matters ought to be handled by the smallest, lowest or least centralised competent authority or – put the other way round – a central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at a more immediate or local level.[202] The economic theory of fiscal federalism has furthermore developed

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201 Serbia recognises the existence of a local sphere at constitutional level. In Switzerland such guarantees can (partly) be found at cantonal constitutional level (federal law provides neither a guarantee of the institution (*Institutsgarantie*), nor a guarantee of continuance (*Bestandesgarantie*). In Pakistan the local level merely comes to bear in the local government ordinances, which have been passed by the provinces under compulsion. However, they remained protected by the constitution until the end of 2007.

202 The principle of subsidiarity has found its way into the COUNCIL OF EUROPE'S European Charter on Local Self Government, Art. 4(3). See also the recommendation no. R (95) 19 of the Committee of Ministers to member states on the implementation of the principle of subsidiarity (adopted by the Committee of Ministers on 12 October 1995 at the 545th meeting of the Ministers' Deputies).

criteria for defining the levels that are in a position to fulfil a task effectively: According to the *principle of fiscal equivalence*, e.g., the circles of funders and beneficiaries of services should coincide and according to the *principle of connectivity (Prinzip der Konnexität*) the circles of those ordering services and of those paying for them should coincide.[203] These and similar principles may deliver arguments in the (political) process of distributing responsibilities between different state levels. However, due to their imprecise silhouette they are not suitable as a legal benchmark for the allocation of tasks.[204] (→ Illustration 2)

With regard to accountability, it is, first and foremost, important that the legal provisions granting powers *clearly set out the extent of the local scope for decision-making* (and thereby the extent of local accountability). In particular, from the legal order must *clearly result the direction of accountability*: where the local level is responsible for carrying out a task according to instructions from the upper level, the responsibility remains to a large extent with (and accountability is directed to) the upper state level. Where the local level is responsible for carrying out tasks under its own responsibility according to local needs, accountability is directed to the local level. In other words, the legal system needs to clearly define not only the task that needs to be fulfilled but it must also show whether the local level is acting as an agent of the central state administration or as an agent of the local citizenry. A common division that relates to the question in hand is the one between '*own powers' (eigene Aufgaben*) and '*delegated tasks' (übertragene Aufgaben)* (→ Illustration 1). This division can be traced back to the idea of local governments' dual position, according to which local governments are acting on the one hand as an agent of the superior state level, and on the other hand in their own responsibility,

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203 See on the diverse economic literature: OATES, WALLACE, E., *Toward A Second-Generation Theory of Fiscal Federalism*, International Tax and Public Finance, 12, 2005, p. 349 - 373.

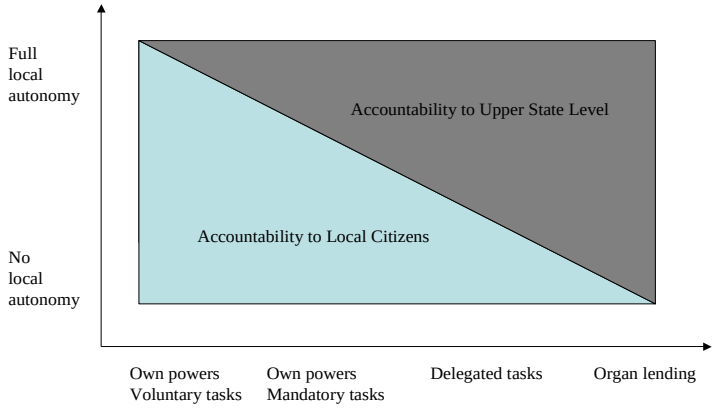
204 Thus, explicitly with regard to the meaning of the relevant constitutional provision in Switzerland (Art. 5a BV) SCHWEIZER/MÜLLER, St. Galler Kommentar BV, Art. 5a, para. 20): 'the central significance of adherence to the principle of subsidiarity will unfold when it comes to politically justifying public authority proposals' (translation by the author).

i.e. as an agent of the local citizenry. Accordingly, local governments dispose of an independent sphere of activity (*eigener Wirkungskreis*) and a delegated sphere of activity (*übertragener Wirkungskreis*). Within the independent sphere of activity, the municipality exercises its own right (in its sole discretion, without instructions from superior state levels). The *independent sphere of activity* can, again, be differentiated between voluntary tasks (*freiwillige Aufgaben*; here the municipality's discretion relates to the 'if' and 'how' of performing a public tasks) and mandatory tasks *(Pflichtaufgaben*; here the municipality's discretion only relates to the question of 'how' a public task may be performed). Within the *delegated sphere of activity*, the municipality is performing a mandate that has been delegated to it by the superior state level (instructed and supervised under the auspices of the superior state level).**[205]** A special form of centralised government administration is the 'agency lending' (*Organleihe*): in this process an organ of the municipality is placed at the disposal of a superior state level and is acting under the instruction of the borrowing state level.

The relationship between the legal definition of a task, the local autonomy and the direction of accountability can be illustrated as follows:

205 Cf. on the idea of the various spheres of activity of municipalities in Germany FÜGEMANN, p. 61 et seqq. According to this author the idea can be traced back to the 19th century; according to other authors even back to the Middle Ages (p. 62).

Graduation of Local Autonomy and Direction of Accountability



The more tasks are allocated on the left side of the scale, the more the idea of vertical division of powers is realised.

Technically, powers can be allocated using an abstract formula or using the method of enumeration. Experience, however, has shown that an accurate abstract assignment is hardly possible.[206] While abstract principles may prove sensible as guidelines (for the legislature), no clear responsibility can be deduced from them for the individual case (→ Illustration 1). Therefore, from an accountability perspective the *listing of individual competences appears indispensible*. This, however, does not necessarily mean that powers of a given sector either entirely

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206 Thus, for example the German public law scholar GEORG JELLINEK proposed using the interest in transferring a task as an abstract criteria for the allocation of a task to the own sphere or the delegated sphere: if political authority is transferred because the interests of the state are, by decentralisation, better served than by direct execution by organs of the state and because the transfer is in the interest of the municipality, then the transfer shall affect the autonomous sphere and from this assignment a right shall follow for the municipality to execute the task. Is the characteristic of the municipality's self-interest missing, then the delegated sphere is affected and the municipality is not exercising its own rights, but those of the state (FÜGEMANN, p. 66, 68). Cf. also the attempts in the Swiss doctrine, illustrated by GLAUS, p. 61 - 73.)

be attributed to the central state (or upper state level) or to a local government. Often it is necessary that different levels cooperate in the fulfilment of a certain task, but even (and especially) then, the spheres of responsibilities of each participating tier must be clearly defined. Since this usually implies detailed regulation, but also because the allocation of tasks may change in certain areas from time to time it makes sense to integrate only very general statements about municipal tasks in the Constitution or matrix Law on Local Self-Government, but to clearly allocate powers in *sectoral legislation* (→ Illustration 2). Such a solution may be detrimental to the legibility of local tasks, but it excludes the risk of having conflicting provisions about local tasks in general and sectoral legislation and therefore in a concrete case offers more clarity about the extent and the limits of the local sphere.

Conclusion: The division of tasks is an on-going political process. Most basically, from a legal perspective, it is important that the allocation of tasks and particularly the direction of accountability is *clearly defined in coherent legal terms*. Since a clear abstract definition is barely possible and the allocation of tasks may change during time, the enumeration of competences in sectoral legislation seems to be the most appropriate legal technique.

The following illustrations will examine how Serbia (→ Illustration 1) and Switzerland (→ Illustration 2) have dealt with the challenge of assigning powers to their local governments.

Illustration 1: Defining the local sphere in Serbia

The existence of the municipal level is nothing new for Serbia. The municipal level already had some significance under the pre 1989 political and legal order of Yugoslavia, where municipalities were considered as a ‘system of self-governing democratic integration of

socio-political organisation representing the basic communities'.[207] But this concept did not hinder the Yugoslav state to maintain

> 'the principle of the functional unity of power and the municipalities were not perceived as the expression of a local level of power in the western sense, distinct and independent from central government, but as the basic unit of a system which, although based on federative, self-governing principles, formed a single whole.'[208]

Even though the municipalities under this system had 'substantial powers and a large degree of autonomy, [t]his autonomy was not embodied in legal instruments, […] in view of the strict political control to which it was subject'.[209] 'In such a context', the COUNCIL OF EUROPE writes, 'there was no clear legal picture of the division of powers between the state and municipal levels. The role of the municipalities was mainly to implement decisions taken at a higher level.'[210]

During the Milosevic regime, i.e. during the last ten years of the past century, the powers of the party and the central state had been even more concentrated in the hands of a few and the space for local self-management had correspondingly been further reduced.[211] In the words of LEVITAS/PÉTERI:[212]

> '...in many countries the creation of sovereign nation states has been taking place against a background of centrifugal ethnic conflict. Not surprisingly in such cases, "decentralization" projects have often been seen as a step towards further national fragmentation. These forces have been most obvious in the states arising

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207 See, on the role attributed to the local level under Titos communism: COHEN, The Socialist Pyramid, p. 440 and MARCOU, p. 34. 'in Yugoslavia, municipalities had a wide range of duties to perform with their own resources and extensive management autonomy, as an expression of the self-management ideology, but [...] without any distinction between state and local government functions'.

208 COUNCIL OF EUROPE, CONGRESS OF LOCAL AND REGIONAL AUTHORITIES, Report Democracy, sub. 'II. Historical Background to Local Democracy in Yugoslavia'.

209 *Ibid*.

210 *Ibid.*

211 GOVERNMENT OF THE REPUBLIC OF SERBIA, Strategy, p. 13.

212 LEVITAS/PÉTERI, p. 17 (emphasis added).

> out of the former Yugoslav Federation, where the state-builders of the 1990s immediately centralized the fiscal structures of their new nation-states, *almost totally erasing the decentralized (though poorly regulated) local governments of the former Federation.'*

Decentralisation was therefore an important topic within the administration reform launched after Milosevic's fall and the Tadic/Kostunica Government accordingly affirmed that 'the distribution of power between the central and sub-central (local) levels of power represents one of essential prerequisites for the general society democratization'[213]. However, three years after the local governance reform in Serbia, i.e. in 2005, it was hardly possible to find out what kind of tasks had been transferred to the municipalities in the realm of the so-called decentralisation reforms, i.e. with the enactment of the Law on Local Self-Government and related legislation. On the one hand, municipal staff, when being asked what kind of changes they felt in practice regarding municipal tasks, they were of the opinion that the situation was actually quite the same as before the enactment of the LSG.[214] Commentators of the handbook of local self-government have declared that 'unlike the previous Law on Local Self-Government (of 19 November 1999) when there were set forth only 13 original competencies of the municipality, now there is 35 altogether', although at the same time somehow contradicting this statement by admitting that '[i]t will not be too difficult to conduct most of the mentioned activities because the better part of them has been conducted by the municipality up to [...] now.'[215]

An analysis of the legal provisions assigning tasks to municipalities does not add a lot of clarity:

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213 GOVERNMENT OF THE REPUBLIC OF SERBIA, Strategy, p. 13.

214 Interviews held with members of the Intermunicipal Working Group Legal Issues (a standing working body set up of the lawyers from the legal departments of the municipalities of Kraljevo, Uzice, Pozega, Cacak and Kraljevo), held in Kraljevo, July 2005.

215 SCTM/MINISTRY OF JUSTICE AND LOCAL SELF-GOVERNMENT OF THE REPUBLIC OF SERBIA, Handbook, p. 5.

- Art. 113 of the *Constitution of the Republic of Serbia*, which was enacted under the highly centralised Milosevic regime in 1990, contains a rather broad list of municipal tasks which has not been changed in the context of the decentralisation reforms.[216] Since regarding all enumerated tasks the provision refers to 'the Law', it is – in itself – neither severely limiting nor guaranteeing municipal tasks or any sort of municipal sphere.
- The Law on Local Self-Government (LSG) states, as an abstract principle, in its Art. 1 that 'the right of citizens to local self-government shall be exercised directly and through freely elected representatives, by administering public affairs of direct, collective and general interest for the local population'. It combines this abstract definition with an impressive list of enumerated own powers ('affairs under the primary jurisdiction of the municipality',

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216 According to this article, the municipalities shall, through their agencies, and in accordance with the Law:

1. enact development program, town and country plan, budget, and annual balance sheet;
2. regulate and provide for performing and development of the municipal activities;
3. regulate and provide for the use of urban construction sites and business premises;
4. take care of construction, maintenance and use of local network of roads and streets, and other public facilities of public interest;
5. take care of meeting specific needs of citizens in the areas of: culture; education; handicrafts; tourist trade and catering services; protection and advancement of environment, and in other areas of direct interest for the citizens;
6. execute laws, other regulations and general enactments of the Republic of Serbia whose execution is entrusted to the municipality; provide for the execution of regulations and general enactments of the municipality;
7. establish agencies, organisations, and services to meet the needs of the municipality and regulate their organisation and work;
8. attend to other business as established by the Constitution and law, as well as by the Statute of the municipality.

Art. 18 LSG)[217] and – in reference to sectoral legislation – with a category of delegated tasks (i.e. 'affairs emanating from the scope of

[217] Art. 18 LSG reads as follows: 'A municipality, through its bodies and in accordance with the Constitution and law, shall: 1. adopt development programs; 2. adopt town plans; 3. approve budget and annual account; 4. regulate and ensure functioning an development of utility services, (purification and distribution of water, steam and hot water production and supply, town and suburb commuter transport, cleaning of towns and villages, maintaining rubbish dumps, organising, maintenance and utilisation of markets, parks, greens, recreational and other public areas, public parking lots, street lighting, regulation and maintenance of cemeteries and burials, etc), as well as organisational, financial and other conditions for their implementation; 5. maintain apartment buildings and ensure safety of their use, determine the fee for the maintenance of apartment buildings; 6. conduct procedure for eviction of illegal tenants from apartments and communal premises in apartment buildings; 7. adopt development plans for construction land, regulate and ensure performance of works relevant to development and utilisation of construction land and determine fees for development and use of construction land; 8. regulate and ensure the use of business premises under its management, set fees for use of business premises and supervise the use of business premises; 9. take care of environmental protection, adopt programs for use and protection of natural values and environmental protection programs, i.e., local action and rehabilitation plans, in accordance with its strategic documents and personal interest and specific attributes, and shall set a particular fee for environmental protection and development: 10. regulate and ensure performance of tasks related to construction, rehabilitation and reconstruction, maintenance, protection, use, development and management of local and non categorised roads and streets in towns and villages; 11. regulate and ensure particular conditions for organisation of taxi services; 12. regulate and provide for the transportation in line shipping in the territory of a local self-government unit and define parts of the coastline or riverbanks and aquatic area where aquatic facilities may be constructed and shipping berthed. 13. establish commodity reserves and determine their volume and structure with consent of the competent ministry, in order to satisfy the needs of local population; 14. found institutions and organisations in the fields of primary education, culture, primary health care, physical education, sport, child and social protection and tourism, monitor and ensure their functioning; 15. organise activities related to protection of cultural values of significance for the municipality, encourage development of cultural and artistic amateurism and establish conditions for work of museums, libraries and other cultural institutions which it founded; 16. organise protection from natural and other serious disasters and fire protection and ensure conditions for elimination, i.e., alleviation of their consequences; 17. adopt principles of protection, utilisation and cultivation of agricultural land and ensure their implementation, define erosion areas, organise use of pastures and decide on change of their use; 18. regulate and determine the manner of use and management of public wells and fountains, determine water-economy conditions, issue water

rights and duties of the Republic which have been delegated, by law, to a unit of local self-government').[218] According to Art. 4(1) LSG, municipalities are responsible for the proper and efficient performance of both, own powers and delegated tasks. State oversight is restricted, in the area of own powers, to questions of legality (Art. 4(2) LSG).

When comparing this concept with the previous 'Law for the General Principles of Local Self-Government'[219] it is true that the so-called own powers are now listed under thirty-five items whereas in the previous Law municipalities' original tasks were stated in twenty-six (not – as stated in the handbook[220] – thirteen) articles, and that oversight is clearly restricted to legality in the domain of own powers. But this does not automatically lead to the conclusion that the

economy approvals and licenses for local facilities; 19. ensure conditions for protection, utilisation and improvement of the areas with natural curative properties; 20. organise and encourage tourism development on its territory and determine visitors' tax; 21. manage development and promotion of catering, arts and crafts and trade, set working hours, locations where particular business activities may be conducted and other requirements for their work; 22. use state assets and manage their safekeeping and augmentation; 23. regulate and organise activities pertaining to keeping and protection of domestic and exotic animals; 24. organise tasks related to legal protection of its rights and interests; 25. establish bodies, organisations and services for the needs of the municipality and prescribe their organisation and work; 26. encourage and assist development of co-operatives; 27. form, if necessary, legal aid services for citizens; 28. ensure protection and realisation of personal and collective rights of national minorities and ethnic groups; 29. determine the language and script of national minorities in official use on the territory of the municipality; 30. provide public information of local interest; 31. determine offences for violation of municipal ordinances; 32. establish inspection services and performs inspection supervision over enforcement of regulations and other general acts from municipal jurisdiction; 33. regulate organisation and work of arbitration committees; 34. prescribe and ensure for the use of name, coat of arms and other municipal symbols; 35. perform other tasks of direct interest for the local population, in accordance with the Constitution, law and statute.'

218 Article 2 LSG. The delegated tasks are regulated in Arts. 19 and 20 LSG.

219 Adopted on 11 November 1999 (Official Gazette of the Republic of Serbia No 49/99).

220 See fn. 215.

municipalities have gained a substantial (and clearly demarcated) sphere of governance.

- First of all, the matrix Law on Local Self-Government makes the widely known distinction between own powers and delegated tasks. This fact leads Serbian commentators to the conclusion that the new system is in line with European standards.[221] However, in the European context, the distinction between own and delegated tasks is made usually to allocate responsibility and – as a consequence – political accountability for carrying out a task: in the first case (own powers) municipalities act under their own responsibility, while in the second case (delegated tasks) they act as executing agents of the central level. In Serbia, however, 'the conditions under which certain tasks are discharged are not always taken into account in their characterisation as own or delegated responsibility, and as a consequence *local authorities may have very limited discretion, if any*, within the scope of their so-called own competences'.[222] This seems to be true especially for those tasks that have been devolved to the municipal level with the enactment of the LSG, because sectoral legislation has not been harmonised with the newly introduced assignment of functions, as the following statements underline:

  > 'The new Law assigned municipalities competences in the areas of elementary education, primary healthcare, a part of social services and encouraging economic development. However, a large number of laws which are to demark competences between competencies of ministries and local authorities in these fields has not been changed, so that municipalities can still not achieve their right.'[223]

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221 See SCTM / MINISTRY OF JUSTICE AND LOCAL SELF-GOVERNMENT, Handbook, p. 6: '[I]t can be concluded that the Law on Local Self-Government is by principle harmonized with the Charter of Local Self-Government with respect to consistency with the subsidiarity principle and establishment of substantial autonomy for the local government'.

222 MARCOU, p. 34 (emphasis added).

223 SCTM, Manual, chapter III, section 11.

In addition, all municipal competences (incl. the ones from within the 'primary jurisdiction') are to be exercised 'in accordance with the Constitution and law'.[224] It is not clear whether this means that the authorities can only act on the basis and within the limits of (sectoral) laws governing the various activities concerned or whether they simply have to assume their responsibilities in a law-abiding manner. If the latter is meant, it is a rather unnecessary statement since it expresses something that should be seen as self-evident. If the former is the correct interpretation, the list of municipal tasks in the LSG is largely an illusion, as long as the substantial provisions defining the municipal spheres of responsibility are not clearly stipulated in sectoral regulations.[225]

- From the wording of the law it is, moreover, not clear which ones of the 'own powers' are obligatory and which ones are facultative, i.e. it is unclear whether the municipality can freely decide, in its own responsibility, *if* it carries out a task or only *how* it carries out a task (as far as there is any room for local discretion at all). A comment in the Handbook on the LSG suggests that at least some of the thirty-five enumerated own powers are facultative:

> 'Detailed list [enumerating the competences of local governments, remark of the author] in the Law on Local Self-Government was necessary because without it numerous government bodies would not know their competencies. The concept, which says that everything that is not prescribed in detail does not exist, and that everything that is not explicitly allowed is forbidden, has to be changed, but the process should progress step by step.'[226]

Does Art. 18 LSG simply enumerate possible fields of activity? In this context the question arises as to what significance is to be attributed to the abstract statement in Art 1 LSG ('the right of

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224 See, as far as own powers are concerned, the initiating sentence of Art. 18 LSG.

225 So also the assessment of the rapporteurs Roppe and Kieres in: COUNCIL OF EUROPE, CONGRESS OF LOCAL AND REGIONAL AUTHORITIES, Report Democracy, under 'III. The Problems Facing Local Democracy in the Republic of Serbia Today', Heading 2 'Provision in the law for the general principles of local self-government'.

226 SCTM / MINISTRY OF JUSTICE AND LOCAL SELF-GOVERNMENT, Handbook, p. 3.

citizens to local self-government shall be exercised directly and through freely elected representatives, *by administering public affairs of direct, collective and general interest for the local population'*): Is it limiting the 'other tasks' that may be performed according to item 35 of Art. 18 LSG ('perform other tasks of direct interest for the local population, in accordance with the Constitution, law and statute') or does it guide the national lawmaker when attributing tasks in sectoral legislation (or both) or does it have no legal significance at all?

- Third, the distinction between own and delegated tasks in the Serbian system is relevant also for the question of how the fulfilment of a given task is financed: own powers are in principle to be financed from the municipal budget while delegated tasks are either to be co-financed by different levels of government or financed from the republic budget.[227] This may help explain why the republic was so generous in defining a whole range of municipal tasks as own powers.
- Finally, the legal authority – and, as far as obligatory tasks should be concerned, the legal duty – to carry out these tasks do not correspond to the factual ability of local governments to make their own choices. As has been shown above (Part 2, Chapter II.3.d), local governments are financially still almost completely dependent on the central government. Moreover, the Constitution does not recognise local (municipal) property. For the time being, therefore, local governments only use real estate in state ownership without any possibilities for them to dispose of it independently, i.e. without some kind of state approval.[228] Both aspects obviously severely limit their autonomy and leave the central government with a huge range of possibilities of controlling local governments: it is notorious that 'the one who wields the purse, holds the power'.

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227 UNDP, Fiscal Decentralization, p. 172.

228 GOVERNMENT OF THE REPUBLIC OF SERBIA, Strategy, p. 40.

It can be concluded that while the Constitution and the Law on Local Self-Government guarantee the existence of a local state level and state the right of citizens to local self-government, legal provisions that would make the local sphere operational, namely provisions that would make it clear exactly what tasks local authorities have, their scope and their limits, whether they are mandatory or optional and how they dovetail with those of the central state, do not exist (yet). With the absence of a clear legal picture of the local sphere a basic condition for local accountability is missing, for: what exactly should local politicians be accountable for?

Illustration 2: Defining the local sphere in Switzerland

Although Bernese municipalities are age-old institutions and were not created through a decentralization-process but pre-existed the state,[229] the question of how to allocate the tasks between the canton and the municipalities remains topical.

The Constitution of the canton of Berne (hereafter: KV)[230] stipulates in Art. 112 that the municipalities perform the tasks that have been delegated to them by the federation or the canton (para. 1) and that they may perform other tasks for as far as neither the federation, nor the canton or any other organisation have an exclusive competence to perform that task (para. 2). Municipal tasks can thus be classed according to the distinction between own powers and delegated tasks (see Art. 61(1) of the Law on Municipalities of the Canton of Berne, hereafter: GG).[231]

- Municipalities can decide autonomously about their *own powers* as long as they do not encroach upon exclusive powers of other state levels or public corporations (Art. 61(2) GG). In practice own powers may range from making available a multi-purpose arena, or

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229 See on this, Part 2, Chapter III.1.

230 Adopted on 6 June 1993, BSG 101.1.

231 Adopted on 16 March 1998, BSG 170.11.

providing optional gas supplies, to the operation of a tennis court, or a pub for foreign workers. The city of Biel e.g. holds a number of subsidiaries providing leisure time facilities including a 'mini-casino'.[232]

- Regarding the *delegated tasks*, the Constitution enumerates certain task-areas that are to be fulfilled jointly by the cantons and the municipalities, without however deciding or even guiding the concrete allocation of (sub-)tasks to either of the levels. The GG only repeats the general provision of the Constitution (Art. 112 KV). The concrete delegated tasks of the municipalities therefore result from federal and cantonal (sectoral) legislation.

The existing allocation of tasks and finances has grown historically and in the 1990s reached a degree of complexity that rendered the system highly opaque[233] During the last two decades, many reform processes have been conducted in this area in order to optimise the allocation of tasks and in particular to clarify the responsibilities of each level: In 1994, the canton of Berne launched a process called 'allocation of tasks between the canton and the municipalities'. This process lasted four years. For the first time, the allocation of tasks and finances between the canton and the municipalities was systematically revised using, besides others, the principles of subsidiarity and the principle of fiscal equivalence as guidelines.[234]

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232 Examples by FRIEDERICH, *Gemeinderecht*, p. 199 para. 166.

233 REGIERUNGSRAT DES KANTONS BERN, Gesamtprojekt, p. 7.

234 REGIERUNGSRAT DES KANTONS BERN, Gesamtprojekt, p. 27/28 (principles 2 and 5). Of late both principles are even codified at federal constitutional level (and apply also to the relation between cantons and their municipalities, see BIAGGINI, Art. 5a, para. 10). The principle of subsidiarity is acknowledged a certain 'normative effect' in scholarship: 'With the expansion of the principle of subsidiarity onto the relation between a canton and its municipalities the fundamental commitment to municipal autonomy is reinforced and its extent is specified and substantiated in content: The cantons must organise their municipalities in such a way that they are in a position to, in fact, fulfil public tasks. This includes for example equipping the municipalities with sufficient funds. The fact that the canton must divide its territory into municipalities cannot, meanwhile, be derived from the principle of subsidiarity.' (SCHWEIZER/MÜLLER, St. Galler Kommentar BV, Art. 5a, para.

An evaluation of the status quo had shown that in some cases the allocation of tasks could not be derived from cantonal laws.[235] It also showed that in some cases the allocation was highly opaque[236] and that in many cases the cantonal lawmaker curtailed municipal autonomy more than necessary. In some cases, e.g., he did not only allocate a task to the municipalities but also provided *how* the specific task is to be fulfilled by the municipality, while funding responsibility was (mostly or entirely) with the municipalities.[237] In other cases, the cantonal

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1212). On the contrary, however, the constitutional entrenchment of the principle of fiscal equivalence (Art. 43a(2) and (3) BV) is met by considerable skepticism by scholars. It is not even clear if it also applies to the relationship canton – municipality (tentatively affirmative: BIAGGINI, Art. 43a BV, para. 6). Beyond this, for both principles (principle of subsidiarity and principle of fiscal equivalence), from a legal perspective, it is criticised that they have very unclear outlines, that their legal reach remains blurred and that they are therefore unsuitable as benchmark for a judicial assessment. (BIAGGINI, Art. 43a, para. 2, cf. also RHINOW, Bundesstaatsreform, p. 77).

235 'The division of tasks was sometimes given poor or no attention at all. Often, the lawmaker was satisfied with the general statement: 'The canton and the municipalities fulfill [...]'. Important questions with regard to the assignment of tasks were in effect left to be regulated by the government or the administration – in ordinances, orders or guidelines – or they were not regulated at all' (REGIERUNGSRAT DES KANTONS BERN, Gesamtprojekt, p. 53). As an example the preservation of monuments and historical buildings is cited: The act in effect at the time dated back to 1902 and was qualified as an 'in every respect unsatisfactory legal basis'. Over the years a 'certain arrangement for the allocation of tasks between cantons and municipalities silently established itself. [...]' It was therefore necessary to 'clarify, in a new act, the blurred borders of powers.' (*op. cit.*, Anhang B, p. B-59).

236 The area of social welfare can be cited as an example: 'In certain areas […] there are unclear assignments of competences between the canton and the municipalities as well as between the carriers of the task and the institutions of social care; in some areas of municipal competence the canton is co-financing without having any say in the matter. The same is true inversely for the municipalities. In some areas […], where municipalities, according to the law, dispose of far-reaching competences, there is serious opacity because municipalities, in their own jurisdiction, can decide – without prior approval – on expenditure which is then included in the equalisation of burdens.' (REGIERUNGSRAT DES KANTONS BERN, Gesamtprojekt, Anhang B, p. B-17).

237 This situation was diagnosed for the areas music schools (REGIERUNGSRAT DES KANTONS BERN, Gesamtprojekt, Anhang B, p. B-60), elementary schools and

lawmaker adopted detailed provisions regarding the organisation of municipalities[238] or provided for excessive oversight possibilities for the canton. [239]

The result of the process was, first and foremost, more clarity about tasks and finances.[240] Contrary to expectations, the process resulted in a rather extended transfer of responsibilities from the municipalities to the canton (coupled with the respective shift of the tax burden) while only few hitherto cantonal tasks were transferred to the municipal level.[241] Moreover, in important areas, it was not possible to disentangle the tasks completely: kindergartens and primary education, social care, social insurances and public traffic were defined as common tasks. The process resulted in the adoption of a new Law on Equalisation of Finances and Charges[242] (hereafter: FILAG) and the amendment of 15 sectoral laws in 2000 which did not, however, mark the end of such reforms; the cantonal government indeed stated that 'the division of tasks between the canton and the municipalities [...] is a permanent task of the cantonal parliament, the cantonal executive council (*Regierungsrat*) and the cantonal administration'.[243] One of the

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secondary schools (op. cit., p. B-51). Such provisions exist mainly because the canton, due to persisting pressure on cantonal finances, reduced its co-financing responsibilities with regard to joint tasks without at the same time withdrawing the material provisions that were earlier justified by the fact that the canton was co-financing a task.

238 Thus, for example with the provision of the school commissions in Art. 50 of the Law on Primary Schools: 'The school commissions are the direct oversight and administering bodies of the schools. Each school commission consists of at least five members who are elected on a four year term .[...] The statute regulates the participation of members of the municipal council at the sessions of the school commission.'

239 E.g. all municipal normative acts were subject to previous cantonal approbation, regardless of the importance of their content.

240 REGIERUNGSRAT DES KANTONS BERN, Gesamtprojekt, p. 13.

241 REGIERUNGSRAT DES KANTONS BERN, Gesamtprojekt, p. 13.

242 Gesetz über den Finanz- und Lastenausgleich vom 27.11.2000 (BSG 631.1).

243 REGIERUNGSRAT DES KANTONS BERN, Gesamtprojekt, p. 93.

project's products therefore was the formulation of basic principles for future legislation.[244]

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[244] The *Regierungsrat* declared the principles to be binding on 15 April 1997. The principles read as follows:

(1) Special attention must be attached to the division of tasks between the canton and the municipalities in each and every rule-making process; not only with regard to the manner and the content of the rules to be enacted, but also with regard to the execution of the task at a later stage.

(2) The principles of the division of tasks between the canton and the municipalities are to be regulated in the law (Art. 69(4) KV). The law shall define as clearly as possibly the task areas as well as the financing responsibilities.

(3) The cantonal law shall leave the municipalities a broadest possible room of manoeuvre (Art. 109(2) KV, Art. 42 OrG);

(4) The canton shall only regulate the principles of organisational law of municipalities (Art. 111 (1) KV). These principles are largely regulated in the Law on Municipalities. Organisational provisions shall only be included in sectoral legislation in exceptional cases. In any case, the reasons for including such provisions in sectoral legislation are to be stated.

(5) If, in a rule-making process, municipal tasks are being 'anchored', it must always be checked whether the manner chosen for regulating an issue does best respect the need of the municipalities of disposing of their own room of manoeuvre. Instead of a conclusive cantonal regulation, the following manners of regulation could be applied:

   a. Restriction to the assignment of the tasks; legislation to be done by the municipalities;

   b. Subsidiary legislation (i.e. legislation that applies only in case a municipality does not enact own legislation);

   c. Restriction to cantonal framework legislation;

   d. Making it possible for municipalities to adopt complementary legislation;

   e. Possibility of deviating from cantonal standards within certain limits;

   f. Granting discretion;

   g. Provision for contractual solutions between canton and municipalities.

Since 2000, the allocation of tasks has further been revised in the area of police (single police; *Einheitspolizei*) and disentanglements are planned in the areas of promotion of cultural affairs.[245] A recent evaluation of the FILAG has resulted in new reform proposals in the areas of primary schools, social care, public traffic, roads, asylum and many more.[246]

Besides the intense vertical integration, another issue that is increasingly being seen as problematic is the *horizontal entanglement of municipalities*. Bearing the small size of municipalities in mind and considering the ever increasing mobility of the population it is not

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The selection of the manner of regulation has to be done on due assessment of the individual case and in due consideration of the framework of superordinate legislation.

(6) If the canton adopts regulations applying to municipalities, it shall take into account the different factual circumstances. Instruments for this are:

a. Selection of a manner of regulating that leaves room for manoeuvre for the municipalities (see point 5)

b. Differentiated legislation according to the category and size of municipality, e.g. delegation of tasks and competences.

(7) In the message accompanying proposal of cantonal legislation the consequences of the proposal for the municipalities, in particular with regard to the municipal autonomy, are to be explained. (Art. 65 of the Law of the Grand Council, [i.e. the cantonal Parliament, remark by the author])'. See JUSTIZ-, GEMEINDE- UND KIRCHENDIREKTION DES KANTONS BERN (ed.), *Leitfaden für die Rechtsetzung im Bereich der Aufgabenteilung Kanton-Gemeinden*, Koordinationsstelle für Gesetzgebung des Kantons Bern, 1997, p. 8 et seq., translation by the author).

245 FRIEDERICH, Gemeinderecht, p. 198 para. 165.

246 REGIERUNGSRAT DES KANTONS BERN, Optimierung der Aufgabenteilung und des Finanz- und Lastenausgleichs im Kanton Bern (FILAG 2012), Bericht des Regierungsrates an den Grossen Rat (Vernehmlassungsentwurf), http://www.fin.be.ch/site/fv-filag-vortrag.pdf (accessed 8 July 2009). With regard to accountability, an interesting example is the partial revision of the Law on Primary Schools (BSG 432.210), adopted on 29 January 2008 (in effect since 1 August 2008), which has the objective of clarifying the role of cantonal school inspectors on the one hand and to augment organisational autonomy and with this the steering capacities of the municipalities on the other hand.

surprising that the functional and the institutional spaces[247] are diverging more and more.[248] In this context the main path chosen by the municipalities has been that of inter-municipal collaboration, in order to improve supra-local coordination, but also to realise economies of scale in municipal services.[249] An investigation in sixteen larger and medium-sized Swiss agglomerations at the beginning of the 1990s found 444 cooperation structures between core cities and surrounding municipalities.[250] This horizontal cooperation has augmented the scope of action of municipalities, but at the same time, a de-facto meso-level has emerged which is composed of 'a complicated network of institutions, organisations, funding formulas, spatial perimeters and actors'.[251] Often, not only municipalities but also the respective cantons – and sometimes even the federation – are involved in these cooperation modes.[252] As a consequence, not only coordination of

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247 On this distinction see LERESCHE, 1996 (zit. in HORBER-PAPAZIAN, p.243).

248 HORBER-PAPAZIAN, p. 243, BUNDESRAT, *Agglomerationspolitik des Bundes*, Bericht vom 19. Dezember 2001, p. 23.

249 ARN et al., Gemeindereformen, p. 67, 69.

250 ARN/FRIEDERICH, Gemeindeverbindungen. According to this study, cooperation is most intensive in the fields of culture, energy supply, waste disposal, social matters, security and justice, and transportation. The cooperation schemes may take a variety of different legal forms. Another survey carried out in 2004 has shown that over 40% of Swiss municipalities collaborate in the areas of civil protection, home care, education, fire service, water treatment, waste management and assistance for the elderly (LADNER, STEINER, GESER (2005), quoted by HORBER-PAPAZIAN, p. 244).

251 LEHMANN, LUZIA; RIEDER, STEFAN; PFÄFFLI, STEFAN, *Zusammenarbeit in Agglomerationen: Anforderungen - Modelle - Erfahrungen*. Luzerner Beiträge zur Gemeindeentwicklung und zum Gemeindemanagement, Vol. 9, Luzern 2003, p. 20. Likewise FREIBURGHAUS/ZEHNDER, p. 8: 'An additional basic problem of horizontal cooperation in Switzerland is its almost chaotic abundance of different kinds and forms. Not only - for laymen and citizens - an opaque spinney has emerged; not only the public authority members are more and more absorbed by respective obligations. Together with the above mentioned democratic deficit this also leads to an ever more precarious imputability of political accountability and thereby to an erosion of legitimacy' (this statement made in the context of inter-cantonal cooperation can also be applied to the intercommunal relationship).

252 KÜBLER, p. 262.

different policies has become more and more difficult, but also responsibilities have become less and less imputable to a certain municipality (or even state level). As KÜBLER put it:

> 'Inter-municipal coordination does not enjoy strong public transparency. And the high degree of entanglement between the involved authorities makes it difficult to see exactly who is responsible for what. We can therefore speak of a "democratic deficit", because a fundamental principle of the democratic State is that policy making must be tied to a transparent process of decision making with an appropriate public oversight'.[253]

The entanglements are particularly pronounced in agglomerations, where approximately 75 per cent of the Swiss population live,[254] because in these areas the functional and the institutional spaces are most diverging.[255] Improving governance in agglomeration areas has therefore become an important new challenge to the Swiss political system.[256] Several strategies are currently being drawn up in order to overcome the problems related to the 'joint decision systems' resulting from the extensive vertical and horizontal cooperation schemes:[257]

- Adaption of the historically grown institutional spaces to the newly developed functional spaces. The proposals range from mergers of municipalities[258] to the complete redrawing of the cantonal landscape;[259]
- restoring fiscal equivalence by disentangling responsibilities between cantons and municipalities and by optimising the systems

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253 KÜBLER, p. 263.

254 REGIERUNGSRAT DES KANTONS BERN, Vortrag SARZ, p. 5.

255 KÜBLER, p. 259, BÄCHTIGER/HITZ, p. 71.

256 KÜBLER, p. 273.

257 KÜBLER, p. 261.

258 Such a merger has happened in the agglomeration of Lugano, where the city has annexed eight suburbs, almost doubling its population. However, according to KÜBLER, the example will probably remain an exception for some time to come (*ibid.*, p. 266).

259 VEREIN METROPOLE SCHWEIZ.

of financial equalisation (including the participation of suburbs in the financing of centrality charges);[260]

- creation of transparent cooperation structures in agglomerations endowed with own decision-making powers, that bring together the numerous organisations of inter-municipal cooperation and thereby facilitate not only coordination, but – equally important – imputability of responsibilities. The tripartite agglomeration conference (*Tripartite Agglomerationskonferenz Bund – Kantone – Städte/Gemeinden; TAK)*, a body consisting of representatives of all three tiers of the Swiss state, has proposed several cooperation models which may serve as an example on how to increase problem solving capacity in terms of efficiency and at the same time restore accountability with regard to the formulation and implementation of agglomeration policies.[261]

It can be concluded that although the legal framework regarding the vertical division of responsibilities is in itself quite clear (even if sectoral legislation needs to be and is continuously being optimised), the divergence of institutional and functional spaces with its consequence of an ever progressive horizontal and vertical integration leads to a situation where it gets more and more difficult to allocate responsibility. This is considered a serious problem for the Swiss system. Reforms in order to restore accountability are necessary (and partly on the way).

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260 See, on this approach, KÜBLER, p. 270. Such reforms are currently undertaken in several cantons (KÜBLER, p. 269).

261 Regarding cooperation within the boundaries of one canton see TRIPARTITE AGGLOMERATIONSKONFERENZ BUND - KANTONE - STÄDTE/GEMEINDEN (ed.), Zusammenarbeit. The canton of Berne has recently adopted the model proposed by the tripartite agglomeration conference and has changed its Law on Municipalities (Arts. 137 - 158) accordingly. Regarding cooperation in agglomerations overlapping cantonal boundaries see TRIPARTITE AGGLOMERATIONSKONFERENZ BUND - KANTONE - STÄDTE/GEMEINDEN (ed), Zusammenarbeit in kantonsübergreifenden Agglomerationen.

b. Legal protection of the local sphere

The creation of a local sphere and a clear assignment of tasks to this sphere only make sense if the sphere is respected by other levels of government. Therefore, legislation must *provide for a system that protects the local sphere*. This protection should relate to the existence of the local structure as such, but also to the extent of the local sphere of responsibilities. Absence of interference of other government levels in the local sphere is a necessary condition for enabling downward accountability (i.e. accountability of local politicians to the local citizenry). Technically, this protection can be achieved by granting municipalities a subjective right for fending off interference by other state levels. Such a right can be seen as an imperative counter-piece to the legal guarantee of existence of a municipal state level.

The following illustrations will show the consequences of insufficient legal protection of the local sphere in Pakistan (→ Illustration 3) and how this problem is being dealt with in Switzerland (→ Illustration 4).

Illustration 3: Legal protection of the local sphere in Pakistan

When reading the LGO, the tasks of the different levels of local government do not appear clearly as the respective provisions refer mainly to the offices of the Provincial administration that have been decentralised (and whose tasks result mainly from the sectoral legislation of the provincial and even federal levels). It is, however, reported that the attribution of tasks to the different local government levels is – with some minor exceptions – clear on paper to those familiar with the previous system.[262] In practice, however, the lines of jurisdiction between the provinces and the different tiers of local governments are blurred, mainly because of the following reasons:

Many *sectoral development projects*, which to a large extent concern subjects within the jurisdiction of the local governments, are being carried out through ‘vertical programs’; that is through programs where

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262 MANNING et al., p. 21.

higher (federal or provincial) levels of government are responsible for planning and operational design, budgeting and financing and often even expenditure control.[263] ADB et. al. are reporting that between 39 and 91 (!) per cent of the budget for health and education were channelled through vertical programmes in 2002[264] and that more than half of the Annual Development Plan is under the effective control of the federal and provincial agencies controlling the vertical programmes.[265] This practice of course undermines local government authority as it bypasses local governments' own planning and budgeting systems.[266]

An additional problem is that *members of the national assembly (MNAs), senators and members of the provincial assembly (MPAs) are provided with funds* (Rupees 10 million for each MNA and Rupees 5 million for each MPA) *for local development schemes*.[267] In some provinces, the finances channelled through the MPA's are being deducted from the provincial allocable (i.e. the money that should normally flow to the local governments), in others, the MPA's must at least seek scheme approval through the district development committee.[268] In Sindh, ADB et al. are reporting that MPAs are allowed to seek approval of their projects at the provincial level.[269] The same is true for NWFP.[270]

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263 ADB et al., History, p. 86, listing some examples in the education, health, and water and sanitation sectors.

264 ADB et al., History, p. 46.

265 ADB et al., History, p. 34. One reason behind this practice of 'vertical programmes' seems to be the fear of losing opportunities for political patronage, according to ADB et al.: '[...] vertical programs feed a clear ambition of federal and provincial legislators that they will, on a continuing basis be able to use local salary, staffing, resource allocation and development contracting as prime sources of political patronage' (*ibid*.).

266 See, on this problem, MANNING et al., p. 41.

267 ADB et al., History, p. 46.

268 See ADB et al., History, p. 33.

269 *Ibid*.

270 Interview with HAJI RAZA KHAN, District Nazim, Mardan, June 2004.

Furthermore, *provincial (executive) rules* – despite the clear assignment of functions in the LGO and sectoral legislation – provide in many cases for project approvals, technical sanctions and authorisation of payments in domains that have been devolved to local governments.[271] For example, the 'North-West-Frontier-Province Delegation of Powers under the Financial Rules and the Powers of Re-Appropriation Rules 2001' of the government of NWFP (finance department), which prescribe the financial powers of administrative departments and of officers of various categories (also concerning devolved departments) in detail, state, in Art. 4(2):

> 'The powers delegated [amongst others: to local governments] shall be exercised by the authorities subject to actual release of funds by the Finance Department and not on the basis of budget allocations nor in anticipation of funds, the observance of codal formalities, conditions prescribed by the Government from time to time and general or specific conditions laid down in the schedules to these rules or in any other rules of the government.'

In the second schedule of the Financial Rules, Art. 6, note 5 it is furthermore stipulated that

> 'where a scheme involves creation of new posts of staff or purchase of vehicles or equipment, that portion of such schemes shall be separately got cleared from the Finance Department before the scheme is considered even if it is within the competence of Departmental Development Working Party, Administrative Departments, Category-1 Officers, or District Development Committee.'

Finally, some of the departments (in NWFP particularly health and education) that have been devolved to the district level *on paper*, remain to be devolved *in practice*.[272]

More generally, it can be said that although on paper the jurisdictions of the different levels of local government are quite clear, in practice individual politicians of the upper tiers of government (province and federation (MNAs and MPAs) as well as the provincial executive and administration (bureaucracy) are regularly interfering in the business of

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271 ADB et al., History, p. 47.

272 See NWFP ESSENTIAL INSTITUTIONAL REFORM OPERATIONALISATION PROGRAM (EIROP), Reflections on the Local Government Ordinance, 2001, Workshop Report, Peshawar, May 28-29th, 2002, p. v.

the local governments – especially where, as it is the case in NWFP, local governments to a large extent are not controlled by the same political party as the provincial government. The political reasons for this behaviour may be manifold, such as

- the fact that a lot of powers have been devolved from the provinces to the local governments, but no powers have been devolved from the federal to the provincial level;[273]
- the fear of federal and provincial politicians of losing opportunities for political patronage;[274]
- the high visibility of local services and therefore the reluctance of politicians of higher levels to cede competences in this domain;
- the fact that the local government reforms were legally enacted and thereby local governments were empowered prior to the establishment of elected provincial governments,[275] although local government is a provincial subject under the 1973 Constitution.

The last of the reasons mentioned seems to lie at the root of the existing problems: referring to the theoretical approach presented in Part 1, the province, although it appears to be a 'principal' on paper, never 'agreed' to a 'basic relationship' delegating power to the local governments, but instead was urged to delegate powers by the presidential 'devolution plan'; obviously against its own interests. It is therefore not so surprising that the province – at least in NWFP, where the ruling political party at the provincial level (MMA) has no mandate in any local government due to a boycott of the local elections in 2001 – seeks to undermine the legal framework wherever it can. There may have been good reasons for bypassing the provinces when enacting the new local government system (NRB claims that such a strategy was necessary in order to break up the provincial bureaucratic power

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273 See, on this, MANNING et al., p. 42.

274 See, on this, CHEEMA et al., p. 27.

275 See, on this, CHEEMA et al., p. 18.

structures at the local level).[276] But theory and practice in NWFP show that this strategy also creates problems.

From a *legal* perspective, the above mentioned problems can be explained by a *lack of legal protection* for jurisdictions of local governments. Regrettably, the LGO does not back the local governments with the legal weapons necessary to protect themselves from interference of higher levels of government, especially the provincial executive, including the bureaucracy.

On the contrary, s. 192, which enables local councils to make bye-laws in their ambit of responsibilities, empowers the provincial government to make model-bye-laws 'on every aspect for the sake of uniformity', without specifying that these model-bye-laws will not bind local governments. Accordingly, the NWFP-government, in s. 18(3) of the NWFP District Rules of Business, states that 'the District Government shall adopt and follow the model bye-laws framed by Government and may draft any other bye-laws under the ordinance, *not inconsistent or repugnant to the model bye-laws*, which shall be sent to the Law Department for legal vetting and approval, and may, after such vetting and approval, enforce the same'. Taken together, these provisions negate any 'protected jurisdiction' in the sense of a marge of manoeuvre regarding *law-making* at the local level and instead leave it up to the provincial government to define the remaining marge of manoeuvre at the local level.

With regard to their *financial* competences at least district governments are, according to the LGO, authorised to spend money from the provincial account IV, but the above (p. 96) cited provincial rules show that in fact the provincial finance department still exerts a very strong control over the use of funds by local governments. This creates potential for conflicts between the province and the local governments.

In the view of the author, the rules of the provincial government are not compatible with the LGO. According to s. 191 LGO, the provincial

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[276] Interview with NAEEM UL HAK, national reconstruction bureau, Islamabad, June 2004.

government may make rules for carrying out the purposes of the LGO which 'shall meet the following considerations: (a) consistency with democratic decentralisation and subsidiarity; (b) enhancement of welfare of the people; (c) fairness and clarity; and (d) natural justice and due process of law.' Although these criteria are not very clear and leave considerable discretion, it is, arguably, not consistent with democratic decentralisation and subsidiarity to *systematically* undermine the marge of manoeuvre at the local level.

The question then is: what happens, if the provincial government enacts rules that are contrary to the principles of the LGO? Section 132 of the LGO provides for a rather independent body, the *local government commission,*[277] to resolve such conflicts between the province and the district governments (lit. d). But: if the local government commission fails to settle the dispute, the aggrieved party, according to sentence 2 of the said article, 'may move to the Chief Executive of the Province for resolution thereof'. According to s. 20(2) of the NWFP District Rules of Business, the chief secretary of the provincial government shall first try to resolve the dispute amicably; in case this does not work, 'the decision of the Chief Executive [...] shall be final'. This means that, ultimately, in NWFP, there is *no independent body*[278] that is legally mandated to check if the province sticks to the rules defined in the LGO regarding the vertical assignment of functions, the chief executive of the province being party to disputes between the local governments and the province.

Again, the provincial rule declaring the decision of the chief executive of the province as final is probably incompatible with the principles of democratic decentralisation, as well as the principles of fairness and due process. It would be the function of the judicial branch to review the provincial rules in the light of the LGO and to declare those rules that are found to be inconsistent, invalid or even void. Theoretically, the high court could, based on Art. 199 of the Constitution, review the

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277 See for more information on the local government commission below, p. 203.

278 Here again the relation of these provisions with other laws is not clear. Can the decision of the chief executive of the province be moved before a district court?

legality of provincial governmental rules in the light of their compatibility with existing laws or ordinances, such as the LGO. But: as unanimously viewed, the courts presently often play a problematic role in Pakistan.[279]

In Sindh and NWFP,[280] there have been open conflicts between the districts and the provinces, which – in the absence of legal mechanisms allowing local governments to defend their room for manoeuvre – have ended up being managed politically through the intervention of the federal government.[281]

Illustration 4: Legal protection of the local sphere in Switzerland

First of all, it must be recalled that Switzerland has a three-tier system of government, and that for arrangements of the municipal level, responsibility lies with the cantons (right of cantons to organise themselves independently; *kantonale Organisationsautonomie*). Municipal autonomy was therefore not guaranteed for a long time at the federal level. It was a principle of cantonal constitutional law, which the federal supreme court, in the late 19th century, only protected if the cantonal Constitution expressly provided for its protection.[282] In 1914, the federal supreme court also recognised the existence of an implicit cantonal constitutional right in cases where the cantonal Constitution did not mention it.[283] Ever since these times, every Swiss municipality disposes of *a subjective constitutional right according to which its*

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279 See, on this topic, ICG (Judicial Independence), and below, Illustration 23.

280 In NWFP 24 district nazimeen threatened to hand in their resignations, remarkably to president General Musharraf rather than the chief executive of the province. They alleged that the provincial government was unwilling to relinquish to them their mandated power, see KHAN, p. 10.

281 CHEEMA et al., p. 28.

282 BGE 2, 455.

283 BGE 40 I 278.

autonomy must be respected.[284] The recognition that municipalities' autonomy is a constitutional right is seen as one of the most significant achievements of the federal supreme court's constitutional jurisprudence.[285] The federal supreme court derived the principle from the constitutional position and significance that is attributed to municipalities in the structure of the Swiss state: they are seen as 'basic cells' of the Swiss state[286] and their protection by the federal supreme court is intended to prevent them from declining to mere administrative units of the cantons.[287]

Nowadays, Art. 50(1) of the Federal Constitution provides that 'the autonomy of the communes shall be guaranteed in accordance with cantonal law'. Thus, cantonal law defines the sphere of autonomy of the municipalities. The role of the federation is to grant legal protection of the autonomy, but only as long as such autonomy results out of cantonal legislation. The *question as to whether the canton does grant the municipalities autonomy* is therefore of great importance. The jurisdiction of the federal supreme court with regard to this question has changed over time:

- The question of whether a municipality was acting in its own sphere of activity (own powers) or in a delegated sphere of activity (delegated tasks) had, initially, been seen as decisive by the federal supreme court. Autonomy was generally assumed only if the municipality was discharging a task from within its own sphere of activity. As numerous responsibilities were transferred to the

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284 AUER/MALINVERNI/HOTTELIER, p. 91 para. 263. On the issue of the conception as a constitutional right cf. DILL, p. 21 et seqq. The autonomy complaint has recently been designated as a special type of complaint and therefore not anymore as a sub-type of a constitutional complaint (Art. 189 (1)(c) BV).

285 AUER/MALINVERNI/HOTTELIER, p. 746, para. 2125 : 'cette reconnaissance constitue l'un des acquis les plus remarquables de la jurisdiction constitutionnelle du Tribunal federal'.

286 DILL, p. 12 with reference to BGE 100 Ia 274 (Parpan), AUER/MALINVERNI/HOTTELIER, p. 746, para. 2125.

287 DILL, p. 12 with refernce tof BGE 109 Ia 176 (Schwellenbezirk Beatenberg), cf. also AUER/MALINVERNI/HOTTELIER, p. 746, para. 2125.

cantons, with time, the municipalities' own powers, and thereby their sphere of autonomy was continuously reduced. Also, the increasing entanglement between the various state levels has made a clear distinction between own and delegated tasks increasingly difficult.[288]

- The federal supreme court therefore changed its jurisprudence in 1963 and introduced the criterion of discretion as its new premise.[289] The question that then became decisive was how the canton's supervisory role was arranged for the sphere in question: where the canton could only assess the legality of a particular measure the municipality was seen as autonomous. Where the canton retained control of expediency there was no autonomy for the municipality. But also this criterion led to a restrictive concept of the sphere of autonomy:

  > 'Actually, if the canton can exert control of expediency, this means that the municipality disposes of a certain discretion, i.e. choice. Otherwise such control would be of no use. To classify all tasks that are subject to such control [i.e. of expediency] beyond the scope of municipal autonomy is in fact tantamount to leaving the municipality without protection in matters where it can deploy its own initiatives and determine itself their content.'[290]

- Since 1976, the sphere of municipal autonomy is defined independently from the legal nature of the task and independently from the extent of the cantonal supervision in the relevant area: municipalities are seen as autonomous in a certain area if the cantonal law grants them a *relatively substantial degree of discretion (relativ erheblicher Entscheidungsspielraum),* even if the relevant sphere is subject to a control of expediency by the canton.[291] In comparison to the criteria applied earlier, the criterion

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288 AUER/MALINVERNI/HOTTELIER, p. 93 para. 269.

289 BGE 89 I 107, BGE 92 I 375.

290 AUER/MALINVERNI/HOTTELIER, p. 93 para. 271 (translation by the author).

291 There is no consensus regarding the question of whether the granted freedom in decision-making must be 'specifically related to municipal autonomy', i.e. in a functional relation to local self-government (in the affirmative TSCHANNEN by

of the relatively substantial degree of discretion leads to a considerable extension of municipal autonomy and thereby of the legal protection afforded by the federal supreme court.

Under the formula developed by the federal supreme court, a municipality enjoys autonomy in *making (municipal) laws* if cantonal and federal laws do not provide conclusive rules on a particular matter. This may be the case where a matter as a whole is not regulated at all but also where a specific question is not regulated by existing cantonal or federal legislation. A municipality also enjoys autonomy in the *application of laws*, if it is either applying its own (duly adopted) municipal laws, or if it is applying provisions of cantonal and federal laws, which do not regulate a question conclusively, but cede relatively substantial discretion to the municipalities.[292] Where municipalities are entrusted with the discharge of particular tasks, in terms of executive organs, i.e. without or with very limited discretion, they, on the other hand, enjoy no autonomy.

The federal supreme court will approve of an autonomy complaint if a cantonal public authority intervenes in the municipal sphere beyond the competences it was granted (on the basis of cantonal law). This is the case,[293]

- if a cantonal public authority transcends its jurisdiction to review in an approval or complaint proceeding, e.g. assessing expediency if it was only entitled to assessing the legality;
- if a cantonal public authority applies federal, cantonal or municipal law incorrectly to the disadvantage of the municipality. This, however, requires differentiation: The federal supreme court may only examine the application of federal and cantonal *constitutional* law comprehensively. As far as the application of norms of the

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referring to BGE 118 Ia 218 E. 3d. p. 221 f., rejecting this appraoch BIAGGINI, Art. 50, para. 6).

292 See TSCHANNEN, Staatsrecht, p. 246 paras. 8 et seq.

293 Cf. on the following TSCHANNEN, Staatsrecht, p. 247 et seq.

statutory level (*Gesetzesstufe*), i.e. of norms in a Law of the federal or a cantonal parliament, is concerned, the federal supreme court's scope of review is limited to the question of whether the relevant Law was applied *arbitrarily*.[294] As the vast majority of norms that define municipal autonomy are found at statutory level (sectoral legislation), the claim is in effect only enforceable for municipalities to the extent that the canton's intervention amounts to an arbitrary application of the relevant norms.

- if a cantonal public authority otherwise issues instructions that curtail the discretion of municipalities in an unlawful fashion (e.g. by adopting spatial plans etc.).

In conclusion, it can be accepted that Swiss municipalities enjoy a sphere of autonomy protected by law. However, as has been shown, the protection of municipalities' autonomy is *limited* in two respects:

- The autonomy of municipalities implies no guarantee of existence for municipalities. Federal law allows for the complete repeal of any autonomy and even of municipalities as institutions, as long as it is done along the path of *cantonal law-making*. Some (but not all) cantons expressly grant their municipalities guarantees of continuance (such as e.g. KV BE).[295] The issue gains a new

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294 According to standard practice of the federal supreme court, a norm is applied arbitrarily if the contested action is evidently untenable, clearly contradicts the actual situation, is severely in breach of a provision or an indisputable fundamental principle, or in some other way runs contrary to the idea of justice. However, the federal supreme court will only set a judgement aside if not only its reasons but also the result is untenable; the fact that a different solution also appears acceptable or even more appropriate is not sufficient (BGE 132 III 209 E. 2.1 p. 211, BGE 131 I 467 E. 3.1 p. 473, each with references).

295 At the time of writing the *Regierungsrat* of the canton of Bern, however, proposed to the cantonal parliament (*Grosser Rat*) a change of the cantonal Constitution (modification of the guarantee of continuance) in order to enable the cantonal legislative to force municipalities to merge even against their will, however under clearly formulated conditions and only in terms of an ultima ratio. See, REGIERUNGSRAT DES KANTONS BERN, *Wirkungs- und Erfolgskontrolle der Förderung von Gemeindezusammenschlüssen*, Evaluation Gemeindefusionsgesetz, Bericht des Regierungsrates an den Grossen Rat vom 26. August 2009, RRB 1478/2009, p. 24 et seqq., accessible at:

significance in connection with the forced merging by the cantons.[296] The cantonal legislator does not only decide on the 'survival' of municipalities, but also on the extent of the sphere of autonomy. Only where the legislator grants municipalities autonomy is this sphere safe from infringements. In fact, the municipal autonomy protects therefore from day-to-day interference by the cantonal executive.

- As far as the application of statutory provisions to the disadvantage of the municipality is concerned, the legal protection afforded by the federal supreme court applies only in the case of a finding of an *arbitrary* handling of the relevant statutory law.

c. Conclusion

In all three illustrations, the vertical division of powers proves to be a difficult challenge. While in Serbia already the allocation of tasks to the local sphere features serious ambiguities, Pakistan fails to implement effective legal protection. In Switzerland, it is the increasing vertical and horizontal entanglements that are causing the somewhat tainted but otherwise essentially tried, tested and proven system to falter.

2. Horizontal dimension

This chapter deals with the horizontal distribution of power amongst various organs within a state level, who are assigned specific competences (*Zuständigkeiten)* in order to fulfil the public tasks (*öffentliche Aufgaben*) of the local level.

From a legal point of view, this relates to the principle of the horizontal division of powers, i.e. 'a fundamental constitutional principle of state organisation'.[297] However, here too the principle shall not be

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http://www.jgk.be.ch/site/agr_gemeinden_geref_fusion_vortrag_rr_evaluation_gfg_fassung_rr_unmarkiert.pdf (accessed 4 September 2009).

296 This has happened, e.g., in the canton of Wallis, see BGE 1P.559/2004 of 19 January 2005.

297 MAHON, p. 1011 (sub. 'Résumé'), translation by the author.

understood in terms of a specific, pre-set form of organisation,[298] but in a wider sense.[299] Following the same logic as with the vertical division of powers, it requires the creation of distinct organs each with legally defined powers (section a below) and a legal protection of this system of powers (section b below).'

a. Creation of distinct organs with legally defined powers

The horizontal distribution of power requires that there are actors who are all relatively independent of each other[300], who are all able to form their own, independent will and assume responsibility for it.[301] Regarding the power base and the relationship amongst organs, various systems are conceivable.[302]

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298 The principle of division of powers - in its classical version - entails four elements: the functional, organisational and personal division of powers as well as a system of 'checks and balances'. The functional division of power is seen as the premise: state functions are classified into legislative, executive and judicial functions. The postulate of the organisational division of power says that there should be different organs with each having its (main) function and that the organs shall be independent of each other. The postulate of the personal division of power says that the organs shall be staffed with persons that are independent from each other. Finally, there shall be a balance between the organs and the organs shall control each other, see e.g. TSCHANNEN, Staatsrecht, p. 363 et seq.; MAHON, p. 1013, paras. 4 et seq.

299 MAHON speaks of the 'idée négative': 'division du pouvoir étatique et répartition sur une pluralité d'organes (pas necéssairement trois), de façon à en éviter la concentration et l'abus' (p. 1017 para. 13).

300 This addresses the dimension of the personal division of powers: The setup of a system with divided powers goes hand in hand with the establishment of a regime of irreconcilabilities which ensures that the members of one branch of power cannot simultaneously partake in the exercise of another branch of power (AUER/MALINVERNI/HOTTELIER, p. 604 para. 1708).

301 As opposed to the vertical division of powers, the individual actors at the horizontal level are generally not vested with legal capacity; the organs act for the state level as legal subject, not in their own name.

302 In the literature, a distinction is drawn between presidential systems, parliamentary systems and mixed systems, cf. e.g. MAHON, p. 1017 para. 14.

Here too, the organs must be equipped with the relevant competencies.[303] As such, the question 'what responsibilities for what organ?' remains a constant topic of discussion in theory of the state.[304] The starting point today is still the classification according to the classical trias of state functions in the way MONTESQUIEU and LOCKE postulated. Experience, however, has shown that breakthroughs in the trias of functions are necessary, particularly between the legislative and executive organs. Aside from allocations according to functions, other criteria have also been proposed recently according to which duties may be assigned. Seiler summarises them under the concept of *'functional suitability'* (*funktionale Eignung*): So for example, significance is relied on as an argument for the assignment to the legislative branch; the criteria correctness, appropriateness, entelechy, technicality and precipitation, flexibility, unpredictability and innovation are cited as arguments for the assignment to the government/administration; and finally justice is seen as an argument for the assignment to the courts.[305]

From an accountability perspective, more important than compliance with the trias of functions and other abstract criteria for assigning duties (which hardly ever find perfect application in their pure theoretical forms)[306] is:

- *a clear and comprehensive assignment of competencies:* the chosen method for the distribution of powers must ensure that in the

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303 See AUER/MALINVERNI/HOTTELIER : 'Dès lors que l'ordre constitutionnel institue différents organes appelés à exercer la puissance publique, le problème central consiste dans la détermination des compétences imparties à chacun de ces organes' (p. 604, para. 1707).

304 Cf. the account of possible conceptions in SEILER, p. 285 et seqq.

305 See SEILER, Gewaltenteilung, p. 304 - 324.

306 SEILER, Gewaltenteilung, p. 264 (noting that it does not necessarily have to follow from the division of powers' fundamental concern that powers are divided into three parts: 'Meanwhile, on rational examination there is no imperative reason for summarising the state functions or organs in three categories. Such a categorisation may serve, just as any other legal classification, a systemising and rationalising purpose. However, need not necessarily be three organs; two or four or five or more could be just as good.', *ibid.*, translation by the author).

individual case there is sufficient certainty about the competent organ and that the competences are regulated for every conceivable case (the latter is often achieved by so-called residual competences);

- *the principle of a fixed assignment of competences (Grundsatz der starren Zuständigkeitsordnung).* According to this principle, once legal competences have been settled, they are deemed binding and no shift in the framework of assigned competences may occur in the individual case at will (→ Illustration 5).[307] That means in particular that
  - a general delegation of competences to other organs (e.g. a delegation of law-making powers from the legislative to the executive) or to low-level authorities (e.g. from the top of the executive to commissions or deans of departments etc.) should *be allowed only within the realm of clear, abstract terms and with respect to the original assignment of competences; and that*
  - a transfer of powers in the individual case may take place *only in a formalised procedure*, so for example, by means of a referendum (→ Illustration 22).

The important point is that in the end it can be ascertained which organ is responsible for the decision in each individual case on the basis of the legal assignment of competences. At the same time, it is worth noting that *always only one organ* can be responsible for a decision, even when several organs or bodies are involved in some way in the decision-making *process*. In other words: the responsibility to apply and the responsibility to decide are to be kept well apart. This must, in particular, also be taken into account in the context of international development cooperation where, under the title of 'participation', the contribution of 'civil society' is generally encouraged: it must always be made clear whether citizens are granted decision-making responsibility (so-called hard participation) or whether civil society will

307 ARN, p. 165.

be merely included in the decision-making-process (so-called soft participation).[308]

The following illustrations shall demonstrate how the challenges with regard to horizontal distribution of powers have been dealt with in Switzerland (→ Illustration 5), Serbia (→ Illustration 6) and Pakistan (→ Illustration 7).

Illustration 5: Horizontal distribution of local powers in Switzerland

Bernese municipalities can, to a large extent, determine themselves which competences to assign to their own organs. Restrictions which may apply to the municipalities may be based on the cantonal Law on Municipalities or on general principles of constitutional law.

First of all, it is to be noted that the cantonal Law on Municipalities grants the municipalities organisational autonomy (*Organisations-autonomie*; Art. 9 GG).[309] The cantonal Law on Municipalities (GG) then confines itself to setting a few guidelines that are considered indispensable:

- Article 11 GG requires that municipalities regulate the basic elements of citizens' competencies, parliament and the municipal council in their statute, i.e. through an act that can be adopted (and amended) only by the citizens. As such this provision institutionalises a system of division of powers at the local level.

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308 Regarding the terms 'hard' and 'soft participation' cf. STRECKER, Referendum and Citizen's Initiative, in: SDC/MSP, Review of Municipal Statutes, p. 21.

309 Organisational autonomy means 'the (relative) freedom of the municipality to determine its organs and their competencies, but also the freedom to decide about the rules of procedure of the organs and about the cooperation between the organs, in short: the freedom to determine the functioning of the municipal organs, incl. the municipal administration'' (S. MÜLLER, Kommentar GG, p. 69, para. 2, translation by the author). The municipalities organisational autonomy, as a matter of principle, already results from the cantonal Constitution: Art. 111(1) KV only grants the canton powers for regulating the 'basic features of municipal organisation', while the old Constitution assumed comprehensive powers of the canton to make provisions.

According to S. MÜLLER, the term 'basic elements' includes the most central and important responsibilities (i.e. important in themselves or significant for the interplay between organs). This includes financial competences, budget competence as well as the competence for adopting the main municipal laws and bye-laws.[310] Likewise, the conditions for the transfer of decision-making powers to individual members or committees of the municipal council or to commissions must be codified in the statute. Details of the system of powers can be dealt with at bye-law level. 'On a whole this regulation must organise the powers of each actor in a way that is clear and unequivocal.'[311]

- Article 12 determines the citizenry as 'the highest organ of the municipality' (para. 1) and Art. 23 GG determines the compulsory competences of the citizens.[312] Besides others, these are:

  a) election of the president of the municipal assembly, the members of the municipal council and the municipal parliament;

  b) election of the members of the audit organ;

  c) adoption and amendment of the statute;

  d) changes in the local tax rate;

  e) introduction of a procedure to found a new municipality, to abolish an existing municipality or to change boundaries of a municipality.

- Article 25 GG allocates the responsibility to lead the municipality, in particular to plan and to coordinate its activities, to the municipal council (para. 1) and provides for a residual competence of the

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310 S. MÜLLER, Kommentar GG, Art. 11, para. 3. Since the federal supreme court declared the principle of legality as applicable also for the area of organisational law (BGE 104 Ia 440 et seqq.), certain further indications result for answering the question of the necessary minimum content of the municipal statute.

311 S. MÜLLER, Kommentar GG, Art. 11, para. 3 (translation by the author).

312 Paras. 2 and 3 allow allocation of some of these responsibilities to a municipal parliament (where such a body exists), however the competences mentioned under a and c must in any case remain with the citizens.

municipal council (para. 2). This means that the council has the authority to act in all matters that are not allocated – by federal, cantonal or municipal regulations – to another organ. The residual competence is restricted, however, to *administrative* issues, as Art. 52(2) GG provides that the citizens, or the parliament – where there is one – are responsible for all *law-making* issues where these are not allocated to another organ either by higher or by municipal legislation.

- A rather astonishing point referring to its importance is (at least at first sight) the fact that superordinate legislation does not make any provisions regarding the *allocation of financial competencies*. The (cantonal) Ordinance on Municipalities (hereafter: GV)[313] merely stipulates that the budget and the tax rate must be decided together. Since according to Art. 23(1)(d) GG, the electorate has mandatory jurisdiction over changes to the tax rate, it, in this case, also has responsibility for approving the budget. Apart from this, municipalities are, in principle, at liberty to determine financial competencies. The absence of any further provisions regarding this issue in the superior law can, however, be explained by calling to mind the fact that the allocation of competences is to be regulated in the statute and that the statute is mandatorily to be decided by the electorate. The electorate usually reserves far-reaching jurisdiction over financial matter for itself (or a local parliament, where there is one).
- While municipalities are free in *assigning* financial competencies, the federal supreme court and – implementing federal jurisprudence – the cantonal executive, by enacting the GV, have developed fairly detailed guidelines that ensure a sensible and transparent *handling* of the (locally) stipulated competences:
  - Accordingly, for the purposes of determining jurisdiction, it is of significance whether an expenditure is new (*neue Ausgabe*) or tied-up (*gebundene Ausgabe*). According to Art. 101(1) GV tied-up expenditure is on hand if no discretion exists in terms of the

313 Gemeindeverordnung of 16 December 1998 (BSG 170.111).

amount, the timing or other modalities of the expenditure. It is always the municipal council that decides on tied-up expenditure, because only expenditure which can actually be decided on can be submitted to the electorate for a decision.

- In practice the question often arises as to whether for a particular project multiple separate authorisations of expenditure need to be decided on or whether an authorisation over the total sum may or must be issued.[314] In such cases, the principle 'unity of subject matter' (*Einheit der Materie*) applies. According to this principle, on the one hand, expenditure which is mutually dependent must be concluded as total expenditure (Art. 102 GV, so-called ban on separating matters, *Trennungsverbot*). On the other hand, expenditure which bears no objective correlation cannot be concluded together (Art. 103 GV; so-called ban on adding matters up, *Zusammenrechnungsverbot).* Together, these aspects prevent circumvention of the (locally defined) system of financial competencies.

Besides the requirements set out in the cantonal legislation (GG and GV), municipalities have to conform to requirements that result from *federal constitutional law,* in particular with the requirements that result from the concept of *division of powers*: although not mentioned explicitly in the Federal Constitution, the idea of dividing powers is recognised as an *unwritten constitutional principle* which is also binding for the cantons.[315] While the Federal Constitution, according to the case law of the federal supreme court, does not require the cantons to organise their 'territory' according to a predetermined concept of division of powers, it requests that certain minimal standards are fulfilled;[316] the most important being the principle of legality and the requirements set out for delegating rule-making power from a legislative body (the citizens or parliament) to the executive body (the municipal council):

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314 FRIEDERICH, Gemeinderecht, p. 214 para. 208.

315 TSCHANNEN, Staatsrecht, p. 363 para. 4.

316 SEILER, Gewaltenteilung, p. 553.

- The *principle of legality*, with regard to the issues discussed here, indicates that the important legal value judgements must be expressed with sufficient precision in a law in the formal sense (*formelles Gesetz*).[317]
- According to the *requirements for delegating legislative powers to an executive body* (which were developed by the federal supreme court),[318] delegation is only permissible,
    - if such a delegation is not unlawful under cantonal law (i.e. the cantons can be stricter);
    - if the delegation refers to a particular matter (the reason being that blanket delegations – the passing of whole regulatory areas – are to be avoided);
    - if the legal provision enabling the delegation is anchored in a law in the formal sense (this ensures that only the organ which, according to the original system of powers, is responsible, can decide to delegate) and
    - if the formal law itself contains the principles (content, aim and extent) of the regulation, as far as the legal status of the citizens is substantially affected.[319]

These minimal requirements also apply for municipalities.[320]

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[317] TSCHANNEN/ZIMMERLI, p. 121 para. 3. An act (law) in the formal sense is an act that was passed by a legislative organ under proper legislative proceedings (*ibid.*, p. 84 para. 1).

[318] Judging on delegation issues regarding the cantonal level (see TSCHANNEN, Staatsrecht, p. 370).

[319] TSCHANNEN, Staatsrecht, p. 371 para. 28.

[320] The Constitution of the canton of Bern, in its Art. 69, contains a similar list of requirements a delegations must meet which, according to certain authors, is more restrictive than the federal requirements (see, e.g. FEUZ, ROLAND. *Materielle Gesetzesbegriffe - Inhalt und Tragweite. Dargestellt insbesondere anhand von Art. 164 Abs. 1 der neuen Bundesverfassung*, Abhandlungen zum schweizerischen Recht, Heft 662, Bern 2002, p. 237 et seqq.; WICHTERMANN, Kommentar GG, p. 391, para. 6). The requirements resulting out of the cantonal Constitution are however binding only for the cantonal executive, not for the municipalities.

Apart from the mentioned cantonal and federal requirements, the municipalities are free in allocating responsibilities. However, an important dictum should be added at this point, which is also derived from the principle of legality: once a system of powers is selected it is binding (principle of exclusivity of the system of powers; *Grundsatz der Ausschliesslichkeit der Zuständigkeitsordnung).* This means that,

- shifts in the system of powers in the individual case are only possible in a formalised procedure (e.g. within a facultative referendum). When considered more closely, the issue here is not a shift, however, but a differentiated (shared) allocation of competences from the outset: jurisdiction lies with the authority with the caveat that the electorate does not, in a pre-determined procedure, claim its own jurisdiction;
- infringements of the jurisdiction of other organs, in the interest of a clear system of powers, are not permissible. It was long debated, for example, whether motions[321] in the area of competences of the executive should be allowed. This issue was clearly negated for the municipality level by the cantonal executive council (*Regierungsrat*) in 1996:'the exclusivity of the system of powers is – under the caveat of changes of the relevant provisions in the municipal statute and other municipal regulations – ascribed reliability and stability, which creates clear areas of responsibility and avoids encroachments'.[322]

  From this perspective, the wide-spread presence of *devolution clauses* in practice continues to appear problematic. These clauses allow the organ responsible to refer a decision in a specific

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Delegation of law-making power from the legislative to the executive body in municipalities is regulated by Art. 53(2) GG; the regulation is however incomplete and needs to be complemented by the minimal standards developed by the federal supreme court, which also apply to the municipal level (WICHTERMANN, Kommentar GG, p. 392 et seq., paras 10 - 16).

321 A motion in this context is a parliamentary instrument, under which the executive can be obliged to act in certain matters.

322 S. MÜLLER, Kommentar GG, Art. 25, para. 27, citing BVR 1996, p. 147 et seqq. (translation by the author).

individual case to a higher organ ('upward delegation' of responsibility). Such clauses are still very common today, but they are criticised by scholars:[323] 'By all means, it is possible to be appreciative of the fact that the system of powers within a municipality is equipped with flexibilities that allow important political issues to be submitted to the superordinate organ. The removal of power ought to be carried out, however, by applying objective, comprehensible criteria, and not according to merely political opportunism or the feeling of the day; an organ of the municipality should not be able to spontaneously deprive itself of the powers – which also entail responsibility – that it was once allocated.'[324]

For the purposes of taking stock it can be recorded that the (above illustrated) legal requirements, when taken together, make sure that

- the most important decisions are taken by the citizens (principle of legality and definition of exclusive competencies of the citizens in the GG);
- the allocation of competencies is comprehensive (in case the municipality does not regulate an issue the abstract criteria stipulated in Art. 25 and 52 GG apply, i.e. law-making issues fall within the competence of the legislative body, all other issues fall in the competence of the executive body);
- the allocation of competencies is (except for the problematic devolution clauses mentioned) binding, since it can only be altered in legally defined cases;
- municipalities still dispose of a wide discretion in allocating the competencies to the different organs (whereby the allocation is controlled democratically by the local citizens).

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323 S. MÜLLER, Kommentar GG, Art. 11, para. 6.

324 S. MÜLLER, Kommentar GG, Art. 11, para. 7 (translation of the author); cf. on this also the statements by the *Regierungsrat* against a blurring of the responsibilities in BVR 1998, 149.

However, as is the case with the vertical division of powers, recent factual developments present a challenge in achieving the aim of a clear system of powers:

- The frequent practice of *outsourcing* the fulfilment of public tasks to actors outside of the central administration leads to an increasing complexity in the system of powers. As a result, especially larger municipalities have reached or even gone beyond the limits of what is reasonable and manageable. It so happens that the budget and supervisory commission of the city parliament of Bern recently commissioned a study to examine how the city parliament could improve its oversight function in light of the opaque and complicated conditions.[325]
- The increasing levels of *intercommunal* cooperation may also – depending on the specific arrangements – lead to intransparency and to a subliminal annulment of the constitutionally guaranteed system of powers. Such cooperation can result in more or less far-reaching limitations of (direct) participation opportunities for municipalities and as a consequence of the electorate.[326] The implementation of tasks through joint organs furthermore affects the constitutional order: such organs are generally not part of the municipality's organisation (*Gemeindebehördenorganisation*) and they are not subject to the same control system as is provided for regular municipal bodies.[327] In addition, unclear mandates and competences, as well as a lack of cost transparency are frequently lamented.[328]

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325 See the study of LIENHARD/CEMERIN.

326 ARN/FRIEDERICH, p. 85 et seqq.

327 See FREIBURGHAUS/ZEHNDER (p. 7 et seq.) on the issue of intercantonal cooperation and the cooperation between cantons and the federal level. In the view of these authors, this cooperation 'as soon as it becomes substantial and binding, leads to a break through or at least to a restriction of the horizontal and vertical division of powers' (translation by the author). These statements can without limitations be transferred to the relationship between municipalities (and the corresponding canton).

328 STEINER, p. 112.

FRIEDERICH expresses the problem of intercommunal cooperation as follows:

> 'Economic advantages and entrepreneurial freedom of action are often in contradiction with (democratic) legitimation of fulfilling tasks and the exigence of clarified responsibilities (accountability). For example, the municipal council, who after all is responsible for financial planning and the use of finances (Art. 71 GG), runs the risk of losing track of the economic and financial interweavements of the municipality and – when faced with the wishes of all the 'specialists' who are assigned specific tasks – to set the wrong priorities.'[329]

To conclude, it can be said that the legal framework in itself, from an accountability point of view, cannot be objected to. However here too, as with the vertical dimension, an increasing degree of complexity and thereby opacity of interweavements are lamented and the political decision-making processes are increasingly being transferred from a well suited system into boards of intercommunal cooperation. It is therefore crucial that when designing models of outsourced task-fulfilment or intercommunal cooperation, concerns regarding accountability are addressed properly.[330]

Illustration 6: Horizontal distribution of local powers in Serbia

In Serbia, the former system of local government was based on a system of so-called 'single authorities', which meant that citizens elected their representatives who in turn appointed, amongst themselves, an executive committee. Executive and normative functions were not separated and the executive committee depended on the majority of the assembly.

The LSG was the first law to introduce the principle of horizontally distributed authorities at the local level in that it separated legislative

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329 FRIEDERICH, Gemeinderecht, p. 241 para. 280 (with further references on the benefits and constraints of intercommunal cooperation; translation by the author).

330 In the above (fn. 261) mentioned publications of the tripartite agglomeration conference attempts are made to develop models mitigating the problems in both horizontal and vertical respects.

and executive functions.[331] However it did this in an unusual way, namely by instituting a system with three organs at the local level: the municipal assembly as the legislative organ, the president of the municipality, who is the main executive organ, and the municipal council, who has a 'coordinating function' between the executive and the legislative organs.[332] Note that the LSG does not consider the citizens of the municipality as an organ, even though the law does not exclude the possibility for citizens to take binding decisions for the municipality within the procedure of an initiative or a referendum (Art. 66 and 68 LSG).

- The competencies of the *municipal assembly*[333] are listed in Art. 30 LSG, using methodologically a combination of a general clause 'adoption of ordinances and other general acts'[334] and an enumeration.

  In addition to the typical legislative function (adoption of ordinances and other general acts), the assembly has jurisdiction over the following: adoption of the municipal statute and its rules of procedure (Art. 30(1) LSG); adoption of the budget and the annual account (Art. 30(2) LSG); adoption of the programme for the development of the municipality, of town planning and regulation of the use of construction land (Art. 30(3) and Art. 30(4)), establishment of municipal bodies, utility and other public enterprises, institutions and organisations determined by the statutes and supervision of their work (Art. 30(7) LSG, including approval of the statutes of such organisations (Art. 30(20) LSG),

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331 SCTM, Manual, chapter II, sub. 'Positive points and basic features of the new Law on local government'.

332 With the enactment of the new LSG in 2007, the competences have slightly been changed. In particular, the municipal council has been strengthened at the cost of the president (see Art. 44 and 46 nLSG).

333 Only the most important functions are listed here. Article 30 of the LSG lists 20 different functions of the assembly.

334 Paragraph 5; besides this general assignment, the LSG enounces concrete acts which the municipal assembly shall pass, such as the act on municipal borrowing (Art. 30(14)) and the regulation of the use of construction land (Art. 30(4)).

determination of certain fees and other charges (see Art. 30(12) and Art. 30(13) LSG) and it is 'the competent body for giving the opinion on laws governing issues of interest to local self-government as well as on republic, provincial and regional plans' (Art. 30(16) and Art. 30(17)).

The municipal assembly elects – besides others – its president and deputy president (Art. 30(9))[335] and the members of the municipal council (the last mentioned on the proposal of the President of the municipality; Art. 30(9) LSG).[336] It further *appoints and dismisses* important municipal staff (the head of administration following the recommendation of the president (Art. 30(11) LSG) and members of management and supervisory boards, as well as directors of public enterprises and other organisations founded by the municipality (Art. 30(8) LSG).

Finally, the law proposes that the municipal assembly may perform *other activities* determined by law and statute (Art. 30(20) LSG).

- The *president* has typical executive functions: he represents and acts on behalf of the municipality (Art. 41(1) LSG), implements (or ensures implementation of) the decisions and other acts of the municipal assembly (Art. 41(2) LSG), ensures the implementation of delegated tasks (Art. 41(4) LSG), has the right to make proposals to the municipal assembly in the domain of competence of the municipal assembly (Art. 41(3) LSG), sets guidelines for and coordinates the activities of the municipal administration (Art. 41(5) LSG), orders the execution of the budget (Art. 41(7) LSG), passes individual acts according to the authority vested in him by law, statute or the decision of the municipal assembly (Art. 41(8) LSG).

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335 In the municipality of Kraljevo, the election of the president and deputy president of the municipal assembly has to follow the recommendation of the president of the municipality (see Art. 17(10) of the Statute). This solution is in contradiction with the LSG.

336 If the recommendation of the president of the municipality for the election of the same member of the municipal council has been rejected twice, the municipal assembly may adopt a decision on the election of a member of the municipal council without such recommendation (Art. 43(5) LSG).

He also proposes the appointment/dismissal of the head of administration (Art. 41(6) LSG) and the members to be elected to the municipal council (see Art. 30(9) and Art. 43(2) LSG).

As with the municipal assembly, the list of competencies of the president of the municipality is non-exhaustive, as Art. 41(9) LSG demonstrates. He performs *other activities* under the statute and other municipal acts.

- Finally, the *municipal council* shall draft the budget of the municipality (Art. 44(1)(1) LSG), supervise the activities of the municipal administration, annul or rescind acts of the municipal administration which are not in conformity with the law, statute or other general acts or decisions made by the assembly (Art. 44(1)(2) LSG), render decisions in the second-instance on administrative proceedings on the rights and responsibilities of residents, enterprises and institutions, and other organisations from the municipality's primary jurisdiction (Art. 44(1)(3) LSG),[337] and assist the president of the municipality in the performance of other activities within his jurisdiction (Art. 44(1)(4) LSG). Art. 60 LSG further stipulates that the municipal council shall rule on conflicts of competences between the municipal administration and various enterprises, organisations and institutions.

When the field study was carried out (i.e. in July 2005), many Serbian municipalities were not properly functioning due to confusion about the roles of the newly introduced organs, i.e. the president of the municipality and the municipal council.[338] This is not surprising when analysing the institutional setting and the allocation of powers between the organs as provided for by the LSG. Particularly *the role of the municipal council* poses a lot of questions that are left unanswered:

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337 First-instance administrative proceedings are carried out by the administration itself, see Art. 49(1)(3) LSG.

338 Interview with members of the intermunicipal working group legal issues (see fn. 214), held in Kraljevo, July 2005; see also SIMIĆ, ALEKSANDAR / SAMARDŽIĆ, MARINA / VUJČIĆ, DRAGAN, in: SDC/MSP (eds.), Review of Statutes, p. 11.

- Regarding its *personal composition*, the municipal council is placed somewhere between the legislative and the executive organs, but rather closer to the assembly since its members are elected (and, as the case may be, dismissed) by the assembly on proposal of the president (Art. 43(2) LSG). If the recommendation of the president for the election of the same member of the municipal council has been rejected twice, the municipal assembly may elect a member without such recommendation (Art. 43(5) LSG). The municipal assembly thus has a lot of influence on the composition of this organ. The president on the other hand also has some influence on the work of the council since he chairs its sessions (Art. 42(7) LSG) and his deputy is an ex-officio member of the council (Art. 43(3) LSG).
- With regard to its *functions*, however, the council holds important executive powers. In particular, its supervisory function seems to be problematic, since the LSG does not specify what sort of control this power includes:

  If it means that the council is responsible for overseeing internal administrative matters (direct oversight) of the municipal administration, then difficult questions arise with regard to the delimitation of competences between the council and the president of the municipality. The president of the municipality is the head of the executive and – as such – responsible for the actions of the municipal administration; in particular he has the power to set guidelines and to coordinate the activities of the administration (Art. 41(5) LSG). But, as far as the control of the administration is concerned, he has to rely on an organ which, due to its composition, is conceived somewhat as a sub-organ of the assembly. Such power-sharing within the executive does not contribute to a clear concept of accountability: instead it opens up the possibility for each organ to shift responsibility onto the other organ in case something goes wrong.

  If it means, on the contrary, that the council exercises a sort of parliamentary oversight, then conflicts arise with regard to the superintendence role of the assembly as a whole (Art. 30(7) LSG).

And furthermore, the question arises why the president and his deputy shall chair or – in the case of the deputy – form part of that organ:

If one restricts the council's oversight function to a mere legal control of actions of the administration – an interpretation backed by the wording of Art. 44 LSG: 'the municipal council shall: [...] 2) supervise the activities of the municipal administration, annul or rescind municipal administration acts not in conformity with the law, statute, and other general acts or decisions made by the assembly' – its composition does not pose problems at first sight. But the question then remains: who is exercising the control over expediency of the decisions taken by the administration? This competence must reside with the president or at least an executive organ, accountable only to the president, for as far as affairs within the competence of the president, i.e. of the executive, are concerned. Otherwise, it is not possible to place all executive responsibility with the president. And even if this last condition was fulfilled, does it make sense to allocate the internal overseeing power to different organs, whereby one exerts control of legality (council) and the other organ (president, directly elected by the people) exerts control of expediency?

- This brings us to another curious point, which is connected to the problem just exposed: the head of administration, i.e. the 'technical' chief of the municipal administration (who is not nominated by the president but elected by the assembly, on proposal of the president), is not only accountable to the president of the municipality (i.e. the 'political' chief of the administration), but, according to Art. 53 LSG 'shall be accountable to the municipal assembly *and* the president of the municipality for his/her work and the work of the department [...]'. Bearing in mind that the council holds important overseeing functions and that the head of administration is in a way directly accountable to the municipal assembly, the following question arises: *What executive responsibility remains with the president?*

The heads of the legal departments of five municipalities[339] were confirming that in practice, the 'president hides behind the council', which is not surprising: the many possibilities of other organs (at foremost the council, but also the assembly) to interfere with the work of the administration, offers the president suitable – but also fully comprehensible – excuses for not being in a position to assume full responsibility for the work of the administration.

- Finally, it is not clear to what extent the council and the president are able to supervise the activities of public enterprises and other organisations founded by the municipality. According to Art. 30(7) LSG the *assembly* shall 'establish municipal bodies, utility and other public enterprises, institutions, and organisations determined by the municipal statute and supervise their work'. Does this provision exclude supervising powers of the president or the council?

A study of the municipal regulations[340] shows that the municipalities are struggling with their duty to implement the cited provisions of the LSG:

- Concerning the *composition* of the municipal council, the Statute of the municipality of Kraljevo states that the council is made up of eight members elected by the municipal assembly (Art. 37(1)) plus the deputy president (Art. 37(2)), i.e. in total nine members. Paragraph 3 of the same article states that the president of the municipality, as the chairperson of the council, has no voting right. According to Art. 2 of the Decision[341] on the Municipal Council though, the council 'consists of seven members elected by the

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339 Interview with members of the intermunicipal working group legal issues (see fn. 214).

340 Provisions regarding the municipal council can be found in the Statute, in the Decision on the Municipal Council of the Municipality of Kraljevo of 5 March 2004 (Official Gazette of the Municipality of Kraljevo No. 011-4/2004) and in the Rules of Procedure on the Work of the Municipal Council of the Municipality of Kraljevo of 4 February 2004 (Official Gazette of the Municipality of Kraljevo No 06-5/2004).

341 In the Serbian context, general-abstract acts of local governments are often called 'decision'.

municipal assembly plus the deputy president, i.e. eight members in total and the president of the municipality, as the chairperson of the council, 'has a right to vote and to decide during the sessions of the council' (Art. 2, Art. 2(2), Art. 2(3), Art. 2(5)).[342] It is obvious that the provisions of the Decision on the Municipal Council are contradicting Art. 37 of the Statute.

- Regarding the *functions* of the municipal council, both the supervising and the coordinating functions are not yet defined without ambiguity:

  As far as *supervision* is concerned, both the LSG and the Statute of the municipality of Kraljevo allocate the task of supervising the municipal administration to the council, while supervision of public enterprises is allocated to the assembly. The municipal regulations, however, endow the municipal council with a comprehensive oversight role: the Decision on the Municipal Council provides that the council takes into consideration 'the reports on the work of the public enterprises, institutions, organs, organizations and offices it i.e. the municipality forms, gives proposals and suggestions on the issue to their organs of management and to the President of the Municipality, gives an opinion to the President of the Municipality on the subject whether to propose the adoption of the listed reports' (Art. 7(5)). The council even seems to obtain an active role in the management of public enterprises: according to Art. 7(6) of the same Decision, the council 'gives an opinion, proposals and suggestions to the President of the Municipality in the process of adoption of plans and programs of the work of the public enterprises, institutions, organs, organizations and offices it i.e. the

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342 Likewise, the Rules of Procedure specify that the chairperson, i.e. the president of the municipality, has a right to vote (Art. 16(2)). The municipality of Kraljevo has given the president an important role within the municipal council: according to Art. 8 of the Decision on the Municipal Council, the president convenes the session of the council, proposes the agenda, chairs the session and signs the legal acts (this is quite a lot considering that the LSG only provides for chairing the sessions and that the Statute of the municipality of Kraljevo explicitly excludes a voting right of the president).

municipality forms'. Finally, Art. 14 of the Decision on the Municipal Council provides that an instruction of the municipal council 'can regulate the operating manner and performance of duties and regulate the principal stands and guidelines for the work of public enterprises, institutions and offices whose founder is the Municipality, during carrying out of decisions and other general acts passed by the Municipal Assembly, when the President of the Municipality requests it from the council' (para. 4). How are these powers of the municipal council to be delimitated from the supervising power of the municipal assembly? Is the municipal council exercising direct oversight, together with the president, and is the municipal assembly responsible for superintendence? Such a solution would make sense; however, it finds support neither in the wording of the LSG, nor in the Statute. Moreover, such a solution would enter into conflict with the provisions contained in the Law on Public Enterprises (LPE): according to Art. 11(1) (3) of this law, every public enterprise must have a supervisory board (which is to be appointed by the founder, i.e. the municipality). How would the competencies between the municipal council (together with the president) and the supervisory board be delimitated?

As far as supervision of the municipal administration is concerned, the Rules of Procedure on the Work of the Municipal Council (note: not the Decision on the Municipal Council)[343] state that the council obtains the reports and views of the heads of the basic organisational units of the municipal administration, that the council has the right to take immediate insight into the work of the municipal administration and that the council can, together with the president of the municipality, issue guidelines for the implementation of decisions and other general acts[344] (Art. 25), reflecting – at the level of local legislation – the ambiguous delimitation of oversight functions between the council and the president set out in the LSG.

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343 The Rules of Procedure are adopted by the council itself. The cited provision, as it allocates specific powers to the municipal council, should find its place in an act adopted by the municipal assembly, i.e. the Decision on the Municipal Council.

344 'Except in cases of action-taking in administrative issues' (see Art. 25 LSG).

- The *coordinating function* is defined as follows: According to Art. 22(2) of the Rules of Procedure on the Work of the Municipal Council, 'the council is to obligatory coordinate the function implementation of the President of the Municipality and Municipal Assembly, in cases of obvious discrepancy in implementation of these functions'. The meaning of this provision is unclear: Since in a system with division of powers the municipal assembly and the president are not supposed to implement the same functions, such an 'obvious discrepancy in implementation of [their] functions' is rather unthinkable.

  Art. 9 of the Rules of Procedure on the Work of the Municipal Council indicates more clearly how the coordinating function shall be performed: the provision states that it is compulsory to summon the following persons – besides the council members – to the regular and extraordinary sessions: the president, the deputy president and the secretary of the municipal assembly, the head of the municipal administration, heads of basic organisational units of the municipal administration when issues of their jurisdiction are on the agenda of the session, as well as other parties and informants involved with the process. This means that the municipal council will never have the possibility to hold a session in its 'normal' composition; instead, members of all organs will sit together.

The provisions defining the powers of the municipal council show that the hitherto existing attitude of unity of powers still prevails over the new concept of the division of powers. A professor of public law at the Belgrade University who was a member of parliament when the LSG was being adopted, stressed that the introduction of the organ of the municipal council was not proposed by the government, but introduced at the last minute by the parliamentary majority with the interesting reasoning that the Constitution would not allow a system of complete division of powers at the local level.[345] This explains the hybrid role of this organ perfectly.

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[345] Interview with Prof. STEVAN LILIC, Belgrade Law School, July 2005. The argument brought forward by those supporting the introduction of the municipal

In conclusion, the attribution of tasks is far from being clear. In particular, there is a lot of confusion about the function and role of the newly introduced municipal council, an additional organ placed between the legislative and executive organs. This results in a reduction of the achievements of division of powers, thereby confusing the whole system.

Illustration 7: Horizontal distribution of local powers in Pakistan

In Pakistan, prior to devolution, the functions of today's local governments were carried out by provincial line departments, a deconcentrated bureaucratic tier. The de facto head of the district administration, the deputy commissioner (DC), controlled all executive, judicial and developmental functions in a district[346] and reported to a non-elected provincial secretariat.[347] The different sectors of local administration were managed by the parent provincial line departments.[348]

The new local government system has – for the first time in Pakistan's history – introduced a horizontal division of powers at the local level: the division between councils and nazimeen. The councils have been provided with typical *legislative* functions (such as approval of bye-laws, the budget, taxes, rates, fees, user-charges etc. and control of the administration through committees)[349] whereas the nazimeen exercise

council was that since municipalities, in the spirit of the Constitution of 1990, are considered as part of the state administration, i.e. as a part of the executive branch of the central state, there could be no division of this local power. This view is obviously disputable from a legal perspective, considering that the Constitution of the Republic of Serbia explicitly recognises the principle of division of powers for the central state level (see Art. 9) and that municipalities are territorial units in which local *self*-government is exercised (see Art. 7 of the Constitution). The Constitution, in the view of the author, does neither explicitly prescribe nor explicitly exclude a system of division of powers at the local level.

346 KEEFER et al., p. 10.

347 CHEEMA et al., p. 15 et seq.

348 KEEFER et al., p. 10.

349 See ss. 39 (zila council), 67(tehsil council) and 88 (union council) LGO.

typical executive functions (lead and supervision of the administration; implementation of the functions decentralized to a local government; supervision, formulation and implementation of annual development plans; representation of the local government on public occasions, etc.).[350]

The assignment of functions to the legislative and the executive body in the LGO is quite clear except for the (important) question as to who can spend what amount of money, i.e. the *assignment of the financial competencies*.

According to s. 109(1) LGO, monies credited to a local fund 'shall be expended by a Local Government in accordance with the annual budget and supplementary budget approved by its council'. The LGO does not specify, however, who can actually spend the money once it is included in the budget. What are the spending powers of the district nazim? Who can authorise what item of expenditure? Not only is the respective relation between the councils and the nazimeen not clear after reading the LGO, but also (and maybe even more importantly) the relation between the nazim and the administration is rather vague. Indeed, s. 193 LGO states that a 'nazim may delegate any of his powers, including financial powers, under the LGO or rules and bye-laws to any of its officers fully or partly and subject to such restrictions or conditions as he may deem fit, after approval by the Council'. But the actual spending powers of the nazim are not mentioned anywhere in the LGO. One might expect to get an answer to this question when reading the NWFP Budget Rules 2003. Section 69(2) of these rules specifies that, before public money can be spent, two elements are necessary: (i) there must be an appropriation of funds for the purpose (i.e. in the budget) and (ii) there must be sanction of an authority competent to sanction expenditure. The central question, however, of what amount of expenditure can be sanctioned by whom (what authority) remains unsolved. Only when we look into the NWFP Delegation of Powers under the Financial Rules and the Powers of Re-Appropriation Rules 2001 (hereafter: FR), we find that spending powers are allocated in an

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350 See ss. 18 (zila nazim), 56 (tehsil nazim) and 80 (union nazim) LGO.

extremely opaque manner to different (provincial and devolved) departments and officers by the provincial government, as has also been pointed out in a technical financial approval sheet of a project carried out within the Devolution Support Program (DSP):

> 'There was a barrage of revisions with regard to Financial Rules (FRs) over the past few years since devolution, comprising of innumerable continued, amended, discontinued, repealed and saved sets of FRs. This change process created an uncomfortable situation where previous rules existed simultaneously with new edicts, and where the level of awareness and comfort regarding new FRs varied, leading to chaos and confusion, and in many instances arbitrary decision-making. No centralized mechanism currently exists at the district level to register, collect and collate all notified revisions in the FRs, and to ensure communication of the same to all departments and relevant stakeholders at the district level.'[351]

It turns out that a 'budget and development committee' (hereafter: BDC),[352] which is composed of several bureaucrats and the nazim as sole elected member, plays a rather important role in authorising expenditure as it can approve development schemes up to 10,000,000 rupees. But no provision is made for the extent of the spending powers of a nazim or – eventually – a council.

In a three-branched governing system (as proposed in Part 1), (non-elected) bureaucrats ('the administration') act as a part of (i.e. according to instructions, under supervision and responsibility of) the executive branch. This is (at least partly) not the case in Pakistan where the local bureaucracy at the district level is, on the one hand, institutionally rather independent from the executive (the DCO, the EDOs and the district police officer are all appointed and paid by the provincial government),[353] and on the other hand, enjoys substantial powers of its own: the analysis of the competences for spending public money has shown that important powers that normally belong to the

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351 DECENTRALIZATION SUPPORT PROGRAM (DSP), Approved Technical Investment Proposals (TIPs), N 002, Compilation of Drawing and Disbursing Officer's (DDO) Handbook and Financial Rules (FRs), Project Information, accessible at: http://www.decentralization.org.pk/docs/N-002.pdf (accessed 8 July 2009).

352 For more considerations on the role of the BDC, see below, p. 184 et seq.

353 See, on this, Illustration 20.

local executive (or even legislative) branch, are allocated to the local bureaucracy.

From the perspective of the district nazim, this results in a situation of responsibility without authority: while he is responsible in principle for the effective functioning of the district government [s. 18(1a) LGO] as well as for the improvement of the governance and delivery of services in the ambit of the authority decentralised to the district [s. 16(3) LGO], some powers that would be necessary for carrying out his responsibilities in fact still lie with the (non-elected) local bureaucracy, which follows instructions of the province rather than those of the district Nazim.

It can be concluded that a form of division of powers has been introduced between two rather powerless organs; however, the real powers remain with the bureaucracy and thereby at the provincial level.

b. Legal protection of the system of powers

A clear regulation of the system of powers is already very valuable and signifies an important step in the right direction. It at least compels those who act beyond their jurisdiction with a duty to justify their acts. No matter how painstakingly intricate and clear a regulation of jurisdiction is though, it can only really start to fulfil its purpose if encroachments on jurisdictions result in legal consequences. The presence of effective protection under the law is therefore a necessary counterpart to the fundamental principle of the horizontal division of powers.

An independent judicial protection of the horizontal system of powers is not even nearly warranted in Pakistan nor in Serbia[354] but Illustration 8 will show that also Switzerland only tentatively created sufficient opportunities of enshrining legal protection.

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354 See, on this, Illustration 23 (regarding Pakistan) as well as fn. 595 (regarding Serbia).

Illustration 8: Legal protection of the system of powers in Switzerland

Compliance with the constitutional system of powers in Switzerland is protected by the principle of division of powers. Even though this principle is not explicitly mentioned in the Federal Constitution,[355] the federal supreme court has, at all times, recognised it as a constitutional right. Its content, however, arises (as far as cantonal or communal actions are concerned) first and foremost from cantonal law.[356] This means that the individual has a constitutional right that the system of powers (as it was codified in the respective canton or the municipality) is respected by the state organs.

This right can be asserted, at first, within the cantonal level and subsequent to the cantonal proceedings, before the federal supreme court. A decision or general act issued in violation of the system of powers will be repealed (in the last instance) by the federal supreme court. However, it must be added that a public law complaint (*Beschwerde in öffentlich-rechtlichen Angelegenheiten*) at the federal supreme court can only be brought by the person who is affected by the disputed decision or general act and has a vested interest in its annulment or amendment (Art. 89(1)(b) and Art. 89(1)(c) of the Law on the Federal Supreme Court[357] (hereafter: BGG). A public law complaint is therefore not possible against decisions and orders that, for example, are of a mere organisational or beneficial nature, and do not otherwise actually affect the individual citizen. In the final analysis,

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355 HÄFELIN/HALLER/KELLER, p. 417 para. 1410: 'The principle of division of powers is not explicitly mentioned in the Federal Constitution, it is however to be seen as a *fundamental organisational principle* of Swiss democracy' with reference to BBl 1997 I 370, translation by the author).

356 BGE 128 I 113 E. 2c p. 116, BGE 128 I 327 E. 2.1 p. 329 with references.

357 Bundesgesetz vom 17. Juni 2005 über das Bundesgericht (Bundesgerichtsgesetz, SR 173.110).

therefore, in all these cases, the system of powers remains without protection by the federal supreme court.[358]

However, at the cantonal level (at least in the canton of Bern), in such cases the legal protection (compared with the federal level) extends further: Art. 65c lit b of the cantonal Law on Administrative Procedure[359] (hereafter: VRPG) introduces by way of the so-called 'citizens' complaint' (*Bürgerbeschwerde*) the possibility for all citizens of a municipality to contest decisions (*Beschlüsse*) which affect a general interest of the municipality. 'If a decision or order was passed under (qualified) breach of the system of powers, the general public interest in seeing a correct decision-making process is affected',[360] which is why in such cases the extended rules for standing apply. By the end of 2008, the assessment of such complaints however lay within the jurisdiction of the cantonal executive. Since 1 January 2009 (due to an amendment of the VRPG), the path to the cantonal administrative court is newly designated.

In conclusion, it can be said that the system of powers enacted by the canton and the municipalities enjoys constitutional protection (principle of the division of powers). However, protection at federal level is incomplete: it is only present in those cases in which the specific decision or act objected to affects vested interests of an individual. The

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358 SEILER, 571. An exception applies if the division of powers complaint (*Gewaltenteilungsbeschwerde*) coincides with a voting complaint (*Stimmrechtsbeschwerde*). The legal situation, too, has not changed since the guarantee of access to the courts was granted: The path to an independent court is only guaranteed where a legal dispute is in question. 'As a constitutional individual right, Article 29a of the Federal Constitution wants to grant procedural protection for the legal position of *individuals.* This is why the guarantee only applies to disputes that are related to an *individual* legal relationship. Such a relationship is missing, e.g., in disputes concerning the closure of a post office [...]. The same is true where conflicts of competence between the federation and cantons or between the parliament and the executive are at stake etc.' BIAGGINI, Art. 29a, para. 6, translation by the author; see also KÄLIN, WALTER, *Die Bedeutung der Rechtsweggarantie für die kantonale Verwaltungsjustiz*, in: ZBl 1999, p. 49 - 63, p. 56.

359 Gesetz vom 23. Mai 1989 über die Verwaltungsrechtspflege (BSG 155.21).

360 M. MÜLLER, Kommentar GG, Art. 95, para. 11.

canton of Bern grants (voluntarily) by virtue of its 'citizens' complaint' a degree of legal protection that extends further, so that at least qualified breaches of the system of powers can (of late also judicially) be examined.

c. Conclusion

While all three countries use the principle of division of powers as a premise for their organisation, on closer observation it appears that in Serbia, with the introduction of the additional organ of the municipal council, the initially sought division of powers is ruptured or at least very diffuse. With the example of Pakistan, throughout the analysis of the financial competencies (with regard to development projects), one does not get rid of the impression that a system has been established that does indeed comply with the principle of division of powers, but that the actual transfer of power into this system has not taken place and as a result much of this power remains with the provincial administration. The Swiss system is ultimately pervaded the most by the principle of division of powers. However, here too serious challenges persist with regard to transparency of the system of powers, and legal protection – at least under federal law – is yet to be developed in more comprehensive terms.

II. MECHANISMS TO 'CALL TO ACCOUNT'

For the agents to maintain control over their principals, they must be able to know what their principals are doing. This is the basis for deciding whether a principal deserves further trust or not, and whether he eventually should be sanctioned.

Accordingly, for a people to maintain popular control over government, they must have access to the necessary information to intelligently scrutinise governmental operations. *Publicity of state operations* is therefore a centrepiece and even a basic condition of any political system promising accountability of the state to the people. MADISON emphasised this insight with the following words:

> 'A popular government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy, or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.'[361]

Publicity of state operations leads to a more even distribution of information between the citizens and the state; it reduces the informational edge and thereby the power advantage of state authorities.[362] It is obvious that the mere awareness of public authorities and officers that their operations are public (or might become public in case somebody requests it) should have a disciplining effect on steps they undertake that would otherwise not be approved of by the public at large (whereby the extent of this effect may well be related to the probability of a fact being made public).

But not only the citizens must be informed. Every government body that is mandated to hold another government body to account must have corresponding possibilities to be informed too. In fact, the whole government process must be *transparent* in order for the different

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361 GAILARD HUNT, ed., The Writings of James Madison, New York 1910, vol. 9, p. 103, quoted in WARREN, p. 145.

362 TSCHANNEN, Staatsrecht, p. 376 para. 5.

actors to play their role, particularly – in the context of accountability – to judge on the deeds and misdeeds of the other actors.

Transparency is a *broad concept*[363] which cannot be reduced easily to a single formula. It embraces a multitude of (at least partially) interdigitated claims, all ultimately targeted to improving the traceability of state operations. It is not the purpose of this study to deal with all aspects of transparency. In the following, *some aspects* that are especially important with regard to accountability shall be discussed using illustrations as examples, with the aim to highlight the importance of the legal design of instruments or reforms promising accountability by promoting transparency.

1. Horizontal dimension

This chapter deals with transparency within a level of state (including information of citizens at the particular level of state). The following aspects will be examined more thoroughly: informing of the public in general (lit. a.), internal state information flows (lit. b), the significance of procedural transparency (lit. c) and the role of the (local) media (lit. d.).

a. Information of the general public

One of the central postulations arising from the concept of transparency is that the general public shall be informed about governmental operations. From a legal perspective, a multitude of set-ups are conceivable, at different stages and in different levels of intensity, to implement this postulation. We can distinguish between two important categories:

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363 Within the good-governance discussion, transparency is often enumerated, besides accountability, as one of the fundamental concepts a good state should be built on, see, for an overview, FUSTER, THOMAS, Die 'Good-Governance'-Diskussion der Jahre 1989 - 1994, Ein Beitrag zur jüngeren Geschichte der Entwicklungspolitik unter spezieller Berücksichtigung der Weltbank und des DAC, Bern-Stuttgart 1998.

- A right (of the citizens and corresponding duty of state authorities) to *direct publicity (unmittelbare Öffentlichkeit*) of state operations in certain areas. Important examples are the publicity of the sessions of (at least) the representative body but also the principle of publicity of legal norms (i.e. the principle that legal norms can only enter into effect after their publication) as well as the publicity of important court decisions.[364]
- A right of the citizens to be informed by the authorities about state operations. This is a kind of *indirect publicity (mittelbare Öffentlichkeit*), whereby information is transformed. The transformation can take on different forms: either the citizen can get access to official records and reports etc., documenting state operations, or the authorities are obliged to inform citizens about certain operations (even without corroborating the information with official documents). Both forms can be provided either on request or ex officio.

It is evident that the impact of these rights with regard to accountability varies a lot: The mere duty of state organs to regularly inform citizens about state operations whereby the authority decides itself about the point of time, the content and the form of the information to be released, can easily be misused for state propaganda and even manipulation.[365] In contrast, a general (and enforceable) right to access official documents on request or even to follow public meetings clearly strengthens the position of the public at large, i.e. the ultimate principal.

In the following, the legal situation with regard to access to local information shall be analysed in all three countries.

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364 See, e.g., TSCHANNEN, Staatsrecht, p. 377 para. 6.

365 SUTTER, p. 152: "A system of transparency which is built exclusively on active information is mainly aiming at [...] social control. For the public at large this is suggestive of manipulation. To counter this feeling, the legal order must provide for instruments enabling the affected persons or intermediaries to verify the respective information at any time. [...]"

Illustration 9: Access to local information in Pakistan

The Pakistani Constitution contains no provision expressly guaranteeing a right to seek and receive information. Yet, in the 1993 Nawaz Sharif case, the supreme court of Pakistan ruled that the right to freedom of expression (Art. 19 of the 1973 Constitution of the Islamic Republic of Pakistan) includes the right to receive information.[366] According to Art. 19 of the Constitution however, the right to freedom of expression (and therefore also the right to seek and receive information) is subject 'to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, commission of or incitement to an offence'. Furthermore, the proclamation of emergency, Provisional Constitution Order No. 1 1999, stipulates that the fundamental rights conferred by chapter I of part II of the Constitution, shall continue to be in force as far as they are 'not in conflict with [...] any order made [under the proclamation of emergency] from time to time'. At the national level, therefore, the right to receive information can easily be restricted.

In October 2002, the current President Musharraf introduced the 'Freedom of Information Ordinance 2002' which provided the citizens of the Republic with improved access to public records 'for the purpose to make the Federal Government more accountable to its citizens'.[367] Besides other weaknesses[368] however, the Ordinance defines 'public bodies' only as bodies of the federal government[369] and therefore does not apply to provincial and to local government bodies.

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366 See ARTICLE 19, Pakistan, p. 4.

367 Freedom of Information Ordinance 2002, preamble.

368 See the analysis of ARTICLE 19, Pakistan.

369 Section 2(h) of the Ordinance reads as follows: 'Definition: - In this Ordinance, unless there is anything repugnant in the subject of context: - 'public body' means - (i) any Ministry, Division or attached department of the Federal Government; (III) Secretariat of Majlis-e-Shoora (Parliament); (iv) Any office of any Board,

None of the provinces have enacted freedom of information legislation yet, but the government of NWFP in August 2004 promised 'to enact a law to allow access to information in government departments'.[370]

While (besides the quite easily restrictable right to freedom of expression guaranteed by the Constitution) no freedom of information exists at the provincial level, the GOVERNMENT OF THE ISLAMIC REPUBLIC OF PAKISTAN in its Local Government Plan 2000 recognised the importance of a free flow of information:

> ' "Information as Empowerment" for the many, as opposed to the traditionally narrow notion of "Information as Power" for the few, is the information system focus of the Local Government Plan. It operationalizes the 'Right to Information' and promotes transparency, accountability, and responsiveness to citizen demands to achieve greater efficacy, efficiency, and acceptance.'[371]
>
> 'Open access and the free flow of information is a basic element of the devolution of power to the grass root level.'[372]
>
> 'The virtual non-existence of the concept of freedom of information, outdated official procedures and regulations restricting public access to information, vested interests in the bureaucracies, and lack of capacity and infrastructure for managing information systems are some hurdles. These obstacles must be overcome if Pakistan is to be positioned to be able to compete in the world of the 21st century. Once in place, transparent information systems have the potential to transform the ground rules of district government by replacing official insularity and secrecy with a transparent and responsive political and administrative culture rooted in citizens' access and contributions to accountability information flows.'[373]
>
> 'Transparency of information in governmental processes and procedures not only improves accountability for official acts, but also the potential for efficacy, efficiency, responsiveness, and acceptance.[...] Open access to information and

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Commission, Council, or other body established by, or under a Federal Law; (v) Courts and tribunals'.

370 DAWN, Internet Edition, 11 August 2004, 'Peshawar: Access to information in NWFP promised', accessible at: http://www.dawn.com/2004/08/11/local36.htm (accessed 9 July 2009).

371 Section 150, p. 29.

372 Section 151, p. 30.

373 Section 154, p. 30.

> the free flow of information are essential for determining responsibility for acts, as well as their classification as licit or illicit.'[374]

Accordingly, the LGO contains some provisions aiming at a more open government; it provides for instruments for direct as well as for indirect publicity:

- *Direct publicity.* According to s. 42(7) LGO, the meetings of the zila councils shall be open to the public, unless the council decides by a resolution to hold a meeting in camera.[375] The publicity of council meetings is an important instrument in providing a general picture of government policy, as the council is the organ that is not only supposed to deliberate on all important policy decisions (such as laws, the budget, the annual development plans etc.), but also – through monitoring committees which report to the council – to scrutinise government performance.

  Precisely because of the importance of the publicity of council deliberations for accountability, the LGO should specify clearly under which conditions the council can decide to hold a meeting in camera. It is valuable that such a decision can only be taken by the majority of the council ('by resolution', see s. 42(7) read with s. 42(3)). In addition however, the reasons that may be brought up for closing the meetings should also be specified in the ordinance. Otherwise, if the nazim has the support of the majority of the council[376] and this majority can decide to hold its meetings in

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374 Section 165, p. 32.

375 The respective provisions for the tehsil and union councils can be found in s. 69(7) and s. 89(6) LGO.

376 Which seems to be the case in most districts. The study of ADB et al. concludes that most of the district nazimeen do not face effective opposition from the district councillors and argues that this is – inter alia – because a district nazim can engineer or threaten to engineer a motion of non-confidence against a troublesome union nazim (i.e. district councillor) while it is much more difficult for a union nazim to introduce a recall-procedure against a tehsil or district nazim. 'In proposing a no-confidence motion against a district or TMA nazim, a councillor has to be confident of securing a majority in both the council and among all the union councillors in the district or tehsil, because otherwise he or she will be forced to resign as a union nazim. By contrast, union nazimeen and naib nazimeen

camera, then the nazim and the majority of the council can effectively stick together and hide information from the public, even in cases where no reasonable motive exists.

Section 45 of the NWFP Local Councils Model Conduct of Business and Meetings By-Laws, 2001, *contrary* to s. 42(7) LGO, states that 'every meeting of the Council shall, unless otherwise directed *by the presiding officer* in respect of any particular item under consideration at a meeting, be open to the public and the press'. According to this provision, the presiding officer can decide on his own, without having the majority of the council behind his decision, to close a council's meeting.

This of course severely limits transparency, as the spread of information to the public is dependent on the will of one sole person, the presiding officer, i.e. the zila naib nazim (who has been elected on the same ticket as the zila nazim).

- *Indirect publicity*. The LGO also provides every citizen with a *right to receive information* at all local government levels. Section 137 reads as follows:

> **137. Transparency. ---** (1) Every citizen shall have the right to information about any office of the District Government, Tehsil Municipal Administration and Union Administration.
>
> (2) Every office shall provide requisite information, if not restricted under any law for the time being in force, on the prescribed forms and on payment of such fee as may be prescribed.
>
> (3) Information about the staffing and the performance of the office of a local government during the preceding month shall, as far as possible, be displayed at a prominent place within the premises of the office for access by the citizens.

Subsection 2 of this article, however, restricts this right severely, as the information must be released only 'if not restricted under any law for the time being in force'. Such laws may be found to a great

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are much more vulnerable to no-confidence motions than their district and tehsil counterparts. This is because in most cases village and neighbourhood committees have not been formed, and a simple majority in the union council is enough to suspend the union nazim.' (ADB et al., History, p. 54).

extent in higher legislation. The 1923 'Officials Secrets Act', for example, states that any document marked as 'classified' or 'confidential' by even a low-level government employee can be denied to the public.[377] An additional weakness is that only the 'requisite' information must be released without specifying who can decide and according to what criteria particular information is to be considered 'requisite' or not. The payment of a fee can be a severely limiting aspect as well, depending on the sum required. Finally, no rules have been enacted yet to regulate the details (such as: defining the 'prescribed forms' and the amount of the fee required).

Subsection 3 provides for an *obligation to publish* some (but by far not all)[378] important official information, but only 'as far as

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377 See ASIM YASIN in: The News International, internet edition, 3 May 2004, www.jang.com.pk/thenews/may2004-daily/03-05-2004/main/main8.htm (accessed 5 June 2004).

378 The obligation includes information about staffing and the performance of the office of a local government during the preceding month. Other obligations to publish can be found in the LGO: The TMA, e.g., according to section 54 (k) LGO shall 'maintain, with the assistance of the District Government, Union and Village Councils, a comprehensive data base and information system for Tehsil Municipal Administration and provide public access to it on nominal charges', according to section 76 (h) the Union Administration shall 'disseminate information on matters of public interest'. Both provisions are very vague, however. The London-based non-governmental organisation ARTICLE 19, in its 'Freedom of Information Principles: The Public's Right to Know – Principles on Freedom of Information Legislation' proposes that 'public bodies should, as a minimum, be under an obligation to publish the following categories of information:

- operational information about how the public body functions, including costs, objective, audited accounts, standards, achievements and so on, particularly where the body provides direct services to the public;
- information on any requests, complaints or other direct actions which members of the public may take in relation to the public body;
- guidance on processes by which members of the public may provide input into major policy or legislative proposals;
- the types of information which the body holds and the form in which this information is held; and
- the content of any decision or policy affecting the public, along with reasons for the decision and background material of importance framing the decision.'

possible', thereby providing an easy (and hard to verify) excuse for not publishing all data. In practice, the duty to publish is often neglected.[379]

Moreover, s. 9(2) of the NWFP Provincial Rules of Business states an obligation to publish all notices affecting the citizens in at least two Urdu dailies which have wide circulation in the local area. Unfortunately, however, this important provision fails to impose consequences for the case where the duty to publish is not fulfilled. Are the notices in this case void or are they valid only insofar as they do not disadvantage citizens, or is there no consequence at all? Moreover, considering that the majority of citizens in NWFP are Pashtu-speaking, it would be important to also provide the publications in Pashtu dailies with a wide circulation.

Section 54(k) LGO further provides for the tehsil municipal administration to maintain, with the assistance of the city district government, union and village councils, a comprehensive *data base and information system* for tehsil municipal administration, and provide public access to it for nominal charges. NRB has developed the software for such information systems (NARIMS) and a district citizen information centre (DCIC) was being installed as a pilot in the districts of Mardan and Abottabad, NWFP, but public access was not yet possible in May 2004. The success of DCIC's with regard to improving accountability will depend to a large extent on whether they provide access to information that is of *relevance for the citizens to monitor local government performance* (e.g. the flow of finances from the province to the district, the district budget, and decisions taken by the council).

In conclusion, the LGO provides for several instruments of direct and indirect publicity. However, the councils' meetings can be closed at will by one sole person (the ally of the executive head!) and requests

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See ARTICLE 19, Right to Know, www.article19.org/docimages/512.htm, p. 4 et seq. ('Principle 2. Obligation to Publish').

379 Interview SAJID QUAISRANI, Project Director AURAT Foundation, Islamabad, June 2004.

for access to information can easily be denied by classifying a document as secret. What remains are the provisions obliging the administration to publish some (but by far not all important) information. In the absence of a reliable mechanism to get access to information on request, it is easy for the local governments to also hide information which they would be obliged to publish under the LGO.

Illustration 10: Access to local information in Serbia

Freedom of information is legally guaranteed within the Republic of Serbia due to diverse international and constitutional provisions:

- The Federation of Serbia and Montenegro, of which the Republic of Serbia formed a constituent part at the time that the field study was carried out, was party to the *International Covenant on Civil and Political Rights (ICCPR)*[380] and, on 3 April 2003, signed the *European Convention on Human Rights (ECHR)*.[381] Both treaties protect the freedom of expression in similar terms[382] and both

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380 Adopted by the UN General Assembly Resolution 2200 (XXI) on 16 December 1966, in force since 23 March 1976, ratified by Yugoslavia (Serbia and Montenegro's predecessor) on 27 April 1992.

381 ETS Series No. 5, adopted on 4 November 1950, in force since 3 September 1953.

382 Art. 10 ECHR reads as follows:

'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Art. 19 ICCPR states:

1. Everyone shall have the right to hold opinions without interference.

implicitly include a right of the public at large to receive information.[383] They do not include, however, binding standards for access to *official* information.[384] In 2002, the Committee of Ministers of the Council of Europe adopted a detailed Recommendation on Access to Official Documents.[385] However,

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2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:

(a) for respect of rights or reputations of others;

(b) for the protection of national security or of public order (ordre public), or of public health or morals.'

383 See, for the ECHR, e.g. *Observer and Guardian v. the United Kingdom*, 26 November 1991, Application No. 13778/88, para. 59.

384 See THEODOR SCHILLING, *Internationaler Menschenrechtsschutz*, Tübingen 2004, p. 120 para. 234.

385 Council of Europe Declaration on the Freedom of Expression and Information, adopted 29 April 1982. The Recommendation states:

'III. General principle on access to official documents

Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.

IV: Possible limitations to access to official documents

1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:

i. national security, defense and international relations;

ii. public safety;

iii. the prevention, investigation and prosecution of criminal activities;

iv. privacy and other legitimate private interests;

v. commercial and other economic interests, be they private or public;

vi. the equality of parties concerning court proceedings,

vii. nature;

since it is a recommendation, the principles elaborated within the Council of Ministers are not binding on the signatory states of the ECHR.

- According to Art. 10 of the (at that time applicable) *Constitutional Charter of the Union of Serbia and Montenegro,*[386] rights and freedoms of man and the citizen recognised under international law shall be recognised and guaranteed in the Federal Republic of Yugoslavia. Article 35 states that – besides others – the freedom of public expression of opinion shall be guaranteed.
- Serbia and Montenegro's (at that time applicable) *Charter on Human and Minority Rights and Civil Liberties*[387] also guarantees the right to freedom of expression: according to its Art. 29, everyone shall have the right to freedom of opinion and expression. 'This right shall include freedom to seek, receive and disseminate information and ideas by speech, writing, and picture or in any other way' (para. 1). Paragraph 2 states explicitly that 'everyone shall have the right of access to data in possession of state authorities', however 'in accordance with the law'. The right to freedom of expression may only be restricted by law, if this is necessary for protecting the rights and reputation of other people, preserving the

viii. inspection, control and supervision by public authorities;

ix. the economic, monetary and exchange rate policies of the state;

x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.

2. Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.'

386 Official Gazette of the Union of Serbia and Montenegro No. 1/03.

387 Official Gazette of the Union of Serbia and Montenegro No. 6/03.

authority and impartiality of courts, national security, public health or morality or public security (para. 3).[388]

The legal significance of the Charter of Human and Minority Rights is not clear, however. According to its Art. 2, the rights granted in the Charter are directly applicable in accordance with the Constitutional Charter of the State Union of Serbia and Montenegro (para. 2). According to para. 3 of the same article 'the rights granted in the Charter shall be directly regulated, secured and protected by the constitutions, laws and policies of the Member States'. It is obvious that the two paragraphs exclude each other, since provisions granting rights to the citizens are either directly applicable (para. 1) or need to be 'translated' by the member states (para. 2).[389]

- Finally, the *Constitution of the Republic of Serbia* guarantees freedom of public expression of opinion in Art. 45 and provides that the work of State agencies shall be open to the public, whereby this

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388 Art. 122 of the Charter further states that the work of federal agencies shall be open to the public and that public inspection of the work of federal agencies may be restricted or denied only in the cases specified by federal law.

389 It is interesting to see that in the Draft of the Charter on Human and Minority Rights, the two paragraphs were presented as *alternatives*. The draft was commented by the Venice commission. The commentator, Mr. Jan. E. HELGESEN, pointed out that the question whether the Charter shall be directly applicable or not is of great importance and strongly recommended Serbia to adopt the first alternative (direct applicability of the Charter): 'In your history you have had many constitutions setting out many rights. The real break with the past will not be to grant even more rights on paper but to practically implement these rights. For this purpose direct applicability is essential.' (Comments of the Venice Commission, Opinion No. 234/2003 of the Council of Europe, CDL (2003) 10, p. 3.) With regard to the second alternative, he mentioned that it is 'in no way satisfactory. The text is not very clear but it seems to abolish any hierarchy between the rights granted by this Charter and the laws and constitutions of the member states. This would greatly reduce the importance of the text.'*(Ibid.)* The question whether the Charter is directly applicable or not is of importance because in case it is, the Constitutional Court in Serbia could declare any provision that does not respect, e.g. the conditions for limiting the right to freedom of expression as set out in Art. 29(3) of the Charter, as unconstitutional (or – depending on the character of the Charter – as in opposition with higher ranking legislation and therefore illegal).

> publicity may be restricted or precluded only in cases provided by law (Art. 10).[390]

It can be concluded that several documents point out the importance in a general sense of freedom of information. However as has been shown, the status of the Charter on Human and Minority Rights as the only document guaranteeing a right to access *official* information explicitly, is not clear; furthermore, the reference in the Constitution of Serbia and Montenegro to international standards does not include an enforceable right to access public documents (since this right is embodied only in a non-binding recommendation). In the end, the Constitution of the Republic of Serbia[391] leaves the definition of the extent of the principle of publicity to the lawmaker.

On 5 November 2004, a new *Law on Free Access to Information of Public Importance*[392] (hereafter: LFAI) was enacted by the parliament of the Republic of Serbia with the 'purpose of the fulfilment and protection of the public interest to know and [to] attain a free democratic order and an open society' (Art. 1(1) LFAI). It has been long awaited within circles of the scientific society because, in the words of a Serbian legal scholar,

> 'accepting free access to information represents a turning point in the transformation of a state and administration from an apparatus of repression and

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390 The Constitution of the Republic of Serbia of 2006 contains, in its Art. 51, a right to information: 'Everyone shall have the right to be informed accurately, fully and timely about issues of public importance. The media shall have the obligation to respect this right' (para. 1). 'Everyone shall have the right to access information kept by state bodies and organizations with delegated pulic powers, in accordance with law' (para. 2).

391 This is also true for the respective provision in the new Constitution (see fn. 390).

392 Official Gazette of the Republic of Serbia No. 120/2004; an English translation can be found at the website of the commissioner for information of public importance: http://www.poverenik.org.rs/index.php/en/doc/lawswww.poverenik.org.yu/Dokumentacija/eng_23_ldok.pdf (accessed 8 July 2009).

> power toward service-oriented public service and a complex system of socially regulated social processes.'[393]

The commissioner for free access to information of public importance, MR. RODOLJUB SABIC, welcomed the Law with the following words:

> 'Modern democratic societies are based on the idea that information is the oxygen of democracy and that the public has justified interest to know about government affairs. A citizen will be able to effectively control the operations of government authorities only if he/she has access to the information available to government authorities. Free access to information available to government authorities helps to make the citizens better informed and the civil servants more accountable, which in turn reduces the risk of potential misuse of power and ensures respect for human rights and freedoms.'[394]

The law gives any person the right to demand access to information of public importance held by public authority bodies (art. 1 para. 1). Information of public importance is information held by a public authority body, created during work or related to the work of the public authority body, contained in a document and related to everything that the public has a justified interest in knowing, regardless of the source, the information medium, the date of creation, etc. (Art. 2). The term 'public authority body' includes state bodies, local self-governance bodies, organisations vested with public authority, and legal persons funded wholly or predominantly by a state body (Art. 3). There is a legal presumption of an existing justified interest 'in all matters regarding a threat to, i.e. protection of public health and the environment'. In all other cases, the justified interest is presumed unless proven otherwise by the authority (Art. 4). According to Art. 8 LFAI, the right to free access to information may only be limited by law 'if that is necessary in a democratic society in order to prevent a serious violation of an overriding interest based on the Constitution or

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393 DEJAN MILENKOVIĆ, *Access to Information as a Fundamental Human Right*, in: LILIC/ MILENKOVIĆ, p. 41 et seq.

394 REPUBLIC OF SERBIA COMMISSIONER FOR INFORMATION OF PUBLIC IMPORTANCE, *A Guide to the Law on Free Access to Information*, accessible at: http://www.poverenik.org.rs/images/stories/Dokumentacija/eng_22_ldok.pdf (accessed 8 July 2009), under "I. Why has the Law been enacted? - 'Information is the Oxygen of Democracy'.

law'. In its second chapter, the law contains several articles on 'exemption and limitation of free access to information of public importance' (see Arts. 9 to 14).

The law further provides for a detailed access procedure (chapter IV). A public authority is obliged, without delay or within 15 days at the latest, to inform the applicant whether it holds the requested information, to allow insight into the document containing the requested information, or to hand out a copy of the document (Art. 16(1)). The applicant may, if a public body does not conform with the law, lodge a complaint to the commissioner (Art. 16(4) and Art. 22), an autonomous and independent state body that is established by the LFAI in order to implement the right to access of information (Art. 1(2)).[395] A complaint cannot be lodged, however, against a decision of the national assembly, the president of the Republic, the government of the Republic of Serbia, the supreme court of Serbia, the constitutional court and the republican public prosecutor (Art. 22(2)). In these cases, an administrative dispute complaint may be filed (Art. 22(3)). The commissioner shall reach a decision on a complaint within 30 days. The decision of the commissioner is binding for the public authorities (Art. 28), but not final: it can be brought before the courts by lodging an administrative dispute complaint (Art. 27).

Chapter V of the Law provides for measures for improving the transparency of the work of public authorities. Only some of these measures shall be mentioned here:

- Article 38 obliges every public authority to appoint one or more official persons to respond to requests for free access to information of public importance. In case such a person has not been appointed, the head of the public authority is the responsible person.
- Furthermore, every state body is obliged to publish a directory with the main data about its work (specified in Art. 39) at least once a year.

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395 See, for details regarding the appointment, the position and the powers of the commissioner, Arts. 29 - 36 LFAI.

- The person responsible for responding to requests about the access to information of each state body has to submit an annual report to the commissioner on the activities of the body undertaken with the aim of implementing the LFAI (Art. 43).

The LFAI is, without any doubt, an important step in the right direction and obviously has 'many of the key elements needed in an effective freedom of information law'.[396] However, there are also some problematic points which include a confusing definition of the scope of the Law, some problematic exemptions, and a worrisome procedural restriction:

- *Scope of the Law*: According to Arts. 6 and 7 of the Law, everyone shall have access to information that falls within the scope of the Law, without discrimination. The scope of the Law is then determined in a manner which has been described, by ARTICLE 19, as 'unnecessarily complex'[397]: first, the information must be *of public importance*, i.e. it must be information about something anyone has 'a justified interest to know', whereby the existence of such an interest is legally presumed. This approach, i.e. to restrict the right of access to information of public importance and then to define this broadly, is unnecessarily complicating things. The relationship between this article and the regime of exemptions/limitations of the right is also not clear: how, i.e. for what reasons, can a public authority prove that there is no justified interest to access information held by it? Can it deny access to information based on other grounds than the ones foreseen in Art. 8 and chapter II of the Law? If it cannot, then the provision makes no sense because it does not add anything to the exemption regime. If it can, then there is room for manipulation and the exemption regime can be easily undermined. In either case, this concept leaves a lot of room for misunderstandings, not only for the citizens reading the Law, but also for the authorities that are supposed to apply it.

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396 ARTICLE 19, Memorandum LFAI 2003, p. 1. The document entails a detailed analysis of different drafts of the Law.

397 ARTICLE 19, Memorandum LFAI 2003, p. 6.

- *Exemption regime*: Art. 8 states the general rule that the right of access to information may only 'be exceptionally subjected to limitations prescribed by this Law if that is necessary in a democratic society in order to prevent a serious violation of an *overriding interest* based on the Constitution or the law'. The wording of this provision might lead to an interpretation allowing any 'interest' in any law as providing the basis for withholding information, under the sole condition that this interest is overriding the interest of having access to information. However, only the interests that are listed in the exemption regime (Arts. 9 to 14) should be considered as legitimate interests for restricting the right of access to information.[398] Article 9 lists several reasons for not allowing access to information to an applicant, most of which are rather unproblematic (e.g. section 1: 'if access would expose a risk to the life, health, safety or another vital interest[399] of a person'). Section 5, however, provides that access must be refused if disclosure would 'make available information or a document qualified by regulations or an official document based on the law, to be kept as a state, official, business or other secret, i.e. if such a document is accessible only to a specific group of persons and its disclosure could seriously legally or otherwise prejudice the interests that are protected by the law and outweigh the access to information interest'. This provision allows disclosure to be restricted through additional regulations and laws and is therefore problematic, as has been pointed out by ARTICLE 19:

  > 'A freedom of information law should include a comprehensive regime of exceptions, but these should not be permitted to be extended by other laws. In particular, the freedom of information law should override other, inconsistent laws.'[400]

  The importance of this remark becomes evident when one bears in mind the fact that in Serbia,

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398 This concern was also raised by ARTICLE 19, Memorandum LFAI 2004, p. 3.

399 The wording 'vital interest' is, however, rather vague and could lead to misunderstandings/misinterpretations and therefore also abuse.

400 ARTICLE 19, Memorandum LFAI 2003, p. 9.

> '[w]hen classifying a document as a military or state secret [,] as much as over 100 laws and other legal instruments (decrees, rules, decisions, and directives) are applicable. This forest offers suitable shelters for a clerk who disapproves of free access to information to journalists in the first place, not to mention ordinary citizens.' **401**

- The last point brings us to a more general problem of the LFAI: the LFAI does *not expressly override other, inconsistent laws*. Legal methodology has developed two general principles, most probably also relevant in Serbian legal thinking, in order to resolve conflicts between contradicting regulations of the same hierarchy (i.e. two laws). The principle '*lex specialis derogat legi generali'* says that, in this case, the provision that is more specific shall override the provision that is more general, whereas the principle '*lex posterior derogat legi priori*' says that the provision that has been enacted later shall derogate earlier provisions.**402** While the principle of the 'lex specialis' does not help in this context – the LFAI regulating access to information in a general way – the 'lex posterior'– principle can help to argue for the LFAI to prime all other pre-existing and contradicting laws (except those that are explicitly mentioned under Art. 9(5) LFAI). But there is no guarantee that parliament does not adopt *new laws* restricting the general principle of access to information as set out in the LFAI. That this fear is not a theoretical one has been proven by parliament only recently, as the following statement of the commissioner for information of public importance shows:

> 'I felt that it was my duty to especially emphasize during this discussion [discussion between the Commissioner and the President of the National Assembly of the Republic of Serbia held on 19th September 2006, remark of the author] the need that the Assembly must, during its legislative activities, respect the unity and consistency of the legal system. Respecting this requirement, as well as the experiences with and standards of democratic countries, it is essential to treat the Law on Access to Information of Public Importance as a fundamental law pertaining to issues of enabling access to documents held by the authorities. It shows a lack of principles to have on one hand a very liberal Law on Access to

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401 MIROLJUB RADOJKOVIĆ, *Free Access to Information*, in: LILIC/MILENKOVIĆ, p. 38.

402 See, on these principles, e.g. KELSEN, p. 210 et seqq.

> Information, and at the same time at the other hand to have certain other laws in certain fields that threaten, reduce, or even completely annul the achieved level of access to information. Regretfully, there were such instances, with the current Draft Law on Foreign Investment as a drastic example.'[403]

Seemingly, the Law of the Police, which was adopted in 2005, i.e. after the LFAI, also contains regulations which are in disagreement with the LFAI and which have been adopted by parliament, although the Commissioner hinted at the problem before the adoption.[404] The problem will remain for as long as there is no adequate *constitutional* guarantee encompassing the right of access to information.

- Another problematic point of the law that shall be mentioned here relates to the possible *objects (Anfechtungsobjekte)* against which a complaint to the commissioner can be lodged. Article 22 LFAI states that such a complaint cannot be lodged against the decision of the national assembly, the president of the Republic of Serbia, the government of the Republic of Serbia, the supreme court of Serbia, the constitutional court and the republican public prosecutor. The consequence of this provision is that appeals against denials for access to information of the mentioned authorities are possible only through an administrative judicial review process. This provision obviously limits the effectiveness of the LFAI considerably, since the commissioner has been appointed to guarantee quick and

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403 Public announcement of the commissioner for information of public importance, 19 September 2006, published at http://www.poverenik.org.rs/index.php/en/arhiva/statements-archive/342----19092006 (accessed 8 July 2009). The draft Law on Foreign Investments provides, in its Art. 28(4) that information on foreign investments, regardless of the Law on Access to Information of Public Importance, shall be absolutely inaccessible to the public, except by approval of foreign investors. This has led the commissioner to the following statement: 'Along with the broad, fluid and imprecise definition of foreign investment, this provision, as a basis for banning public access to absolutely all information, could naturally very easily be used as a means to hide various activities of corruption.' *(Ibid.)*.

404 See REPUBLIC OF SERBIA COMMISSIONER FOR INFORMATION OF PUBLIC IMPORTANCE, Report 2006, p. 16, indicating other laws containing provisions that are in contradiction with the LFAI, such as, e.g. the Law on Administrative Procedure.

effective protection of the right of applicants for access to information. Even if this provision does not directly affect access to information at the local level, it sends a negative signal regarding the commitment of the central level, which will probably not be helpful in encouraging local governments to assign the necessary importance to the idea of 'open government' at the local level.

- Finally, a rather practical problem at the local level results from the wording of Art. 38 LFAI: according to para 1 of this provision, 'the government agency shall designate one or several public servants (hereafter: authorised person) to proceed with requests for a free access to information of public importance'. Paragraph 3 states that 'where an authorised person specified in para. 1 of the present art. is not designated, responsible for proceeding with requests shall be *the headman of the government agency'*.[405] In municipalities that do not make use of the right to regulate the issue themselves as proposed in para. 1 of the law,[406] it is not clear at all who should provide information that has been requested under the LFAI. The guides explaining the LFAI to citizens mention as examples, for the local level, the president of the municipality or mayor, the head of the municipal administration, the secretary of the municipal assembly, the municipal public defendant, the directors of public institutions (schools, hospitals, libraries etc.), directors of public enterprises, construction bureaus etc., the president of the municipal court, the municipal public plaintiff, the municipal ombudsman, the director of internal revenue service and the director of cadastral survey

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405 Emphasis added.

406 The legal frameworks of six municipalities (Arilje, Uzice, Kraljevo, Pozega, Cacak, Cajetina) have been analysed with regard to this topic. None of them contained a provision designating persons responsible for giving information under the LFAI, in several of them provisions could be found which were in contradiction with the LFAI.

service.[407] Such a system poses the well-known risk that since (almost) everybody is responsible, nobody is responsible.

Besides the mentioned substantial problems with the Law, the *implementation of the Law* has proven to be very difficult. When the field study was carried out (in July 2005), the commissioner for free access to information did not yet dispose of even basic infrastructure and financial means to carry out his duties, although the Law had been enacted and the commissioner had been elected by the end of the year 2004.[408] Implementation problems remained even two years after the adoption of the Law. The commissioner stated, in his March 2006 report, that 'willingness of state agencies to allow access to all information on their work [...] is still on a low level'. He mentioned that only ten per cent of the complaints lodged at his office were unfounded, i.e. that a 'huge percentage [of requests for access to information placed with public authorities] were groundlessly dismissed or unsolved'.[409] The commissioner also noted that most state authorities 'had done almost nothing or completely little to educate their personnel in implementation of the law', that they had not produced the required information booklets,[410] set up web sites, and that many[411] never produced or were late with their annual reports.

Of course the above-mentioned problem regarding conflicting provisions contained in other Republic laws does not help to facilitate the implementation of the LFAI. This is also true at the *municipal level*: even if the LFAI clearly derogates any contradicting local regulation,

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407 See MSP/SCTM, *Free Access to Information - Citizen's Right to Know*, accessible at: http://www.msp.co.rs/Preuzimanje/Pravna%20pitanja/Free%20Access%20Information.pdf (accessed 2 September 2009).

408 REPUBLIC OF SERBIA COMMISSIONER FOR INFORMATION OF PUBLIC IMPORTANCE, Report 2006, p. 7.

409 REPUBLIC OF SERBIA COMMISSIONER FOR INFORMATION OF PUBLIC IMPORTANCE, Report 2006, p. 19.

410 Not even 10% of all municipalities (see REPUBLIC OF SERBIA COMMISSIONER FOR INFORMATION OF PUBLIC IMPORTANCE, Report 2006, p. 22).

411 About half of all municipalities (see REPUBLIC OF SERBIA COMMISSIONER FOR INFORMATION OF PUBLIC IMPORTANCE, Report 2006, p. 22).

the mere existence of such regulations causes a lot of confusion. The Statute of the Municipality of Kraljevo, for example, mentions that the work of the municipality is public and that the publicity of the work and the information of the citizens are more closely determined by a special decision of the municipal assembly (Art. 3). However, such a 'special decision' does not exist and a referral to the LFAI can be found nowhere. Instead, the decision on the municipal administration, in Art. 44, defines that publicity of the work of the municipal administration is to be achieved by giving information through means of public information and publishing official publications (para. 1) – a wording which can be interpreted to cover only active information by the municipality and thus to exclude access to information on request of the citizens. Furthermore the municipal administration is to withhold information if its contents represent a state, military, official or business secret (para. 2) without any additional conditions to be fulfilled, and that the question of whether to issue or to withhold information about the work of the municipal administration is to be decided upon by the head of the municipal administration or a person substituting for him, in case of his absence or prevention (para. 3). Such regulations are not in line with the LFAI, but they are also common in other municipalities, and their existence obviously causes no consequences.

While the LFAI is an important document regarding *indirect publicity*, it does not provide any mechanisms for *direct publicity.* In particular, it does not – in its final version[412] – address the issue of publicity of the assembly's meetings. This issue is touched upon by the Law on Local Self-Government: Art. 33 LSG states that the sessions of the municipal assembly shall be public (para. 1) and that 'the municipal assembly may decide to close a sitting of the assembly to the public for reasons of security and other reasons determined by the law and the statute'

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412 In its first draft, the LFAI contained a provision guaranteeing unlimited (and unrestrictable!) access to sessions of all public authorities, however only for journalists (the provision read: 'Journalists shall have the right to directly follow the work of a public authority, especially by personally attending meetings i.e. sessions of public authorities'). This (arguably too-) far-reaching provision has however been dropped at a later stage (see ARTICLE 19, Memorandum LFAI 2003, p. 7).

(para. 2). Many municipalities have not regulated this matter but have created ambiguities by literally repeating the text of the LSG in their statutes.[413] Moreover, in the Serbian context, at the local level, the term publicity is normally understood to mean that an assembly session is open to be attended by journalists and other reporters of the media, but not necessarily to ordinary citizens.[414]

The openness of meetings of the deliberative body of a local government is obviously very important for the citizens to be in a position to scrutinise the activities and the role of their elected representatives, as well as the government. It should therefore be absolutely clear under which conditions an assembly session may be closed to the public.

Therefore, the municipality of Kraljevo has changed its Statute[415] and its internal rules of procedures. The new regulation reads as follows:

> Art. 25 Statute of the Municipality of Kraljevo
>
> The Municipal Assembly Sessions are public.
>
> 'The Municipal Assembly may decide, according to the method specified by the Rules of Procedure, that the Assembly session shall not be public for the reasons of public safety and country defence, protection of public moral or if the discussion is on the acts which are considered a secret according to the current regulations.'
>
> Art. 49 Rules of Procedure of the Municipal Assembly of Kraljevo
>
> 'Sessions of the assembly shall be open to the public and shall be directly broadcast by the mass media whose founder is the Assembly. Invitations and materials for sessions of the Assembly shall be delivered to the mass media within the deadline from article 47 of these Rules of Procedure [7 days, except in urgent matters, remark of the author], for the purpose of informing the public.'

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413 A. SIMIĆ/M. SAMARDŽIĆ/D. VUJČIĆ, in: SDC/MSP (ed.), Review of Municipal Statutes, p. 5.

414 A. SIMIĆ/M. SAMARDŽIĆ/D. VUJČIĆ, in: SDC/MSP (ed.), Review of Municipal Statutes, p. 6.

415 The process was supported by the Municipal Support Programme (MSP), who developed, as an activity of its 'legal assistance' to the partner municipalities, a proposal on how to regulate this question, see SCD/MSP, Review of Municipal Statutes, p. 6.

Art. 50 Rules of Procedure of the Municipal Assembly

'A session of the Assembly may be wholly or partly closed to the public, for the purpose of safety and defence of the country, keeping of official or military secrets, or for the purpose of protection of public morals.

A motion for expulsion of the public may be given by the President of the Assembly, the President of the Municipality or at least 15 councillors [out of totally 70 councillors, remark of the author], and it shall be voted on without any debate.

The motion for expulsion of the public shall be passed if it is voted for by the majority of the number of the councillors.

A session of the Assembly which is closed to the public may be attended only by the councillors, the President of the Municipality, the rapporteurs for certain items of the agenda and the professionals assisting in the work of the session of the Assembly.

The President of the Assembly shall be obliged to warn the persons from paragraph 4 of this article of their obligation to keep the things they learn during the session which is closed to the public as a secret.'

Art. 51 Rules of Procedure of the Municipal Assembly

'The President of the Municipality and representative of the municipal administration shall participate in the work of a session of the Assembly.

Citizens may also participate in the work of a session of the Assembly if it is approved by the President of the Assembly, providing that:

- there are technical possibilities and
- their presence does not disturb holding of the session.'

This is a comprehensive and balanced regulation of both, the interests of the general public to have access to the discussions that are held within the deliberative body, and the (likewise public) interest of a functioning state. The provisions make sure that:

- the public is being informed in advance about what will be discussed during the next meeting, which is a necessary precondition for citizens/journalists to decide if they want to attend the meeting or not;
- that journalists as well as ordinary citizens can, in principle, attend the meetings;

- that the meetings can only be closed in exceptional and clearly defined circumstances, decided on by the majority of the councillors. Here one can find two weak points, however:
    - closing of a session when 'the discussion is on the acts which are considered a secret according to the current regulations' (wording of Art. 25(2) of the Statute), or for the purpose of 'keeping of official [...] secrets' (wording of Art. 50 Rules of Procedure) respectively, opens many possibilities for keeping the public away from the democratic process;
    - furthermore, the procedural aspect could be regulated more clearly: article 25(2) of the Statute refers to the rules of procedure for determining the decision-making-procedure. Article 50(3) of the Rules of Procedure states that the motion for expulsion of the public shall be passed if it is voted for by the majority of councillors. It is not specified whether there is a need for a qualified majority (that is, of the *total* number of councillors) or just a simple majority of councillors *present* at the meeting. One has to go back to the Statute, whose Art. 23(2) states that the municipal assembly shall take the decision on the exclusion of the public from its sessions by the majority of the total number of councillors (which is an exception from the 'normal' decision-making procedure, where the majority of the number of councillors present is required, see Art. 23(1) of the Statute). This ambiguity could easily be removed by stating in Art. 25 of the Statute that the decision to hold a meeting in camera is to be taken by a qualified majority as provided for in Art. 23(2) of the Statute.
- that the limit of the given technical possibilities (e.g. size of the town hall) is respected and that the decision-making process is not disturbed.

In order to enhance accountability in *all* municipalities, it would be desirable that the main aspects of the regulation dealing with the publicity/secrecy of assembly sessions, i.e. particularly the reasons for

which the public may be excluded, be stated in the LSG, which is not the case now.[416]

To sum up, the analysis has shown that with the enactment of the LFAI and of provisions guaranteeing publicity of local assemblies' meetings in the LSG, Serbian legislation has made an important step in order to overcome the culture of secrecy. However, troublesome weaknesses remain regarding the instruments of transformed publicity (LFAI) and the immediate publicity, where it is up to the municipalities to define the standards.

Illustration 11: Access to local information in Switzerland

One may assume it is self-evident that in Switzerland access to information is comprehensively, constitutionally safeguarded. This, however, is not the case, at least as far as the federal level is concerned.

The constitutionally guaranteed freedom of information (Art. 16(3) BV) only covers the right to accessing information from 'freely available sources' (Art. 16(3) BV). This includes parliamentary debates, court proceedings, the companies' register, tax register and the land register.[417] Conversely, negotiations of parliamentary commissions (including any confidential reports that are considered by such commissions), the registry office register, and also penal institutions are not considered 'freely available sources'.[418] Under the jurisprudence of the federal supreme court (which is heavily criticised by scholars)[419], freedom of information in particular does not cover claims by private

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416 The nLSG goes a small step further on this: According to Art. 35(1), the sessions of the assembly are open to the public. The assembly of the municipality can decide its session not to be open to the public for reasons of security or other reasons provided for by the law. This means that at least only reasons that are mentioned in a law are recognised as justifying the closure of an assembly meeting. In short: municipalities are not allowed any more to provide, in their statute, for additional reasons for closing assembly meetings.

417 KLEY/TOPHINKE, St. Galler Kommentar BV, Art. 16, para. 31.

418 KLEY/TOPHINKE, St. Galler Kommentar BV, Art. 16, para. 31.

419 MÜLLER/SCHEFER, Grundrechte, p. 295 et seqq.; TSCHANNEN, Staatsrecht, p. 384.

individuals and the press to be informed about internal administrative processes.[420]

Concerning the access to information held by the federal administration, the 'principle of confidentiality with a caveat on publication' *(Geheimhaltungsprinzip unter Öffentlichkeitsvorbehalt)*[421] applied until very recently. It is only with the enactment of the Federal Public Transparency Act[422] which came into force on 1 January 2005 that a right to access documents of the federal administration, independent of a justified interest, was granted (limits of this right for reasons of a primarily private or public nature are listed conclusively in the Act).[423]

In 1995, the canton of Bern was the first Swiss canton to perform the shift towards the 'principle of public access with a caveat on confidentiality' (*Öffentlichkeitsprinzip mit Geheimhaltungsvorbehalt)* by enacting the revised cantonal Constitution and the Public Information Act[424] (hereafter: IG). The cantonal Constitution (KV BE) under Art 17(3) grants a comprehensive right of access to documents. Article 70 furthermore compels cantonal authorities to provide sufficient information. The Public Information Act specifies further details on these provisions and extends their application to the municipalities (Art. 1 IG). The mentioned legal instruments establish various claims for direct as well as indirect publicity:

- *Direct publicity*: Under Art 10 IG municipal assemblies are open to the public (para. 1). The provision gives not only citizens with a

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420 On the legal position that results on the basis of international public law treaties (ECHR, ICCPR which also apply to Switzerland), cf. the remarks on Serbia, Illustration 10.

421 BRUNNER/MADER, Öffentlichkeitsgesetz, p. 2.

422 Bundesgesetz vom 17. Dezember 2004 über die Öffentlichkeit der Verwaltung, Öffentlichkeitsgesetz, SR 152.3.

423 Art. 7 - 9 of the Federal Public Transparency Act. For more information on the Federal Transparency Act, cf. BRUNNER/MADER, Öffentlichkeitsgesetz.

424 Gesetz über die Information der Öffentlichkeit, adopted on 2 November 1993, BSG 107.1.

right to vote, but also foreigners a right to follow the assembly (this being of importance especially for journalists). The assembly decides itself on the admissibility of video and sound recordings.[425] Every citizen entitled to vote has the right to demand that his statements and the casting of his vote are not recorded (para. 2). Furthermore, the proceedings of the municipal parliament, where one exists, are held in public; sound and video recording/broadcasting by media professionals are always permitted in this case, provided they do not interfere with the council's operation (para. 3). On the contrary, meetings of the municipal council and commissions as well as protocols of their debates (not however: the decisions (*Beschlüsse*) are confidential,[426] except a municipal general abstract act or (with regard to commissions) the body setting up the commission provide for their publicity.

- The instruments providing *indirect publicity* may be classified according to whether information is to be delivered ex officio or on request:
  - Information provided ex officio (*active information*): Article 12 IG commits municipalities to ensure access to all documents serving as a basis for municipal assemblies' or municipal parliaments' decisions. Under Art. 20 IG reports, studies and legal opinions must be made accessible, unless overriding public or private interests stand to the contrary (para. 1). Municipalities manage their freedom of information policy according to their own individual means (para. 2).
  - Information provided upon application *(passive information):* Article 27 codifies a comprehensive right of access to official documents, as long as no overriding public or private interests stand to the contrary (and with the caveat of the protection of

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425 But not on the right to attend of a journalist who is writing a report; such a right arises even if under an assembly resolution no picture and sound recordings may be made.

426 This provision was held to be in accordance with the KV by the administrative court (BVR 2000, 1 et seqq.).

personal data in the special legislation which extends further). Article 29 IG, finally, defines the term 'overriding interests', which is used extensively throughout the Act:

Overriding *public* interests are at hand according to para. 1 in particular, if (a) due to the premature publication of internal working papers, applications, drafts or similar the decision-making process would be significantly affected; (b) the public would be harmed in a different way, namely by threatening public safety, (c) if it lead to disproportionate expense and efforts for the public authority.

Accepted as overriding *private* interests are under para. 2, in particular (a) the protection of the personal privacy sphere; (b) the protection of personal privacy in pending administrative and judicial proceedings (with exceptions) and (c) professional, business or trade secrets. The provisions pertaining to the exceptions relate only to those parts of a document or an information which are worthy of protection and are valid only as long as the overriding interest in confidentiality remains. The responsibility of issuing information on the basis of the Public Information Act is governed by the Public Information Ordinance[427] (hereafter: IV): *Informal* requests are responded to by the competent authorities of the canton and municipalities (Art. 1(1)); formal requests must be forwarded immediately to the appropriate administrative office (Art. 1(2)). It is either the public body which is engaged with the particular matter that is responsible for considering formal applications for the access to documents, or – if the matter has been dealt with and closed internally – the responsibility lies with the administrative office responsible for administering the files (Art. 5(1) IV). In both cases, municipalities may enact their own regulations which may deviate from the system provided for by the canton and may in particular designate a central information centre (Art. 1(3), Art.

427 Verordnung über die Information der Öffentlichkeit vom 26. Oktober 1994 (BSG 107.111).

5(2) IV). Art. 10(1) IV requires the public authority to immediately assess its jurisdiction and if necessary to forward the request onto the appropriate authority. Finally, Art. 31 IV determines the procedure and jurisdiction for challenging of administrative decisions regarding the access to documents.

In the run-up to the paradigm shift away from the confidentiality principle towards the publicity principle, a concern was that the state could be overburdened with requests. However, this concern did not materialise; experience (not only in the canton of Bern) has shown that the publicity principle can be implemented 'pragmatically and effectively'[428] and that an active information policy by public authorities on the one hand and eased access to official documents on the other hand create confidence in public conduct; this at least is the conclusion that NUSPLIGER reaches.[429]

b. Internal information flows

As already mentioned,[430] it is not sufficient that the general public (as ultimate principal) is informed about what is going on within the state (as the sum of agents). Since citizens, to a large extent, also delegate the task of calling and holding to account to their (multiple) agents, these must be provided with the informational instruments necessary to exercise their corresponding function.

Again, many different instruments are possible. To begin with these can be categorised according to their objectives and their functionality into three categories:

- *Standardised reporting procedures:* These instruments pursue the aim of a 'general being informed'. Their purpose is to allow the principal to take note of deviations from the 'courant normal'.

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428 KURT NUSPLIGER, *Das Öffentlichkeitsprinzip in den Kantonen*, in: BRUNNER/MADER, *Öffentlichkeitsgesetz*, p. 388 para. 27.

429 *Ibid.*

430 See above, p. 132.

- *Investigative instruments:* These instruments relate to the procurement of information as and when required. Their purpose is to enable the principal to carry out vigorous and targeted checks if deviations are suspected.
- *Fire alarms:* These are agents (or mere measures) that are deployed especially to bring to light possible grievances in the field of activity of another agent (e.g. ombudsman). Common to them is that they cannot impose sanctions; their information at hands of those entitled to impose sanctions may however serve as an important basis of decision-making for ultimately imposing sanctions.

The three categories of instruments may be positioned *along the entire chain of delegation:*

- Instruments of the *legislative vis-à-vis the executive* body may include, for example, regular reporting procedures, councillors' instruments for gathering specific information, legislative monitoring committees, etc.
- Instruments of the *executive head within the administration* (and vis-à-vis outsourced administrative units) may include, again, regular reporting procedures, right to access dossiers, fire alarms like ombudsmen, boxes of grievances or citizen's report cards (the latter may, depending on the design, also take the form of fire alarms at the hand of the legislative and – via the accountability procedure in public parliamentary proceedings – at the hand of the electorate).

Overview

	standardised information	**investigative instruments**	**fire alarms**
service providers to head of executive	regular reporting	right of access to dossiers	box of grievances
executive to legislative body	regular reporting, regular monitoring committees	councillors' questions, special investigative committees	ombudsman

A system promising accountability should, along the entire chain of delegation, include a combination of all elements. Standard information processes without the possibility of digging deeper and in some individual cases asking for specific information are in themselves not worth a lot. Fire-alarms may be helpful in reducing the abundance of information and easing the burden on those responsible for issuing sanctions. Sophisticated internal administrative information processes are of little help if the flow of information is blocked elsewhere (for example between the executive and the legislative). In other words: The system must be constructed in such a way that information flows without interruption from the citizens as 'clients' via the executive to the legislative (and ultimately back again to the citizens as principals). In addition, the information-instruments of the various actors must correspond with the sanctioning mechanisms (see below Chapter III) and the latter must correlate to the relevant areas of responsibilities (see above Chapter I).

Countless illustrations could be dedicated to this topic, which, however, would be well beyond the scope of this study. In the following, general internal flows of information and problems related to this shall be illustrated using the example of Pakistan. The chapter will then move

on to consider an exemplary illustration on the topic of 'fire alarm' (the local ombudsman in Serbia).

Illustration 12: Internal information flow in Pakistani local governments

The LGO and related provincial rules include several instruments designed to ensure the internal flow of information. These shall briefly be analysed, starting at the end of the chain of delegation (or, at the beginning of the flux of information, respectively).

Internal flow of information from the administration to the nazim. One of the big achievements in the new local government system is that the head of the local administration (now the DCO) – for the first time in Pakistan's history – has been 'made accountable' to an elected nazim, while before, the deputy commissioner reported directly to the provincial line departments. In the words of the NATIONAL RECONSTRUCTION BUREAU,

> 'the new local government plan integrates [...] the bureaucracy with the local governments [...], into one co herent structure in which the district administration and police are answerable to the elected chief executive of the district.'[431]

According to s. 17(1) LGO, the zila nazim shall 'head' the district government; he shall be assisted by the DCO. While the zila nazim has the power to issue executive orders to the DCO and the EDOs 'for discharge of the functions decentralised to the District Government [s. 18(1n) LGO], it cannot be clearly discerned from the text of the LGO whether he has full hierarchical control over the administration or not.[432] In addition, most of the staff are still provincial staff (i.e. they

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431 GOVERNMENT OF THE ISLAMIC REPUBLIC OF PAKISTAN, Local Government Plan 2000, section 3 p. 1.

432 For the DCO, in contrast, the LGO specifically provides that as the coordinating head of the district administration, the same has the authority to call for review and to assess the performance of the groups of offices, as well as to give directions for taking actions or measures for improving efficiency, service delivery and achievement of goals assigned in the approved plans of the district government (s. 28 (2, explanation) LGO).

are hired, paid, promoted, transferred etc. by the provincial government).[433]

How do the LGO and relevant Provincial Rules provide for the answerability of the DCO and the EDOs vis-à-vis the nazim in this context?

The LGO states that each EDO shall inspect the work of the offices, in his group of offices, every six months and submit the respective reports along with steps taken and required to be taken for corrective measures to the zila nazim (*regular reporting*). Besides this provision, the LGO only requires that in matters of policy and important decisions, the DCO 'shall obtain approval of zila nazim before communicating such matters and decisions to the [provincial!] Government' (s. 30(1)). More detailed rules aiming at an open flow of information from the administration to the zila nazim can be found in the NRB Model Rules of Business (hereafter: MDRB):[434]

- Section 6 states that no important decision relating to the administration of a group of offices shall be taken without the approval of the zila nazim and that the EDOs shall keep the zila nazim informed on every important case they dispose of.
- Furthermore, s. 7(2) of the same Model Rules states that no order shall be issued without the approval of the zila nazim in the cases that are specified in Schedule II. Schedule II encompasses the following categories of orders necessitating the approval of the zila nazim:

    (1) Annual Budget Statement,

    (2) Authentication of the Schedule of authorized expenditure,

    (3) Laying of Supplementary Statement of expenditure before the Zila Council,

    (4) Cases in which Provincial Government has issued directions involving implementation of law,

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433 See, on this, Illustration 20.

434 Accessible at: http://www.nrb.gov.pk/publications/Distt-Govt-ROB.pdf (accessed 2 September 2009).

(5) Proposals involving major changes in the functions or powers of DCO, EDOs and Heads of Offices,

(6) All cases which are liable to involve the District Government into any controversy with Provincial Government or with another District Government,

(7) Recommendations for the grant of honours and awards,

(8) Cases regarding premature transfers of DCO and EDO,

(9) All matters of policy and important decisions before communicating such matters and decisions to the Provincial Government,

(10) Cases in which inspecting officers are to be designated to objectively examine the performance of a TMA or UA in relation to service delivery,

(11) Enquiry reports conducted by the Tehsil or Union Nazim, as and when required, concerning respective local government.

- MDRB 14 (1) specifies that (in addition to those matters enumerated in the 2nd schedule) no order shall be issued without the approval of the zila nazim in cases involving important policy or departure from important policy (whereby departure from policy includes departure from a previous decision of the zila nazim (lit. a)).
- MDRB 14 (2) further strengthens the informational position of the nazim in that he has the right to require any case to be submitted to him for information.

It is interesting to see how the provincial government of NWFP has managed to curb the informational position of the zila nazim vis-à-vis the district administration:

- Schedule II of the NWFP District Government Rules of Business (hereafter NWFP DRB) not only reduces the requirement of formal approval (such as the proposal in the MDRB) to a mere duty to submit matters to the zila nazim before issuance of orders and to submit reports on matters specified in schedule III to the zila nazim for his information (see s.4(3 and 4) NWFP DRB). More importantly, the matters specified in schedule II are much more restricted than the respective proposal in the MDRB. Only the

following matters must be submitted to the zila nazim before the issuing of orders:[435]

(1) Annual Budget Statement

(2) Laying of supplementary statement of expenditure before the Zila Council.

(3) Cases in which Provincial Government has issued directions.

(4) Complaints to the Provincial Government Commission about disputes between any department of the Government and District Government or between two District Governments.

(5) All cases which are liable to involve District Government into controversy with Provincial Government or with another District Government.

(6) Recommendations for the grant of honours and awards.

- The other provisions of the MDRB that have been cited above[436] have not been integrated into the NWFP-version of DRB.

While some of the deviations from the MDRB may be less important,[437] at least two of them critically weaken the informational position of the zila nazim, namely

- the fact that the zila nazim does not even need to be informed about the authentication of the schedule of authorised expenditure, whilst he is responsible for the use of finances in the district (see s. 18 (1)(f) and section 20 LGO);
- the fact that the DCO and the EDO can be transferred prematurely (s. 8 of Schedule II MDRB) and that proposals can be made involving major changes in the functions or powers of the DCO, EDOs and heads of offices (s. 5 of Schedule II MDRB), both

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435 Note that such important matters as the authentication of the schedule of authorised expenditure; proposals involving major changes in the functions or powers of DCO, EDOs and heads of offices; cases regarding premature transfers of DCO and EDO etc. are left away in the NWFP DRB.

436 Sections 6, 14(1) and 14(2).

437 E.g. the fact that s. 10 of schedule II of the MDRB has not been included in the NWFP DRB.

without the district nazim being informed. At the same time, he, as the head of district government, is responsible for the management of the district administration (see s. 16(1) LGO).

It results that the involvement of the nazim in important policy decisions, as well as his possibilities to keep himself informed about them, are very restricted in NWFP.

Besides the mentioned provisions aiming at regular information of the nazim, the LGO also provides for indirect channels (*fire alarms*) for the district nazim to get information on the performance of the administration:

- According to ss. 36 and 115 LGO, the head of the *internal audit* office, as well as the *external auditor*, shall report to the zila nazim. The internal auditor (who is appointed by the nazim) shall serve as a principle support person to the nazim by providing information to him and members of the respective council on local government performance (see s. 115 A LGO).
- The *councils' monitoring committees*, which are primarily reporting quarterly to their councils (s. 138(10) LGO), may identify inefficiency or corruption of functionaries of local governments and report to the concerned nazim for appropriate action and remedial measures. As will be shown below,[438] in practice, the monitoring committees mostly fail to deliver their quarterly reports, however.
- The *zila mohtasib* (i.e. a local ombudsperson) may, in case his recommendations concerning cases of maladministration are not complied with, refer these matters to the zila nazim (third schedule, s. 7(1) LGO). This channel, however, did not work in NWFP in 2004 as zila mohtasibs had not been installed by then.
- According to s. 188 LGO, eventually, every district (tehsil, union) government shall set up a complaint cell for redressal of grievances. In theory, such a complaint cell could work as a 'fire alarm' also for the nazim, giving him feedback regarding 'misdeeds' of the

438 See below, p. 172.

administrators. While the MDRB explicitly state that the complaint cell shall function under the direct supervision of the zila nazim (s. 35), the NWFP DRB contain no such provision, however. In practice, the complaint cells had not been installed in many districts, and where they had been installed they were not used because nobody knew of their existence.

In conclusion, the informational position of the nazim remains weak.

Information flow from the executive branch to the district councils: the legal framework in NWFP provides for two instruments of the representative bodies to gather information from the executive bodies: councillors' questions, as well as specialised (regular) monitoring committees:

- *Councillor's questions:* According to s. 18 of the NWFP Local Councils Model Conduct of Business and Meetings Bye-Laws (2001), the councillors may ask questions to the 'Nazim as head of the District Government/TMA/UA for the purpose of obtaining information on a matter of public importance within the cognizance of the District Government/TMA/UA.' According to subsection 4 of the same provision, while zila councillors can ask questions concerning all levels of local government, tehsil councillors and union councillors can only ask questions regarding their respective tier.

  However, according to s. 19 of the same Model Rules, the presiding officer, i.e. the naib nazim, in unions the nazim,[439]

  > 'may disallow any question which
  > a. is not self-contained and intelligible;
  > b. relates to a matter which is subjudice in a court of law;
  > c. is frivolous vexatious, offensive or injurious to the interest of the Council;

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439 The 'Presiding Officer' means, in the case of zila, tehsil or town council, the respective naib nazim (who is elected on the same ticket as the nazim) or a member of the panel of presiding officers elected according to the ordinance and rules, and in case of union council, the nazim or, in his absence, the naib union nazim (see s. 2(g) of the NWFP Local Councils Model Conduct of Business and Meetings By-Laws, 2001).

d. is outside the ambit of functions of the Council;
e. asks for an expression of an opinion;
f. contains arguments, inferences, ironical expression or defamatory statements;
g. requires information contained in documents ordinarily accessible to the public;
h. contains references to newspapers by name or asks whether statements in the press or by private individuals or bodies are accurate;
i. asks for an expression of legal opinion or the solution of an abstract or hypothetical proposition;
j. refers to the character or conduct of any member or official of the Council, except in his public or official capacity;
k. is excessive in length; and
l. amounts in substance to a suggestion for any particular action.'

In addition, the presiding officer may, at his discretion, amend the form of any question (subsection 2 of the same provision).

The reasons mentioned for disallowing councillors' questions are rather extensive and are unnecessarily restricting the councillors' right to information: why should a councillor not be allowed to ask for the expression of an opinion? Or ask whether statements made in the press or by private individuals or bodies are accurate? Or ask for a legal opinion? Or suggest a particular action? Some of the other reasons mentioned in section 19 are opening up possibilities for arbitrarily rejecting legitimate questions: when is a question 'not self-contained'?; when is a question 'injurious to the interests of the council'?

- *Scrutinising the administration through monitoring committees*: Each council elects[440] different monitoring committees responsible for monitoring the functioning of each of the offices of the respective government (see s. 139(1) LGO for district and (2) for tehsil monitoring committees). The union councils' monitoring

[440] Section 50 of the NWFP Local Councils Model Conduct of Business and Meetings By-Laws, 2001, subsection 2, provides that the council may, by motion or by a verbal resolution moved by a member and approved by the council, empower the presiding officer to constitute committees, without holding elections keeping in view the educational qualifications and experience of the members as he may deem fit. This provision, in the view of the author, is contrary to the LGO.

committees are not only responsible for monitoring the functioning of the union administration but also of the district government and the tehsil municipal administration for the delivery of services within their respective area (s. 139(3) LGO).[441]

These committees, according to the LGO, shall prepare quarterly reports containing, in particular, an evaluation of the performance of each office in relation to (a) the achievement of its targets, (b) the responsiveness to citizens' difficulties; (c) the efficiency in the delivery of services; and (d) the transparent functioning. The quarterly reports are to then be submitted to the respective councils, which may – through a resolution – require the respective nazim to take necessary action (s. 139(5)).

According to the NRB Guidelines for Monitoring Committees,[442] the primary role of the monitoring committees is to identify problems at the offices/facilities and bring these to the attention of the respective council nazimeen and the concerned administration. This process[443] of scrutinising the administration has the potential to bring critical information for holding those in power to account, not only to the councils and the respective nazimeen, but also – through the principle of publicity of the council's meetings (s. 42(7) LGO) – to the general public. The monitoring committee members of the councils should thus act as a bridge between the people, the elected representatives and the administration; they should contribute to making the workings and the deficiencies of the administration transparent, which is a precondition for holding the executive accountable.

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441 Special committees exist for scrutinising budgets and accounts as well as for monitoring court performance (insaaf-committee), see ss 39 (i), 76 (xi), 88 para. 1 (n) LGO.

442 Accessible at: http://www.nrb.gov.pk/publications/guidelines_monitoring_committees_with_annex.pdf (accessed 2 September 2009).

443 For an overview of the (quite complicated) flow of information gathered through monitoring committees, see NRB Guidelines for Monitoring Committees (fn. 442), p. 22.

In practice, however, the monitoring committees, with few exceptions, do not play their vital role in the accountability process. In some places, monitoring committees have never been established.[444] In others, they have been elected but never met or at least did not issue the quarterly reports.[445] In other places again, they were very active in the beginning but then became 'dormant' as the other actors, i.e. the councils, the nazimeen and especially the DCO/EDO's did not act according to their recommendations.[446] Members of monitoring committees are complaining that basic resources needed to meet the expenses are not available[447] and that there is a lack of support from the administration and/or the nazim with regard to requests for information.[448] The last complaint relates to a weakness in the legal framework which does not grant the monitoring committees any special information rights besides the general right of every councillor to ask questions.

While some observers think these are initial problems, others point out that monitoring committees should be composed of members of the ruling party *and* of members of the opposition, as well as female representatives (in the sense of a proportional representation). But as local elections were to be held on a non-party basis, supposedly no opposition exists, and thus there is no guarantee that those political forces have a seat in the monitoring committees.[449]

It can be concluded that although the new legal framework seems to address important informational issues, it includes (or fails to prevent

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444 Interview with SAJID QUAISRANI, Project Director AURAT Foundation, Islamabad, June 2004.

445 Interview with SAJID QUAISRANI, Project Director AURAT Foundation, Islamabad, June 2004.

446 Interview with ZAHID ELAHI, Governance Advisor, CIDA, Islamabad, June 2004.

447 Interviews with ZAHID ELAHI, Governance Advisor, CIDA, Islamabad 2004 and with SAJID QUAISRANI, Project Director AURAT Foundation, Islamabad, June 2004.

448 Interview with ZAHID ELAHI, Governance Advisor, CIDA, Islamabad, June 2004.

449 Interview with SAJID QUAISRANI, Project Director AURAT Foundation, Islamabad, June 2004.

the provincial governments from introducing) numerous hurdles that are detrimental to the objective of enhanced accountability.

Illustration 13: Fire alarms: local ombudsman in Serbia

Article 126 LSG provides that a local self-government unit may appoint a 'civil defender' (Ombudsman) and defines the general set-up of such an institution. According to this article, the ombudsman shall protect collective and individual rights and the interests of citizens by having overall control of the work of the administration and public services (para. 1). He shall inform the administration and public services of any occurrence of illegal and improper activities violating the rights and interests of the citizens and shall give his recommendations and objections regarding that matter, accordingly advising the assembly and the public (para. 2). He has a right to access documents and information relevant to the performance of his activities (para. 3). Finally, the LSG prescribes that the ombudsman must be appointed by the assembly and that he or she must be a respectable and politically unbiased person. The competence, authority, manner of conducting the duties, and appointment and removal from office can all be regulated by the statute or another general act of the municipality (para. 4).

An ombudsman-institution, as provided for by the LSG, could be an important fire alarm, since it is set-up as a body independent from the administration (and the public service providers), with broad information rights, reporting to the assembly and even to the public at large, on any occurrences of illegal and improper behaviour on the part of the local authorities. By doing this, it would provide important feedback to the assembly and the public on the performance of the executive branch. The LSG, however, leaves the decision of whether to introduce such an institution or not to the municipalities.

The municipality of Kraljevo adopted a Decision on a Civil Defence Attorney of the Municipality of Kraljevo in February 2005.[450]

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450 Official Gazette of the Municipality of Kraljevo of 25 February 2005.

Unfortunately, two important points, the mandate of and the access to the ombudsman, are regulated in an ambiguous manner:

- Whereas the LSG describes the mandate of the ombudsman to 'protect collective and individual rights and interests of the citizens', the Decision of the municipality of Kraljevo basically assigns this institution the task 'to protect human rights'.[451] The referral to the concept of human rights can be interpreted in different ways:

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451 Cf. Art. 2 of the Decision: 'The civil defense attorney protects human rights and freedom from illegal and irregular working […].'› Art. 8: ‚The civil defense attorney is authorized to perform the following activities:

- he follows the application of international standards on human rights at the territory of the municipality;
- he collects information from different resources on the application of law and other regulations from the sphere of human rights by the local self-government bodies;
- he makes the Annual Report on implementation and respect of human rights and the application of the indiscrimination principle by the bodies from the article 2 from this decision;
- he receives and examines petitions relating to the violation of human rights made by the local self-government bodies;
- he acts on his own initiative in the case where there is a doubt about the existence of the human right violation made by the local self-government bodies;
- he performs periodic reviews and inspections of the local self-government bodies' work;
- he intervenes in peaceful settling the disputes connected with the violation of the human rights at the territory of the municipality;
- he achieves the direct cooperation with the Republic bodies and acts as a mediator between regional bodies of the state administration and the holders of the public authorizations from the sphere of activities of the Republic of Serbia and citizens, at the territory of the municipality;
- he initiates the criminal, disciplinary and other proceedings with the relevant bodies in the case of the violation of human rights made by the local self-government bodies;
- he organizes and participates in organizing and preparing the campaigns for informing the public about the issues significant for the realization and respect of human rights and about the ban of discrimination;

- From a Western European perspective, it looks like a restriction of the potential activities of an ombudsman. A typical Western-European ombudsman deals with all kinds of 'maladministration', ranging from indecent (but still legal) behaviour of the administration over violation of citizens' rights to – in extreme cases – violation of human rights. Thus, human rights issues form a very small part of an ombudsman's potential activities, which is especially true for local level ombudsmen.[452]
- On the other hand, in a context of transition where non-democratic laws have been used as an instrument of repression for decades, the explicit referral to the concept of human rights might be interpreted as enriching the ombudsman's potential activities: bearing in mind the sometimes poor quality of the existing laws, 'legality' of state action alone would not be a sufficient guarantor for fair treatment of all individuals. It could be argued that a broad understanding of the mandate to 'protect human rights' in such a situation of transition may include all sorts of indecent and unfair treatment of the citizens, because 'even the pettiest forms of disrespect toward citizens acquire the character of a lessening of their status as equal bearers of fundamental rights'.[453]

- he initiates and encourages education regarding human rights in all areas of life;
- he cooperates and exchanges his experience with other civil defense attorneys and other bodies and organizations dealing with the protection and promotion of human rights in the country and abroad, and
- he performs other activities in accordance with the law and other regulations of Kraljevo Municipal Assembly.'

452 Cf., on this, KÄLIN/STRECKER, Ombudsman, p. 9.

453 Such is the reasoning of the Greek deputy ombudsman, advocating for a 'rich conception of the rule of law' intimately tied with the idea of human rights, see ANDREAS CH. TAKIS, *Ombudsmanship, Human Rights, and the Rule of Law*, in: DIMITRIS CHRISTOPOULOS / CIMITRIS HORMOVITIS (ed.), *The Ombudsman institution in South-eastern Europe*, proceedings and papers of the workshop 'The Ombudsman's role in South-eastern Europe - strengthening the rule of law as a

Even if one can, in theory, interpret the referral to the concept of human rights in a broad way, there is a danger that in practice, the role of the local ombudsman be reduced to a 'prosecutor for human rights violations', a concept that, while it may make sense at the national level, is questionable for the level of local governments. The Greek deputy ombudsman, ANDREAS CH. TAKIS, recently pointed to this danger:

> 'It is not only understandable but desirable also for polities with recent memories of massive violations of human rights by state organs to strongly emphasize the requirement for respect and effective protection of human rights. Yet, when a liberal and democratic order has been restored – and this can be affirmed with relatively certainty only when state violations of human rights are a relatively rare phenomenon –, the focus of the citizens' interest shifts to less spectacular and more petty aspects of their public life. It is not arbitrary arrest or imprisonment, or, again, deprivation of property or the prohibition of worship activities that mostly concern them. Such occurrences would – by hypothesis – be only sporadic. Much more frequent and mundane, and for this reason perhaps more painful for ordinary citizens, are the common and constant daily frictions they encounter with state machinery. Such frictions are a permanent source of discontent and, accumulatively, have the tendency to undermine the legitimizing basis of state authority even in constitutional democracies. […] Deploringly, the crucial contribution of the ordinary Ombudsman's main task, that is, combating maladministration, to the legitimization and strengthening of a liberal democratic polity, risks to pass unnoticed when putting the stress on its specific human rights mandate as something substantially different from upholding the rule of law. More importantly, the thin, formal conception to which the rule of law is reduced when disjoined from human rights, fails to account fully for the very main task of ombudsmanship, combating maladministration'. **454**

It would therefore be preferable for the local Decision to explicitly mention not only the role an ombudsman can play with regard to human rights protection, but also his main function, namely to combat maladministration in all its occurrences.

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step towards European integration, Athens, 2003, p. 66 (accessible at: http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN014896.pdf, accessed 2 September 2009).

454 ANDREAS CH. TAKIS, *op. cit.* (fn. 453), p. 65.

- Article 16(5) and (6) of the Decision read as follows: 'The claim is submitted within a year from the date of delivering the final decision in the case the claim refers to. If it is not possible to start the administrative procedure or the administrative dispute against the enactment or the action of the local self-management bodies, the claim is submitted within a year from the date the violation is done.' This provision can be interpreted in such a way that the ombudsman can only be accessed after the final decision in a case has been taken. Bearing in mind that court performance is very weak in Serbia[455] and proceedings can last for many years, such a hurdle would severely limit the effectiveness of the ombudsman institution.

According to Art. 40 of the Decision, the election of the civil defence attorney should have taken place within a period of 60 days from the date when the Decision entered into force (i.e. from 5 March 2005). However, in July 2005, still no ombudsperson had been elected and even two years later the institution only existed on paper.[456]

c. Transparent procedures

Aside from specific rights to publicity, freedom of information and the provisions on internal information flows, considerable significance is also attached to the transparency of procedures. All of the aforementioned rights do not help if procedures remain opaque and unintelligible. The claim for transparent procedures stands in close connection to the requirement of a clear system of powers (cf. above Chapter I).

Of very special significance in this context seems to be the transparency of the budget process. That is to say the *budget* is often considered as 'the single most important policy document of governments'.[457] This is

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455 See, on court performance, below, fn. 595.

456 Interview with DRAGAN VUJČIĆ, Head of Department for EU Integration and International Cooperation SCTM, member of the Serbian legal team mandated by the Municipal Support Programme Kraljevo, held in Belgrade, November 2007.

457 ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), *OECD Best Practices for Budget Transparency 2001*, p. 1. See also S.R. OSMANI, *Expanding Voice and Accountability through the Budgetary Process*, background

also true with regard to accountability, as the budget sets the standard against which the government will be held accountable for the use of financial resources. The second important set of documents are the *accounts*, where governments literally 'render an account' on how the budget has been executed, or – in other terms – on what has really happened with the money. It is obvious that transparency in all stages of the budgetary process[458] is crucial for holding the government accountable. As OSMANI puts it:

> 'The transparency of the system of budget management is critically important. Transparency takes many forms, but in all its forms is founded on a system of budget information that allows for both officials and the public to scrutinise what actually happens to the money. When such information is available, and publicly disseminated, it can act as the 'nourishment' on which a culture of greater accountability can develop – often in ways that cannot be planned or predicted in advance.'[459]

The following illustrations will highlight that on this requirement so closely related to the demand for accountability there is considerable need for improvement in Serbia (→ Illustration 14) as well as in Pakistan (→ Illustration 15).

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paper prepared for UNDP's Human Development Report 2002, Ulster 2002, p. 1: 'Budget is one of the most important economic tools available at the disposal of governments[...]. In any case, the sheer range of effects the budget can have on the structure of incentives and the allocation of resources makes it perhaps the most potent instrument of government policy.'

458 OSMANI, op. cit. (fn. 457), identifies three stages: the stage of preference revelation, the stage of conflict resolution, and the stage of impact evaluation. The Council of Europe distinguishes six 'traditional' patterns of budget preparation and administration in European countries (which nevertheless may easily be reassigned to the three stages of OSMANI): (1) Preparing the budget within the local administration, (2) finalising the local executive's proposals, (3) budget debates in the council and its committees, (4) approval of the budget, (5) execution and supervision of the budget, and (6) closure of the budget and discharge (see COUNCIL OF EUROPE, Budgetary Procedures, p. 22 et seqq.).

459 ANDY NORTON, DIANE ELSON, *What's behind the budget? Politics, rights and accountability in the budget process*, Overseas Development Institute, London 2002, p. vii.

Illustration 14: Transparency of the budgetary procedure in Serbia

In Serbia, before the decentralisation reforms started,

> 'local government budgets lack[ed] any type of meaningful purpose, let alone transparency and accountability, to serve as a management tool that clearly and concisely guides the delivery of public services and improvements.'[460]

In 2002, the Budget System Law[461] (hereafter: BSL) was adopted. This Law introduced a modern and uniform legal basis for the whole Republic of Serbia, including local governments, in order to ensure 'the integrity of the budget system'(Art. 3(2) BSL).

However, at least at the local level, the following problems remain:

- The provisions of the BSL concerning the local governments have not been 'translated' into the local regulations. This is especially confusing – once again – with regard to the allocation of tasks to the different organs of the municipality. The BSL assigns tasks to the local assembly (e.g. Decision on the local budget, Art. 6(1)), to the 'relevant executive body' (e.g. adoption of the budget proposal, Art. 24(4)) and to the 'local authority body responsible for finance' (e.g. determining the volume of expenditures of direct budget beneficiaries within a quarter or other period, Art. 34(1)). While the term 'local assembly' is clear and the 'local authority body responsible for finance' is identified in the local Decision on administration of the municipality of Kraljevo as being the 'Department for Finance and Economy' (Art. 20 of the Decision), the term 'relevant executive body' needs further specification in the local level regulations in order to make clear whether it designates the president or the municipal council. While the LSG allocates the task of ordering execution of the budget to the president (Art. 41(s. (7) LSG) and the task of drafting the decision on the budget to the

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460 At least in the view of USAID/DAI, see DEVELOPMENT ALTERNATIVES INC. (DAI), *Serbia Local Government Reform Program*, Performance Monitoring Plan 2002 – 2005, December 2002, p. 24, accessible at: http://pdf.usaid.gov/pdf_docs/PDACF059.pdf (accessed 8 July 2009).

461 Official Gazette of the Republic of Serbia No. 9/2002.

municipal council (Art. 44(1) LSG), other responsibilities are not clearly assigned to either the president or the municipal council. For example, Art. 15(2) BSL states that the local executive authority shall submit to the local assembly the proposed local authority budgets, planned sales of the local authority's non financial and fixed assets during the budget year, and the proposed decisions required for the executing of local budgets. Is this now a task of the president or of the municipal council? And who drafts the final account statement (Art. 63 BSL)? Who makes the decision on changes in budget appropriations and on the use of funds of the current budget reserve (Art. 41(6) BSL)? No answer to these questions can be found in the local legislation analysed during the field study. There may be additional provisions that are not known to the author, but it seems that even the experts from the financial management team of the SERBIA LOCAL GOVERNMENT REFORM PROGRAM, when formulating, with the support of the REPUBLIC OF SERBIA MINISTRY OF FINANCE AND ECONOMICS and the SERBIAN ASSOCIATION OF ACCOUNTANTS AND AUDITORS, the 'Financial Desk Reference and Budget Guide for Local Governments in Serbia', were confused about the relations between the different organs, at least when it comes to financial reporting, as the following statement shows: **462**

> 'The Law prescribes that the financial department submits the reports to the main executor [the executive body, see art. 24 para. 3 of the BSL, remark of the author]. Even though it is not clear whether the financial department is accountable to the main executor, the impression is that the Law prescribes that financial officer forwards the report directly to the Assembly. At the same time, it seems that the Law on Local Government prescribes that the Municipal Council is responsible for the supervision of the work of the financial department. This contradiction complicates the organizational structure by not clearly delegating responsibility to a specific body.'

- A second problem severely limiting transparency of the budget process is the fact that no financial control system is in place.

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462 CHARLES JOKAY/DON MANNING/BOGDAN VITAS (eds.), *Financial Desk Reference and Budget Guide for Local Governments in Serbia*, undated, chapter *5, p. 6.*

> Though the BSL requires that the 'competent executive body of local authority shall establish a Local Inspection and Audit service' (Art. 67(3)) that would be operationally independent (Art. 69(1) and (3)), would be responsible for carrying out audits and inspections over direct and indirect beneficiaries of local budgets, as well as over public enterprises founded by a local government (Art. 67(4) BSL), and would report bi-annually to the local assembly (Art. 70(3) and (4)), no such office was in existence in Kraljevo in July 2005, i.e. three years after the adoption of the BSL.[463] Neither was the annual account statement subject to external audit, as required by Art. 71 BSL.[464] Without such instruments, the members of the local assembly are barely in a position to effectively scrutinise the financial activities of the executive branch.

Transparency of the budgetary procedure (including the accounting) would be critically important in order to enhance accountability of the executive branch. The procedures foreseen by the BSL are not clear enough, though, at least as far as the local level is concerned. In addition, the local level completely fails to adhere to the mandatory provisions of the BSL. The fact that these failures do not have any consequences points to another problem (missing legal accountability), which is dealt with below (Chapter III.2.c and III.3).

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463 Interview with RADOMIR MILOVANOVIĆ, Project Manager, Municipal Support Programme (MSP), Kraljevo, July 2005. Even though the BSL also provides for an inspection and audit service at republic level, such an institution did not yet exist in 2005. A Law on the Supreme Audit Institution was enacted in November 2005. It was supposed to be implemented within six months. However, in June 2006 still no supreme audit institution was in place, see OECD/SIGMA/EU, *Serbia External audit assessment June 2006*, p. 2, accessible at: http://www.sigmaweb.org/dataoecd/18/59/37739925.pdf (accessed 2 September 2009).

464 Interview with ALEKSANDAR PROTIĆ, Project Manager, Municipal Support Programme (MSP), Kraljevo, July 2005.

Illustration 15: Transparency of the budgetary procedure in Pakistan

The LGO contains several provisions aimed especially at the transparency of the budget process, particularly with regard to the execution stage of the budgetary process. Examples are s. 114(5) which prescribes that 'a statement of monthly and annual accounts and such other necessary statements shall be placed at a conspicuous place by the local government concerned for public inspection', and s. 114(6) which provides for the respective accounts committees of the councils to hold public hearings, in which objections to statements of accounts may be heard and internal and external audit reports shall be discussed.

The bulk of the provisions regarding financial transparency, however, can be found in the NWFP Budget Rules of District Governments and Tehsil Municipal Administrations 2003, which have been adopted by the provincial government in August 2003, following the respective Model Budget Rules issued by the NRB.[465] The rules set out a uniform procedure for the budget process, prescribe the information (and the level of detail of this information) to be included in the budget,[466] lay down (at first sight) clear criteria for expenditure and receipt management (see s. 69 et seqq.) as well as for the re-appropriation of funds.

What is missing at present, however, are clear criteria for *accounting*. Section 107(2) LGO states that a district, a tehsil/town and a union local fund shall be established and that all revenues received shall be credited to the public account of the respective local government. According to s. 109(1) LGO, the monies credited to a fund shall be expended by a local government in accordance with the annual budget and supplementary budget approved by its council. As to the question of how the accounts shall be kept, s. 114 LGO refers to the national accounting system (prescriptions of the auditor general of Pakistan). In

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465 Accessible at: http://www.nrb.gov.pk/publications/Budget_Rules.pdf (accessed 2 September 2009).

466 See, for example, s. 9 on budget classification, part IV on estimates of receipts, part v on estimates of current expenditure, part VI on statement of new expenditure.

NWFP however, the LGO has been amended insofar as the accounts 'shall be kept in such form and in accordance with such principles and methods as the Provincial Government may prescribe [...] till such time that adequate capacity is developed to conform to the national accounting system [...]'.[467] At the time that the field study was carried out, there was a situation of confusion as to what rules were to be applied. The offices of the auditor general of Pakistan did not carry out the certification of district accounts for the financial year 2001-2002 due to delays on the part of the bodies (the district accounts officers) responsible for issuing the accounts reports.[468] Admittedly a functioning financial management system was generally not yet in place.

Finally, what renders the whole process completely intransparent is the role of the so-called budget and development committee (BDC), both with regard to planning of development projects/elaborating the (development and current) budget proposal as well as with regard to the administrative approvals[469] necessary for executing the budget (i.e. for spending money). It is composed of the zila (or: tehsil) nazim (chairman), the DCO (or: TMO) and the EDOs (or: TO's), with the EDO (or: TO) finance being the secretary.[470]

- *The role of the budget and development committees within the planning and budgeting process:* Each development project proposal has to be approved by the BDC *before* being laid before the council. Projects that are not approved by the BDC never have the chance, therefore, to be included in the annual development program and even to be discussed within the respective council. The BDC thus has the power to reject development project proposals (that are

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467 See s. 114 LGO.

468 PARACHA, p. 35.

469 'Administrative approval' means the concurrence and formal acceptance of the budget and development committee to the incurring of the expenditure proposed in the project proposal and amounts to an order to execute the proposal subject to the approval by the council (s. 2 (1, iii) NWFP Budget Rules 2003).

470 See s. 48 (5, 6) NWFP Budget Rules 2003.

sometimes the result of a lengthy political process at the grassroots level),[471] although it is a mere administrative body with no political legitimisation. In practice, many union nazimeen complain that development schemes (even proposals that have been adopted by a union or tehsil council) are often blocked by the BDC and sometimes even by the EDO finance alone (as secretary of the BDC), saying that a project is 'not feasible' or that it is not possible to include it in the district budget.[472]

In addition, in NWFP the government revised, by notification in 2003, the composition of the BDC (which in NWFP at the district level is called district development committee, DDC), whereby the zila nazim has been replaced by the DCO who will act as the chair of the said committee.[473] This creates serious opacity because the nazim, as political 'head' of the district, who is – besides other things – responsible for district-wide development, leadership and direction for efficient functioning of the district government (s. 18(a) LGO) and for maintaining administrative and financial discipline in the district government (s.18(f) LGO), is no longer really involved in the planning of development projects and the elaboration of the development (and even the current) budget proposal. How can the nazim be made responsible for the budget if he is not even part of the committee taking the most important budget decisions? Of course such ambiguities offer immense possibilities for 'passing the buck', when for example tehsil development projects that have been voted on in the respective council are not included in the district budget at the final stage.

The reason for the approval of projects by technocrats seems to lie in the fact that the politicians – due to missing technical knowledge – often decide to implement projects that are not feasible in practice.

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471 See s. 33 as well as part III of vol. II of the Schedules of the NWFP Budget Rules 2003.

472 Interview with women tehsil councillors, Mardan, June 2004. See also ADB et al., History, p. 55.

473 Notification No. SO (Coord)/P&D/177/04/2003, dated 26.3.2003.

It is true that this problem can only be resolved by introducing some kind of technical approval. Two principles should however be complied with:

- If the technical approval is conceived not as a recommendation but as a binding decision of an administrative body (without political legitimisation), then there must be clear criteria for approval/disapproval and the administrative body must be obliged to give reasons for its decision. Otherwise, the technical approval procedure risks being misused as a political instrument.
- With the introduction of the possibility for an administrative body of a higher state level to decide on the fate of a democratically decided project of a lower state level (such as a project decided by a tehsil council), and in the absence of clear and objective, i.e. *apolitical*, criteria for the approval or disapproval of such a project – it must be openly acknowledged that responsibility for the issues in need of approval in fact shifts to the upper state level and it must be made sure that those bearing the political responsibility (in the district: at least the district nazim) have a say in this decision. It should result clearly from the legal framework then, that the lower level is responsible for *making a proposal*, while the upper level is responsible for *taking the decision*.

- *The role of the budget and development committees with regard to expenditure control:* Section 69(2) of the NWFP Budget Rules specifies that before public money can be spent, two elements are necessary: (i) there must be an appropriation of funds for the purpose (i.e. in the budget) and (ii) there must be sanction of an authority competent to sanction expenditure.

  As far as development projects are concerned, s. 45(1) LGO states more precisely that expenditure can be incurred only on development projects for which administrative approval and technical sanction (for works) has been accorded and the development project has been included in the budget and has been approved by the council.

> This means that even if a development scheme has passed the initial approval by the BDC and in a next stage the approval of the council and therefore is included in the budget, an additional administrative sanction of the BDC for spending money is necessary.[474] This opens up once more a possibility to block politically approved schemes. In addition, for schemes involving works (i.e. for non-CCB-schemes) technical sanctions[475] are required with very low transparency as to who is competent for sanctioning what kind of works and according to what criteria (see the NWFP Delegation of Powers under the Financial Rules and the Powers of Re-Appropriation Rules 2001). Finally, where a scheme involves creation of new posts for staff or purchase of vehicles or equipment, that portion of such schemes shall receive clearance from the provincial finance department separately before the scheme is considered, even if it is within the competence of the district development committee.[476]

The far reaching possibilities for non-elected officials (that are in many cases more loyal to the province than to the respective local government) to block development schemes at different stages (and even after they have been adopted by the competent political bodies) call the other achievements regarding transparency within the budget process seriously into question. Public deliberation of the budget in the council is of limited use if a committee without political legitimisation

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474 This at least seems to be the case in NWFP where s. 6 of the Delegation of Powers under the Financial Rules and Re-appropriation Rules 2001 (FR) in its note 4 (b, ii) states that development schemes will only be approved (by the BDC) and implemented if they are reflected in the annual development plan and approved by the zila council.

475 Section 38(2) of the NWFP Budget Rules 2003 reads as follows: 'For every work proposed to be carried out, except petty works and repairs a properly detailed estimate must be prepared for the sanction of the competent authority. This sanction is known as the 'Technical Sanction' to the estimate. Such sanction shall only be accorded by the officials in accordance with the powers delegated to them.'

476 See s. 5 note 5 FR. The budget development committee (BDC) is often referred to as district development committee (DDC) in NWFP.

can – even against the will of the nazim – cut off some proposals in advance and block the execution of other schemes, even after the council adopted them.

d. The role of the local media

Media clearly play an important transparency-role within the accountability process. THE EUROPEAN COURT OF HUMAN RIGHTS case law refers to the press as one of the most important means of permanent public criticism and control of all power in a state based on the rule of law.[477] TSCHANNEN also describes the existence of media as a necessary precondition to render possible any political discourse: the political process simply delivers too much information for normal citizens to absorb and handle; there must be a substitute who gathers and edits political information for it to be accessible to the citizens.[478]

In the words of MULGAN,

> '[t]he mass media, primarily television, radio and print journalism, are integral to most mechanisms of government accountability. They provide the main means by which information and discussion about government activities are conveyed to a wider public. When governments respond publicly to inquiry or scrutiny, only a very few members of the public are physically present to hear what is said. If accountability is to be extended to any significant proportion of the public, the government's statements must be reported in the media. Indeed, much political accountability, such as election campaigning and legislative questioning, is conducted in the expectation that the media will report it. The media are therefore an essential element in political communication, including the dialogue of political accountability.'[479]

The mentioned mediating and controlling functions of the (mass) media need to be *legally ensured*, however. That these functions cannot be performed (at least not exclusively) by the state media appears self-evident: the risk of one-sided, euphemistic broadcast of information and a correlating degree of reluctance to criticise and even the risk of

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477 MÜLLER/SCHEFER, Grundrechte, p. 250, with a reference to Lingens c. Österreich, Ser A Nr. 103 Ziff. 41, Eu GRZ 1986, p. 428.

478 See TSCHANNEN, Staatsrecht, p. 380.

479 MULGAN, p. 68.

establishing a state-run propaganda machinery appear obvious. A legally codified duty of the state to inform the public objectively is therefore not sufficient (→ Illustration 16). Since these functions should *not* be or at least *not exclusively* be performed by the state, it is misguided to speak of the media as a 'fourth power within the state'; the media should, on the contrary, certainly *not* be part of the state's power structure. In fact, the state here is sought as the *guarantor of a sphere of freedom*: the state is on the one hand obliged to create conditions that foster media-diversity and on the other hand to leave the media the necessary space for them to exercise their accountability functions. Under this the following considerations need to be taken into account: restrictions on the freedom of press must be balanced carefully not only with the private interests of an affected journalist but also with a general public interest in a functioning press. As far as state functions are indispensable (e.g. guaranteeing competition, award of licenses), these must be organised in manner that is as far as possible distanced, i.e. independent, from the state.[480]

In the following, the case of Serbia shall illustrate how the legal framework influences the functioning of (local) journalism in different ways.

Illustration 16: Legal framework for local media in Serbia

In the recent past, free media were almost non-existing in Serbia. Under the socialist single-party system, the media and journalists were used as a propaganda service of the regime and their main role was the protection of the state. This did not change during the Milosevic regime, 'except that their ideological premise was replaced by a nationalist one'.[481] The political oppression by the Milosevic regime is

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480 Cf. on all this BURKART, St. Galler Kommentar BV, Art. 17, para. 5.

481 HELSINKI COMMITTEE FOR HUMAN RIGHTS IN SERBIA, *The Media as a Part of the Anti-European Front, Press Media in Serbia: an Unchanged Matrix*, Belgrade, December 2004, p. 108, accessible at http://www.helsinki.org.rs/doc/Media-Unchanged-Matrix.pdf (accessed 9 July 2009).

indeed said to have been 'built on a sophisticated combination of legal and media repression'.[482] Although the Constitution contained (and still contains) provisions guaranteeing freedom of expression, the famous Public Information Law, adopted in 1998, introduced draconian fines for journalists who criticised the government.[483] This Law was cancelled after the Djindjic government took office in January 2001, but media harassment has persisted since then.[484] Several weaknesses in the legal framework might at least partly explain the still fragile status of the media, especially at the local level.

The guarantee of the freedom of the media and exceptions thereto can be found in several international and constitutional documents:

- Art. 10 ECHR[485] and Art. 19 of the ICCPR, both protecting freedom of expression in general, including the guarantee of media freedom, have already been mentioned above (Illustration 10). The State Union of Serbia and Montenegro (as international successor of the State Union: now the Republic of Serbia) being party to both international treaties, those provisions are binding.

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482 STEVAN LILIC, *Access to Public Information - Introduction*, in: LILIC/MILENKOVIĆ, p. 21. For a detailed description on how media were used to serve the political goals of the Milosevic regime see HELSINKI COMMITTEE FOR HUMAN RIGHTS IN SERBIA, op. cit., (fn. 481), Annex I, The role of the media, p. 102 et seqq.

483 FREEDOM HOUSE, *Nations in Transit 2005*, Country Report Serbia, sub 'independent media', accessible at: http://www.freedomhouse.org/template.cfm?page=47&nit=380&year=2005 (accessed 9 July 2009).

484 *Ibid.*

485 Article 10 ECHR reads as follows: (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary (para. 2).

- The (then applicable) Charter on Human and Minority Rights of the Federal Republic of Yugoslavia, ('small charter') guarantees the freedom of the mass media in its Art. 30;[486]
- The Constitution of the Republic of Serbia likewise contains a provision – Art. 46 [487] – guaranteeing the freedom of the press.[488]

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486 Art. 30 of the 'small charter' reads as follows:

„Any person may establish a newspaper or some other public media without a permit to do so. Television and radio stations may be established in conformity with the laws of the Member States.

There shall be no censorship in the State Union of Serbia and Montenegro.

Any person shall have the right to a correction of any published untrue, incomplete or incorrectly transmitted information that infringes on his/her rights or interests, in conformity with the law.

Any person shall have the right to receive a reply to information published in the media, in conformity with the law.

No one may prevent newssheets from being distributed or information and ideas from being disseminated through other mass media, unless it is established by court decision that so is necessary for the purpose of curbing the advocacy of war, incitement to direct violence or racial, national or ethnic hatred that stand for incitement to discrimination hostility and violence.'

See, however, on the doubts regarding the binding effect of the small charter, above, p. 144.

487 Art. 46 of the Constitution of the Republic of Serbia reads as follows:

'The freedom of press and other public information media shall be guaranteed.

Citizens shall have the right to express and make public their opinions in the public information media.

Publication of newspapers and dissemination of information by other means shall be accessible to everyone without seeking permission, subject to registration with the competent agency.

Radio and television broadcasting organisation shall be established in accordance with law.

The right to correction of published incorrect information which violates someone's right or interest, as well as the right to compensation for any moral and property damage arising therefrom, shall be guaranteed.

The censorship of press and other public information media shall be prohibited. No one may obstruct the distribution of the press and dissemination of other information, except when the competent court of law finds by its decision that they call for the forcible overthrow of the order established by the Constitution, violation of the territorial integrity and independence of

While there is no doubt about the question of whether media freedom is, in principle, guaranteed or not, the extent of that right is less clear due to the existence of these diverse (and not in all points congruent) provisions. For example, the use of different wordings results in a confusing regime of exceptions: while the international texts require that restrictions must be 'necessary in a democratic society',[489] the Constitution of the Republic of Serbia contains no such limiting element.[490] Moreover, the reasons considered as legitimate to restrict the freedom of press differ in their wording (e.g. the Constitution of the Republic of Serbia allows restriction of the freedom of press when the information is calling for 'violation of the territorial integrity and independence of the Republic of Serbia' while no such restriction is foreseen in the international texts nor in the 'small charter').[491] In addition to the international and constitutional documents, the *Law on Public Information* (adopted in March 2003)[492] contains another provision defining the possibilities for restrictions to the freedom of press, accumulating the elements that can be found in the diverse domestic constitutional texts and in the international treaties, including the principle of proportionality. According to its Art. 17, distribution of information can be prohibited

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the Republic of Serbia, violation of guaranteed freedoms and rights of man and citizen, or incite and foment national, racial or religious intolerance and hatred.

The public information media which are financed from public funds shall be bound to provide the general public with timely and impartial information.'

488 And also the Constitution of 2006 protects the freedom of the press in its Art. 50.

489 See Art. 10(2) ECHR.

490 This problem has been solved with the adoption of the Constitution of 2006. According to Art. 50(3), the competent court may prevent the dissemination of information by means of public informing only when 'this is necessary in a democratic society to prevent inciting to violent overthrow of the system established by the Constitution or to prevent violation of territorial integrity of the Republic of Serbia, to prevent propagation of war or instigation to direct violence, or to prevent advocacy of racial, ethnic or religious hatred enticing discrimination, hostility or violence'.

491 This problem remains with the Consitution of 2006 (see fn. 490).

492 Official Gazette of the Republic of Serbia No. 43/2003 and 61/2005.

> 'if a district court determines it as necessary in a democratic society in order to prevent the following: call for violent disruption of the constitutional order, violation of territorial integrity of the Republic, propagandise a war, stimulus to direct violence or call for racial, national or religious hatred which shall represent stimulus to discrimination, hostility or violence, and the publication of the information may directly result in serious, irreparable consequence which cannot be prevented otherwise'.

It can be concluded that the legal order does guarantee the freedom of press, but the terms are rather confusing.

In practice however, independent and critical journalism of local media is reported as being hampered mainly because of the weak legal status of local media, the handling of criminal law protecting the honour and reputation by the courts and the difficulties (for independent media) in getting information from local governments. These difficulties all point to failures in the legal system in guaranteeing the vital function of (local) media.

- *Legal status of local media:* Local electronic media are an important source of news for the population, but most of them are still *under municipal ownership* and – often – control.[493] While many of these outlets were important sources of professional news during the Milosevic era when opposition-controlled municipalities allowed editorial independence, there has been a growing trend in the past years to restrict their ability to operate as independent public-service media. The president of the Association of Media (NUNS), NEBOJSA BUGARINOVIC, underlined that 'municipal politicians often feel these outlets are their own PR system'.[494] Following the local elections in October 2004 for example, some municipal administrations controlled by the Serbian Radical Party removed

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493 The share of print media in Serbia is small, see FREEDOM HOUSE, *Nations in Transit 2006*, Serbia and Montenegro, Serbia section, p. 10, accessible at: http://www.freedomhouse.org/template.cfm?page=47&nit=399&year=2006 (accessed 9 July 2009); IREX, Media Sustainability Index 2005, p. 104, accessible at: http://www.irex.org/programs/MSI_EUR/2005.asp (accessed 9 July 2009).

494 IREX, op. cit. (fn. 493), p. 99, 101, 104.

critical journalists from their jobs in local media.[495] The following statement, made by a journalist working in a municipal media outlet, also points out the dependence of these outlets from local politicians:

> 'In the period when relationships of ownership between our radio station and the city get examined and redefined, we always receive instructions 'not to rock the boat', regardless of the fact that we have always criticized city authorities, no matter who they were. Yesterday they were some other guys, today they are Radicals. We were told not to be hasty to publish any material on city authorities, because solving the ownership structure was 'a higher interest''.[496]

Local electronic *private media* do also exist but they seem to be equally under pressure from local governments and local party leaders. Numerous reports about journalists being attacked for critical reporting on local politicians or their supporters can be found in the literature.[497] Only one example shall be presented here:

> 'On September 6, the current affairs editor of Radio OK, Sasa Stojkovic, was verbally attacked and threatened with physical violence by two Serbian Radical Party members of the Vranje Municipal Council. This was followed, just days later, by a telephone call from the president of the Council, Nenand Stosic, who threatened him with arrest because of an opinion poll, the results of which had not been broadcast but which Stosic believed to be malicious.
>
> On Monday September 12, the Radio OK editor and other journalists held a press conference to inform the public about the attack and sent an open letter to the president of the council, asking him to explain his threatening behaviour. Stosic subsequently denied having called Radio OK. The editor and journalists then called a new press conference and informed the public that, because of the increasingly frequent threats they were receiving, all telephone conversations in the radio premises were recorded and that this included a recording of Nenad

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495 FREEDOM HOUSE, op. cit. (fn. 493), sub. 'independent media'.

496 Journalism in Serbia – degraded and humiliated, B92 Document, survey on the state of journalism in 2005, with plenty of examples of political pressure put on media outlets and journalists, accessible at: http://www.b92.net/doc/media/media_sep_28.php (accessed 8 July 2009).

497 ANEM Statement published on the website of the International Freedom of Expression Exchange IFEX, accessible at: http://www.ifex.org/serbia/2005/09/16/president_of_vranje_municipal_council/ (accessed 9 July 2009).

> Stosic's call. The recording, which includes obscene language in addition to the threats, was played at the press conference. Stosic then called the station again, now fully aware that the conversation was being taped, and threatened the journalist to whom he first spoke, saying that he was in for 'suffering and pain' and that friends of his would 'be paying a visit'.

Since there was *no legal framework for these outlets* after the fall of the Milosevic regime, they are all operating without any licenses and find themselves 'in a weak and insecure position and their status often depends on the politicians' 'goodwill''.[498] As a consequence, 'the atmosphere of non criticism pervades'.[499]

In 2002, the Parliament of the Republic of Serbia adopted the *Law on Broadcasting*. This Law regulates the process of allocation of frequencies and licences for electronic media and also provides a deadline for local governments to privatise their media outlets.[500] However, in 2005 the Law was still not implemented because the main implementing body, the broadcast council, was not yet operational. Its members had been elected by the Parliament (after the deadline prescribed in the Law had already expired) under violation of the procedure foreseen by the Law,[501] which resulted in protests and resignations of those members that had been elected correctly.[502] As a consequence, the processes for allocation of

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498 B92, Journalism in Serbia – degraded and humiliated, op. cit. (fn. 496).

499 *Ibid.*

500 It is interesting to see that the new Law on Local Self-Government of 2006 reintroduces state-owned media at the local level (contradicting the Law on Broadcasting): According to Art. 20(34), the municipality '[...] sets up TV and radio stations for the purpose of reporting on the language of national minorities officially used in the Municipality, as well as for reporting on the language of national minorities that is not in official use, when such reporting constitutes the achieved level of minority rights'.

501 For a detailed description of the process see YOUTH INITIATIVE FOR HUMAN RIGHTS, *Rule of Law – Towards a Democratic Development: Implementations of Transitional Laws in Serbia II*, June-September 2005, p. 17.

502 See GOVERNMENT OF THE REPUBLIC OF SERBIA, *Reforms – Updated Statement*, Annex IV: The Civil Society, Media and Democratisation of Serbia, November 2003, p. 7, accessible at:

broadcast frequencies and the transformation of property ownership in local media operated by local government bodies were stalled.[503] In August 2005, amendments to the Broadcasting Law moved the deadline for local media to privatise to the end of 2007 and for print media to April 2006.[504]

The delays in privatising local public media operated by local governments result in 'unacceptable pressure on their operations, jeopardize their independence and lay them open to political abuse'.[505] At the same time, the postponement of the public competition for frequency licences makes it impossible for independent broadcasters to plan their development because nobody knows what conditions will have to be met for frequency allocation or whether the independent media will be granted any licences at all.[506] Under such circumstances, it is hardly possible for local media to play their role of a local watchdog.

- *Criminal Law*: A second serious problem for journalists is the handling of the criminal law provisions for protection of honour and reputation by the courts. Proceedings under Arts. 170 and 171 of the Criminal Code dealing with insult and defamation often result in an undue limitation of the freedom of speech, because the courts either do not pay the necessary attention to the importance of this constitutional right, or simply because they are under pressure. The abusive use of criminal law to limit the freedom of the press has been highlighted by the international organisation Article 19,

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http://www.seerecon.org/serbiamontenegro/documents/reforms_statement_serbia/annex4-5-civil_society.pdf (accessed 10 July 2005).

503 VERAN MATIC, Media in Serbia, October 2003, p. 2 (accessible at: http://www.b92.net/eng/insight/opinions.php?yyyy=2003&mm=10&nav_id=34267 (accessed 9 July 2009).

504 See ANEM News of 30 August 2005, accessible at: http://www.anem.org.yu/cms/item/medscena/en/Vesti?articleId=6502&type=vest&view=view (accessed 9 July 2009).

505 VERAN MATIC, Twelve months on, accessible at: http://www.hartford-hwp.com/archives/62/327.html (accessed 9 July 2009).

506 *Ibid.*

referring to a survey conducted by the Association of Journalists (NUNS) published in 2003:

> 'The survey identified 173 ongoing defamation cases initiated against journalists since October 2000, the majority of them criminal cases. NUNS concluded that the large number of cases – many brought by politicians, public officials and high profile businessmen – represented a new means of 'punishing the media' in the post-censorship period. Many of the cases documented in the survey have been brought by high ranking officials in the Socialist Party of Serbia (SPS) and local government officials, including several serving and former mayors. A persistent theme is that the impugned articles allege corruption and/or involvement in organised crime. The NUNS survey reveals that the same plaintiffs often bring multiple cases and many of the defendants are the subject of several outstanding cases. According to the legal councel of Blic News, as of February 2003, over seventy charges had been filed against the weekly magazine, with damages requested amounting to 250 million dinars (approximately 4 million USD). In June 2002, it was reported that journalists from the Kragujevac weekly Nezavisna Svetlost were regularly being sued for libel by prominent local individuals and had to appear in court twenty times in February 2002.' **507**

The UN Human Rights Committee, in its Communication No 1180/2003 adopted on 31 October 2005, also stated that the State Union of Serbia and Montenegro violated Art. 19(2) of the covenant on civil and political rights (CCPR) because a well-known journalist was convicted for criminal insult by the courts.

With the enactment of the new Criminal Code**508** in 2005, the situation has ameliorated insofar as insult and defamation are not any more punishable with prison but only with fines (in rather huge amounts, though: approx. EUR 460 – 5,200 for insult and EUR 1,150 to 11,500 for defamation). However, the fear of possible criminal proceedings still seems to lead journalists to self-

507 ARTICLE 19, Memorandum on the Serbian Draft Criminal Code, Criminal Offences against Honor and Reputation, London, November 2004, p. 2, accessible at: http://www.article19.org/pdfs/analysis/serbia-draft-criminal-code-defamation-nov-2004.pdf (accessed 9 July 2009).

508 Official Gazette of the Republic of Serbia Nos. 85/2005, 88/2005, 107/2005.

censorship.[509] At the same time, the OPEN SOCIETY FUND reports that '[c]riminal acts against journalists [which are not a rarity, remark of the author][510] are not prosecuted'.[511] It is obvious that such a one-sided court practice does not reflect the fundamental importance of the freedom of press and that it is actually contrary to various international and constitutional documents. The above mentioned, confusing different wordings regarding restrictions of press freedom, at any rate make it easier for courts to adhere to such abusing practices.

- *Access to information*: The shortcomings of the Law on Free Access to Information have already been mentioned above. It is obvious that the still prevailing attitude of secrecy at all levels poses a problem for local journalism. As IREX reports – concerning the situation in 2005 – '[l]ocal media in particular have real problems getting any official information, especially if it is delicate and does not favour politicians or the parties in power in their municipalities.'[512]

It can be concluded by quoting FREEDOM HOUSE that 'in practice access to information is still denied, legal protections for press freedom are unsecured, and legal penalties for 'irresponsible' journalism – whether justifiable or not in terms of journalistic ethics – remain common practice.'[513]

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509 US. DEPARTMENT OF STATE, Bureau of Democracy, Human Rights, and Labour, *Country Report on Human Rights Practices in Serbia 2006*, released on March 6, 2007, sub. 'Freedom of speech and the press', accessible at: http://www.state.gov/g/drl/rls/hrrpt/2006/78837.htm (accessed 9 July 2009).

510 See, for example, US. DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOUR, Country Report on Human Rights Practices in Serbia 2006, released on March 6, 2007, sub. 'Freedom of speech and the press', accessible at: http://www.state.gov/g/drl/rls/hrrpt/2006/78837.htm (accessed 9 July 2009).

511 IREX, op. cit. (fn. 493), p. 102.

512 Ibid.

513 FREEDOM HOUSE, op. cit. (fn. 493), executive summary, sub. 'independent media'.

e. Conclusion

This chapter has shown particularly how far-reaching the information-dimension of the topic is. The legal framework must ensure the flow of information. For this it needs:

- information rights (from the administration up to the political executive level);
- information rights of the legislative vis-à-vis the executive;
- information rights of voters vis-à-vis the state.

Under ideal circumstances regular information procedures and the possibility of specific requests should complement each other. Additional fire-alarm institutions are definitely helpful, but are not able to replace regular channels of information. The existence of transparent procedures eases the flow of information on all levels. The convergence of information, finally, should be embodied in the context of accountability debates in the legislative. From this point onwards the principle of publicity of parliamentary proceedings coupled with a functioning (and free) press are supposed to bring the information to the general public.

2. Vertical dimension

As already mentioned in Part 1, local governments are supposed to function within a framework of higher legislation. While decentralisation aims at shifting political accountability downwards (the local state shall be accountable for its political decisions towards the local citizenry), the upper levels, by enacting the legal framework for local governments, must be in a position to check whether this framework is being respected (legal accountability).

The ‘horizontal’ information-mechanisms also, to a certain extent, bring some information to upper tiers of government. The legal framework should, however, provide for instruments designed especially for informing the upper tiers of government in order for them to be in a position to check whether the local level adheres to the legal framework. As such, the same mechanisms are conceivable as within

the horizontal dimension. Ideally, the upper tiers should be equipped with standardised information sources as well as possibilities of targeted inspections.

The illustrations shall demonstrate how the canton of Bern and the government of NWFP, Pakistan, have regulated this matter. The illustrations will show that less detailed provisions not necessarily translate into more liberty for the municipalities – quite to the contrary: a state that is serious about local autonomy must put in place detailed provisions that, on the one hand, ensure the legally sound use of the autonomous sphere by the local level, and on the other hand prevent undue interference by the upper state level(s). This includes the enactment of rules providing the upper state level with possibilities to get the necessary information.

Illustration 17: Vertical information flows in Switzerland

Since municipalities are institutions of cantonal law, they are subordinate to cantonal oversight (Art. 11 (1) KV BE, Art. 85 GG).[514] The cantonal oversight pursues two objectives: on the one hand it is a means for the canton to ensure the quality of its own structures which the municipalities are part of and for which the canton is responsible. On the other hand, the cantonal oversight is also seen as a necessary counter piece to the municipal autonomy. In the words of WISMER, 'because municipal autonomy is of such great importance, it requires due attentiveness of the state'.[515]

The canton disposes of several means to keep itself informed about what is going on in the municipalities:

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[514] In this context oversight is to be understood in terms of *Verbandsaufsicht*, i.e. oversight of the municipality as a whole (in contrast to *Dienstaufsicht*, i.e. supervision which is in place within a hierarchically organised administrative unit).

[515] J. WISMER, *Die kantonale Staatsaufsicht*, in: Die Gemeindeautonomie, Veröffentlichungen der Schweizerischen Verwaltungskurse an der Handels-Hochschule St. Gallen, Vol. 6, Einsiedeln/Köln 1946, p. 137 (translation by the author).

- First of all, the most important legal act of a municipality, its statute, is obligatorily subject to an intermediary examination by the canton (prior to its adoption by the citizens; Art. 55(1) GG). The municipalities may voluntarily send other legal acts to the canton for an intermediary examination (Art. 55(2) GG).
- Secondly, several municipal legal acts are subject to cantonal approbation after their adoption (the cantonal approbation being constitutive for their entering into force): this is the case – again – for the municipal statute (Art. 56 GG) and for other acts as far as special legislation provides for such a duty.[516]
- Approbation of such acts may only be rejected by the competent cantonal body if the act in question is illegal or inconsistent (Art. 56(2) GG). As long as a provision may be interpreted in a lawful manner, it is to be approved, even if – in the view of the canton – it seems inexpedient. Accordingly, the intermediary examination is in principle also limited to such questions.[517]
- Finally, the yearly accounts of the municipality need to be approved by the canton (*Passation*); the prefect (i.e. the person responsible for general oversight of municipalities within the cantonal administration, cf. Art. 87(1) GG), however, only checks the plausibility of the accounts, the regular audit of municipal accounts being carried out by an (obligatory) separate municipal organ.[518]

Besides these *standardised procedures*, the canton disposes of several *investigative instruments*:

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[516] Art. 61 of the cantonal Law on Construction (Baugesetz vom 9. Juni 1985; BSG 721) provides, e.g. an approval duty for plans in the area of construction and planning (WICHTERMANN, Kommentar GG, Art. 57, para. 3, with further references). The number of acts in need of approval has constantly been reduced during the passed decade in order to not burden the municipalities with overly cumbersome administrative procedures.

[517] WICHTERMANN, Kommentar GG, Art. 56, para. 7.

[518] The audit organ (Art. 72 GG).

- According to Art. 141 GV, the prefect may visit a municipality at any time. He may undertake vigorous controls, ask questions, and verify whether the municipal administration is conducted correctly.
- Whenever there is a reason to believe that the correct functioning of the municipal administration is in danger due to illegal behaviour of municipal organs or that it is otherwise seriously endangered, *and* at the same time the municipality does not tackle the problems itself (a duty that is foreseen in Art. 86 GG),[519] the competent cantonal body may open a procedure of supervisory investigation (Art. 88(1) GG). The requirement that the canton shall intervene only where a municipality does not solve its problems itself is an expression of the *principle of subsidiarity* of state oversight: the correct functioning is first of all an own responsibility of every municipality; only where a municipality does not assume that responsibility, shall the canton be entitled (and obliged) to investigate (and as the case may be to adopt the necessary measures). An investigation can be opened either at the notice of a private person or of a municipality or ex officio. The investigation must be conducted within a formalised fair procedure (due process), in order to serve as a basis for adopting supervisory measures against a municipality at a later stage.[520]
- Special inspections can be conducted, finally, in financial matters (Art. 142(2) GV).

Information does, however, not flow only in one direction, i.e. from the municipalities to the canton. In practice the supporting and consulting function of the cantonal administration vis-à-vis the municipalities is almost equally important. The cantonal administration, for example, provides model regulations for municipalities and systematically informs the municipalities on all matters that are of relevance for

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519 Article 86 reads as follows 'In case irregularities are established in a municipality, the competent body of the municipality verifies the matter and induces the necessary measures' (para. 1). 'For this purpose, a municipality may conduct (or let a third party conduct) an official investigation' (para. 2).

520 WICHTERMANN, Kommentar GG, Art. 88, para. 2.

them.[521] Without this cantonal support, especially small municipalities would be overstrained in several respects. It is indeed this informal part of the cantonal oversight that is considered as a 'guarantor of the living conditions of the municipalities.'[522]

One can conclude that the canton disposes of a broad set of informatory measures that allows it to respond to different kinds of situations. The standardised procedures may serve as a general indicator. The investigative instruments may serve in situations where a closer look is necessary. An additional analysis of sectoral legislation dealing with oversight[523] would show that in the canton of Bern many instances of the cantonal administration are involved in municipal oversight (be it informally, in a general way or in special situations). These findings do not lead to the conclusion, however, that municipal autonomy is under threat. As WICHTERMANN asserts: 'Cantonal oversight must respect municipal autonomy, but at the same time it defines its limits'[524] – this explains the rather detailed regulation of that topic.

Illustration 18: Vertical information flows in Pakistan

The LGO contains several provisions designed especially for informing the upper tiers of government about deeds and misdeeds of lower levels of government, although the analysis will show that the extent of information that flows to the province is very limited.

The main body exerting some (although rather punctual) oversight over local governments is the provincial *local government commission*[525] which, according to s. 132 LGO shall

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521 See the 'Bernische Systematische Information Gemeinden' (BSIG).

522 WICHTERMANN, Kommentar GG, Art. 85, para. 4, citing WISMER, Staatsaufsicht, p. 124 (translation by the author).

523 Such an analysis would be well beyond the scope of the present study.

524 WICHTERMANN, Kommentar GG, Art. 85, para. 3 (translation by the author).

525 The provincial local government commission is composed of the minister for local government as chairman, two members from the civil society (each one nominated

> (a) conduct annual and special inspections of the local governments and submit reports to the Chief Executive of the Province;
>
> (b) conduct, on its own initiative or, whenever, so directed by the Chief Executive of the Province, an inquiry by itself or through District Government into any matter concerning a local government;
>
> (c) cause, on its own initiative or, whenever, so directed by the Chief Executive of the Province, a special audit by itself or direct a District Government to arrange a special audit, of any local government;
>
> (d) submit to the Chief Executive of the Province an annual report on the over-all performance of the district and tehsil level local governments.

The local government commission also acts as a dispute resolution body. According to s. 132(d) LGO '[the LGC shall] resolve disputes between any Department of the Government and District Government or between two District Governments'. If it fails however to settle the dispute, 'the aggrieved party may move to the Chief Executive of the province for resolution thereof'.

Besides the investigating, inquiry and reporting powers of the local government commission, the province does not have any other institutionalised means to be directly informed about the functioning of the local governments. In particular, the LGO does not provide for a duty of local governments to systematically inform the province regarding their financial management or their legislating (rulemaking) activity.

Concerning *decision- and particularly lawmaking*, the NWFP government has solved this problem by stating, in its District Government Rules of Business 2001,

- in section 18(3), that any bye-laws under the ordinance that are drafted by a district government[526] shall be sent to the law

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by the leader of the house and leader of the opposition in the provincial assembly), two eminently qualified technocrat members selected by the provincial government, and the secretary, local government and rural development department (ex-officio member and secretary of the commission) (s. 131(1) LGO).

526 No such provision exists with regard to tehsil municipal administrations.

department for legal vetting and approval. This makes sense insofar as the province gets informed about the legislating activity of the district governments. At the same time however, the provision is rather problematic in that it prescribes that the bye-laws may not be inconsistent or repugnant with the model bye-laws (i.e. the laws that, according to the LGO, lie within the competence of the districts) formulated by the provincial government.[527]

- in section 27(2) of the same rules, the duty to submit all drafts of bye-laws or orders having the force of law to the provincial law department before they are laid before the zila council. Here again, the same provision goes too far in that it excludes any changes to be made by the zila council except with the knowledge of the law department, thereby excluding any deliberation on lawmaking within the zila council.
- in section 28(5) of the same rules, that the governor and the chief minister of NWFP have the right to require to 'submit for their consideration' any matters on which a decision has been taken by the zila nazim or the zila council, as the case may be.

With regard to *financial management,* the province, in its Delegation of Powers under the Financial Rules, simply states that the spending powers delegated (besides others) to the local government departments 'shall be exercised by the authorities subject to actual release of funds by the Financial Department *and not on the basis of budget allocations nor in anticipation of funds, the observance of codal formalities, conditions prescribed by the Government from time to time and general or specific conditions laid down in the schedules to these rules or in any other rules of the government*' (s. 4(2) FR).

This is clearly not in the spirit of the local government ordinance and clear rules on the extent *and* the limits of information possibilities of the province vis-à-vis the local governments (coupled with effective

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527 This last provision negates any law-making room of manoeuvre of the districts in that the province itself makes the laws which, according to the LGO, would lie within the competence of the districts and over which the province should have a say only insofar as they are inconsistent with provincial or federal laws.

mechanisms for compliance) would help to curb the influence of the province and to keep the (important) oversight on a rule-based and therefore objective level.

III. MECHANISMS TO 'HOLD TO ACCOUNT'

1. Preliminary remarks

The fact that the principal may not only call, but also hold the agent to account is crucial to the concept of accountability: where no sanctioning power rests with the principal, he must rely on other mechanisms (trust or competition of different agents etc.) that are not part of the concept of accountability. The usual sanctions provided for in a political system can be classed according to the criteria that are applied for deciding whether a behaviour should be sanctioned or not (see lit. a below) and according to the object that is being sanctioned (see lit. b below).

a. Classification according to criteria

What criteria are decisive for the question of whether an agent should be sanctioned or not? We can discern political and legal criteria (leading to political and legal sanctions): *political sanctions* apply where the principals' political expectations are not fulfilled. Their existence is crucial for achieving representation: the office-holders have an incentive to gear the entirety of their decisions towards the (probable) will of the majority. However, the effect of political sanctions (alone) is limited: what if governments hide information that would be necessary for citizens to scrutinise the behaviour of their agents? Or if governments unduly shape public debate in order to avoid political sanctions? Or if governments, all of a sudden, act outside their mandate? Or, in more general terms, if governments do not stick to the terms of their office? In such cases, *legal sanctions*, i.e. sanctions that apply if governments are disregarding the 'rules of the game', can help reduce the accountability-deficit.

Political and legal mechanisms of accountability are fundamentally different in concept[528] and the distinction has its consequences with regard to a 'sensible legal design':

- The criterion 'fulfilling political expectations' is, by definition, extremely *diffuse*: the citizens, i.e. the multiple principals may have different – and often conflicting – individual interests. There is no objective measure to determine whether these interests or expectations are fulfilled or not. The question of whether an agent should be sanctioned or not can only be answered, therefore, *by the principal himself* (and in the case of multiple principals, by all principals together). Accordingly, political sanctions should be placed only in the hands of those who have given a mandate, i.e. – in the state – in the hands of the organ that has elected or appointed the respective official.
- The situation is different with regard to the criterion 'respecting the rules of the game'. If these rules are *clearly formulated*, a third party can check whether they have been respected or not. We can even assume that only a third party will decide on this issue objectively, since those that are involved will probably be tempted to interpret the rules in their own favour. To take up the example that has been used earlier: only the principal himself can judge whether the house his architect has built is in accordance with his aesthetic expectations (as far as these expectations have not been fixed objectively in a plan in advance). A neutral third party can however judge whether the architect has complied with the 'generally accepted norms of architecture' or whether he has built the house according to the plans. Legal sanctions, therefore, are best placed in the hands of a third party that has been accepted by both parties, in advance. It is to be expected that reasonable negotiating partners will accept *only a third party that seems to be neutral.*

Legally, *political sanctions* are made possible by granting each principal (i.e. ultimately each citizen) a subjective right to participate (equal with all other principals, i.e. citizens) in the making of the

528 See, for a comparison LAUTH, p. 62.

decision whether or not to sanction an action or a person on political grounds. In order to ensure political accountability of office-holders to the people, the exercise of such a right should be general (i.e. it should be at the disposal of all citizens above a certain age), equal (i.e. every citizen's statement has the same weight), free (i.e. coercion or pressure from the state is curbed as much as possible) and secret (to minimise 'social' pressure). In the very least, the legal framework should ensure that every citizen above a certain age has the *right to vote* and that every person who has the right to vote is allowed to exercise that right in a non-discriminatory manner on the basis of equal treatment of the law.[529]

Legal sanctions, on the other hand, are made legally possible using the idea of *a state based on the rule of law*, i.e. the idea that every state action must have a sufficient legal basis (*Gesetzesvorbehalt*) and that the state's officers are not allowed to act against the law (*Gesetzesvorrang*). The law provides for sanctions that apply in case an agent does not adhere to the legal framework (i.e. does not fulfil certain clearly stated duties or acts beyond his legal mandate). As developed above, such a concept is in need for a neutral third party, i.e. an independent agent, mandated to decide whether in a concrete case the legally stipulated 'terms of office' have been met or not.

b. Classification according to the object

When we think of sanctions in the context of accountability, we probably have in mind sanctions that are directed against an office-holder, i.e. a person. Such sanctions may be based on political or legal grounds. The most typical sanction directed against an office-holder based on political grounds is voting-out of office, and as an example for legal sanctions directed against a person, penal law is well known.

While such sanctions may function as a *general* incentive to keep the representatives in line with the will of the majority and with the rules of the game they are usually not appropriate to control *specific*

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529 See on all this INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, *Handbook of Electoral System Design*, s. 4.

government actions. In particular, they do not protect citizens from having to bear the consequences of single decisions that are either politically not shared by the majority or that are against the 'rules of the game', be it even unintentionally. It makes sense, therefore, to provide for mechanisms that are directed against single government actions. An example of such a mechanism based on political grounds is the facultative referendum; examples for mechanisms based on legal grounds are the repeal of a legislative act (i.e. a local law) by the upper state tier or a court for reasons of non-compliance with higher-ranking legislation (local statute or laws of upper state tiers) or repeal of a concrete administrative decision in the course of judicial review.

Overview: classification of sanctions. Depending on whether a body of the local level or the upper state level applies a sanction, the horizontal or the vertical dimension is at stake.

	Against Person	**Against Action**
Political Sanction *(=political accountability)*	i.e. voting-out	i.e. fac. referendum
Legal Sanction *(=legal accountability)*	i.e. penal sanction	i.e. repeal of a general act or decision

2. Horizontal dimension

a. Political sanctions against persons

Local governments should be accountable to the people, i.e to the citizens of the locality. The system therefore must provide for at least one general mechanism at the disposal of the local citizens to remove an agent that is not fulfilling his mandate according to their expectations. The most typical mechanism designed to serve this purpose are *re-elections* (i.e. obligatory renewal of the mandate after a certain time period). On the one hand, by (re-)electing their

representatives, citizens substantiate the 'basic relationship' with regard to the persons filling the offices of the state (i.e. they mandate future representatives),[530] and on the other hand, they sanction the performance of those who were in office for the previous period (i.e. they hold the representatives to account for past actions, so-called retrospective voting).[531]

While some doubt the effectiveness of elections as a mechanism to sanction the past behaviour of agents (retrospective voting),[532] the fact that an office-holder does not have an unlimited mandate (i.e. the fact that the principal retains the possibility to renew or cancel the mandate after a certain time period) clearly makes a difference compared to a situation where this possibility is inexistent (or completely ineffective), as experience with autocrats worldwide shows. Accordingly, nobody seriously questions the fact that elections remain the most basic (but not the sole) instrument for government accountability to the people. Indeed, since elections are often the sole instruments remaining in the hands of the citizens, their legal conception is of utmost importance with regard to accountability.

Besides elections, the legal order may also provide for a possibility to recall an office-holder during his term of office, i.e. to cancel the mandate even before it is expired (such mechanisms are often referred to as *recall*).

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530 This is sometimes called the 'mandate-view', cf. PRSZEWORSKI/STOKES/MANIN, p. 29.

531 This is sometimes called the 'accountability-view', cf. PRSZEWORSKI/STOKES/MANIN, p. 29.

532 E.g. PRSZEWORSKI/STOKES/MANIN, p. 49: '[...] elections are inherently a blunt instrument of control, voters have only one decision to make with regard to the entire package of government policies [...]' and p. 50: 'Governments make thousands of decisions that affect individual welfare; citizens have only one instrument to control these decisions: the vote. One cannot control a thousand targets with one instrument'. PRSZEWORSKI/STOKES/MANIN are not arguing against elections as a mechanism of accountability, however. Their point is that, besides elections, other mechanisms ensuring accountability ('accountability agencies' guaranteeing information and additional instruments to sanction office-holders), are necessary (see p.50).

In order for such instruments (elections and recall procedures) to be effective as a mechanism of accountability, they should be designed in a manner that allows *the principal* (not a third party) to sanction *a concrete office-holder* whereby the procedure to decide whether an office-holder should be sanctioned or not must provide for *safeguards against manipulation* by the agent(s) (or a third party). The more complex (and, accordingly, the less transparent) the election design (or the recall procedure) and the bigger the possibilities for manipulation, the less effective the mechanism will be for accountability.

Finally, political sanctions against persons make sense only insofar as the 'sanctionable' persons have effective steering capacity over their staff. This remark seems to be self-evident; the illustration from Pakistan will however show that in practice this condition is not always fulfilled.

All three countries provide direct elections of the local assembly by the citizens, and direct or indirect election of the executive body. Moreover, Serbia and Pakistan both provide the possibility to recall the executive head. A closer look at the regulations in Serbia (→ Illustration 19) and Pakistan (→ Illustration 20) will however show that there is a lot of room for improvement in this important domain in both countries. As a comparison, the situation in Switzerland is also illustrated (→ Illustration 21).

Illustration 19: Political sanctioning of persons in Serbia

In Serbia, local elections are nothing new. But the elections that were held during the period between 1990 and 2000 could hardly be considered free and fair. 'It was their common characteristic that the position of the ruling SPS was incomparably more favourable than the position of the opposition parties'.[533] Furthermore, numerous reports

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[533] CESID, p. 9 et seq. The superiority of the SPS, according to CESID, had been expressed in the institutional (e.g. altering of important electoral rules immediately prior to elections and adoption of electoral rules with retroactive effect), media (state control) and economic (domination of the so-called social – in fact state –

deplored massive electoral manipulation in the form of, for example, double voting en-masse, 'voting' of persons being permanently absent or deceased, employees pressured to vote for SPS candidates by the management of 'socially owned companies', organised planting of already prepared voting ballots into the polling boxes, forging of electoral records and election board records, alteration of the election results made by electoral commissions and the large-scale annulment of the election results by court rulings (particularly in the 1996 municipal elections).[534]

The LSG provides for direct and secret elections, not only for members of the municipal assembly, but also – for the first time – for the president of the municipality[535] with the aim of strengthening the accountability to the citizens. The local elections held in 2004 were generally considered as having been free and fair.[536] Nonetheless, many are complaining that 'politicians are not listening to the citizens but rather to their party leaders'.[537] A closer look at the provisions dealing with the right to vote will show that the mechanism of elections could be improved with regard to strengthening the accountability of local governments to the citizens:

The (then applicable) Constitutional Charter of the State Union of Serbia and Montenegro, in its Art. 7, states that 'a citizen of a member state shall have equal voting rights and duties in the other member state as its own citizens, except for the right to vote and to be elected'. Therefore, voting rights of Serbian citizens are left to be regulated by the Republic's legislation. Article 42 of the Constitution of Serbia states

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ownership in the Serbian economy with the ruling party having the role of the 'general manager' of the economy) fields.

534 CeSID, p. 10.

535 This has been changed with the enactment of the nLSG (fn. 109) in 2007. According to its Art. 45, the president of the municipality is now elected by the municipal assembly.

536 Interview with Prof. Zoran Lucic, Executive Director of CeSID, held in Belgrade, July 2005.

537 Interview Lucic (fn. 536); Interview with members of the IMWG legal issues (fn. 338).

that a citizen who has reached the age of eighteen years shall have the right to vote and to be elected to the national assembly and to other agencies and bodies.

The right to vote regarding the local level is regulated in detail in the Law on Local Elections. Article 7 of this Law places further restrictions on the passive and active voting right: double citizenship is necessary, i.e. only Serbian and at the same time Yugoslav citizens have the right to vote; furthermore legal capacity and residence in the territory of the electoral unit where the franchise is exercised are required. While the LLE in its main features guarantees free and fair elections, some points deserve further attention; the most important being the design for *attributing and revoking mandates* of the members of the municipal assembly:

- Candidates to the municipal assembly are elected under a proportional representation list system (Art. 8(2) LLE). According to Art. 42(4) and (5),[538] only one third of the seats won in the election are allocated to the candidates according to their sequence in the respective list. The other two thirds of seats are allocated *by the political party* (or other nominator). This means that the political parties can, to a large extent, choose *after* the elections which candidates from their lists are allocated a mandate in the assembly. This system is not only obscure, but it also leads to a strong dependence of the candidates on their party leaders, which has the consequence already mentioned above: that the politicians are not listening to the needs of their voters, but rather following the instructions of their party. Moreover, the system results in citizens not knowing whom exactly they support with their vote for a

538 Art. 42(4) and (5) LLE read as follows: 'One third of won seats is allocated to the candidates in the list according to their sequence.

The electoral list nominator shall no later than within 10 days of publication of the overall election results inform the electoral commission about the candidates in the list who will be allocated the remaining two thirds of seats, of which every fourth seat shall be allocated to a person of less represented sex in the list'.

particular list, thereby rendering it impossible to hold individual councillors accountable for bad performance.[539]

The negative effects of such an election design have been pointed out by LIDIJA BASTA-FLEINER and SARAH BYRNE:

> 'The elections of local representatives through party lists has a greatly negative impact on the accountability of local councillors because they therefore owe their primary allegiance to the party, and are required to be accountable to the (not very democratic) party hierarchy and not to the actual local citizens who voted for them. Single-party domination of local politics has a detrimental effect on local policy making. This makes politics in a sense non-rival, because candidates no longer need the support of voters, as they are effectively guaranteed power by their 'party machines'. Though opposition parties could present a threat, what then arises is more of a clash between competing power groups than an evidence-based choice on which councillor would do a better job for the local citizens.'[540]

- Another very problematic provision can be found in Art. 45 LLE, stating that a mandate of an elected member of the municipal assembly shall expire if he ceases to be a member of the political party or coalition on whose candidate list he was elected. This rule is consistent with the problematic selection procedure just mentioned above (Art. 42(4) and (5) LLE), according to which the party (or other nominator) ultimately mandates the members of the assembly, but both provisions are inconsistent with the idea of accountability of the state to the citizens. Such a system leads to a situation where the nominator (i.e. most often a political party) can remove an elected member from the assembly by expelling him from the party. Parting from the idea that the citizens delegate powers to their

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539 Usually, under proportional representation systems, the order on the list determines the allocation of mandates; or mandates are allocated on the basis of preferential votes for candidates.

540 LIDIJA R. BASTA FLEINER and SARAH BYRNE, analytical summary of the conference 'Decentralisation between Regionalism and Federalism in the Stability Pact Countries of the Western Balkans' (June 9th and 10th 2006, Tirana, Albania), International Research and Consulting Centre, Institute of Federalism, University of Fribourg, Switzerland, p. 17 (accessible at: http://www.federalism.ch/files/documents//FINAL%20Annalytical%20Summary.pdf, accessed 9 July 2009).

representatives, and parting from the fact that elections are one of the few, if not the only mechanism of the citizens to hold their representatives politically accountable, it is obvious that the design of the election system should provide the 'last word', not only regarding election, but also regarding the removal of office, to the citizens, and not to the political parties. The fact that a member of the assembly has resigned from or has been expelled from the party should therefore not entail their expulsion from the assembly. Fortunately, the Constitutional Court of Serbia ruled Art. 45 LLE (but not Art. 42!) to be unconstitutional in September 2003.[541]

- A further problem (which is however not restricted to the topic of elections) relates to the possibilities for arbitrary interpretation of *imprecisely phrased legislation*. Only one example shall be mentioned here: lists of candidates may be submitted not only by political parties, coalitions, and other political organisations, but also by groups of citizens (Art. 18 LLE). The law does not define, however, which organisations qualify as 'political organisations', nor does the law specify the number of persons or processes required for constituting a 'group of citizens'. These questions are not dealt with in the Law on Parliamentary Elections,[542] which applies accordingly to the election of councillors if not otherwise

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541 The constitutional court of Serbia decided, on 27 May 2003, that Art. 88(1) and (9), containing a similar provision regarding the members of the national assembly, were unconstitutional. The court's decision addresses the issue of whether a mandate belongs to the elected deputy or the political party of which the deputy was a member when elected. According to the constitutional court's decision, supplemented by a subsequent decision of 25 September 2003 on the same issue regarding mandates in municipal assemblies, the termination of membership in a political party cannot be a ground for revoking an elected deputy's mandate (cited in: Venice Commission and OSCE/ODIHR, Joint Recommendations on the Laws on Parliamentary, Presidential and Local Elections, and Electoral Administration in the Republic of Serbia, adopted by the Venice commission at its 66th Plenary Session (Venice, 17-18 March 2006) on the basis of comments by Mr Jessie PILGRIM (OSCE/ODIHR, expert) Mr Hjörtur Torfason (Venice commission member, Iceland) (opinion 347/2005, accessible at: http://www.osce.org/documents/odihr/2006/03/18617_en.pdf, accessed 3 September 2009).

542 Official Gazette of the Republic of Serbia No. 35, 2000 (updated in March 2004).

prescribed by the LLE (Art. 52 LLE) either. The absence of legal criteria for both terms can easily be misused to arbitrarily declare a nomination invalid.

Although the Constitution guarantees the right to vote and the LLE provides for a detailed procedure of voting, albeit with the above mentioned problematic elements, the *legal order falls short of protecting the right to vote:*

- Article 48 LLE provides that electoral complaints can be lodged by a voter, a candidate[543] or a nominator.[544] Complaints are submitted to the municipal electoral commission, which has the power to take decisions by a majority vote of its members (Art. 13(5) LLE). The deadline for submitting a complaint to the municipal electoral commission is 24 hours, which is extremely short. Moreover, this short timeframe for lodging complaints to the municipal electoral commission begins from the moment that a contested decision is taken or an action is executed or an omission is made, and not from the moment the complainant receives notification of the decision. Besides, the fact that it is extremely difficult (if not impossible) to determine the beginning and the end of this timeframe, there is a real danger that the timeframe has expired even before a potential complainant has received notification of the decision at stake.

  According to Art. 50 LLE, an appeal against the decision of the electoral commission (as well as the decision sustaining the complaint) may be filed to the competent municipal court, again within the extremely short period of 24 hours from the delivery of

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543 Art. 48 (1) only mentions candidates for members of the municipal assembly. Art. 54 LLE however declares that 'election or recall of the president of municipality shall be conducted on the basis of the appropriate application of the provisions of this Law related to the election of councillors of local self-government assembly, if the provisions of this Law do not specify otherwise'. The author assumes that this referral also includes the provisions regarding the protection of the right to vote (even if a restrictive interpretation could lead to another conclusion).

544 A member of a polling board is also entitled to lodge a complaint regarding violation of the electoral franchise or election procedure that occurred at a polling station (Art. 48(2) LLE).

the decision. According to para. 2 of the same provision, the appeal 'shall be deliberated upon at the council's session.' This provision obviously makes no sense since no council (is it referring to the municipal council?) is involved in the procedure. The court must take its decision within 48 hours following the receipt of the appeal and the files. Finally, para. 4 provides that 'a decision issued on the basis of the appeal procedure is legally valid and there may be neither requests for extraordinary challenging of the court decision nor request for retrial as pursuant to the Law on Administrative Disputes.'

The short timeframes, as well as the exclusion of any remedy, are all the more bothering when bearing in mind the critiques advanced by CeSID already in 2002, according to which first instance municipal courts (which are basically functioning as civil law courts) are not professionally qualified to rule on administrative procedure and electoral disputes.[545]

- Another problem related to the protection of the right to vote is the failure of the law to prevent judges from serving both on an election commission and the municipal court. During the 2002 elections, the VENICE COMMISSION and OSCE/ODHIR notes, the presidents of two municipal courts also sat as permanent members of the municipal electoral commission: 'Thus, the judges of the municipal court were being asked to rule on appeals from decisions of the [municipal electoral commission] that had been taken by their president, which raised concerns regarding possible conflict of interest.'[546] Although the problem had been pointed out by the OSCE, the new LLE does not contain any safeguards against such (or similar) situations.

It can be concluded that on the one hand, the election design results in accountability to the political party rather than to the local citizenry,

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[545] CESID, p. 73.

[546] See VENICE COMMISSION AND OSCE/ODIHR, Joint Recommendations on the Laws on Parliamentary, Presidential and Local Elections, and Electoral Administration in the Republic of Serbia, op. cit. (fn. 541), p. 23.

and on the other hand, the legal protection of the right to vote as provided for by the Law on Local Elections is extremely basic and does not reflect its fundamental importance at all.

Illustration 20: Political sanctioning of persons in Pakistan

One of the main features of the LGO is the introduction of direct, as well as some indirect, elections at the local level: while union nazimeen (who are at the same time district councillors), naib nazimeen (who are at the same time tehsil councillors) and union councillors (except those on reserved seats) are directly elected on the basis of adult franchise and joint electorate (see s. 148(1) LGO) and are thereby made accountable to their electoral ward. The district and tehsil nazimeen and naib nazimeen, as well as union, tehsil and district councillors on reserved seats are elected indirectly (see s. 148(2) and s. 148(3) LGO) and are therefore made accountable to the union councillors of the whole tier rather than to the citizens of their electoral ward.

The fact that the district nazim is elected indirectly has been criticised a lot amongst the diverse observers of the devolution process. KEEFER et al.[547] argue that the indirect election of the district nazim undermines accountability to the voters. The same argument is put forward by MANNING et al.[548] The INTERNATIONAL CRISIS GROUP also reported that 'given the indirect nature of their elections, district nazims are answerable to a narrow 'electoral college' of union councillors. [...] In several districts ICG visited, councillors claimed that their union councils are neglected in development projects because of their opposition to the nazim. The nazim's need to reward supporters has resulted in a lopsided situation where some union councils are richer and more developed than others.'[549]

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[547] KEEFER et al., p. 22

[548] MANNING et al., p. 25.

[549] INTERNATIONAL CRISIS GROUP, Devolution, p. 14.

In the literature, accountability-arguments in favour for both direct and indirect elections can be found.[550] Only one remark shall be made here: when we speak of indirect elections, we normally think about a situation where the respective council can elect the executive (which is the usual set-up in a parliamentary system). The argument that is often made in favour of indirect elections is that this strengthens the role of the council vis-à-vis the executive head. Obviously, this argument is not valid here as the nazimeen are not elected by their respective councils but by the union councillors. At the time the field study was carried out there was a lively discussion on whether, for the next elections, the district nazim should be elected directly, which would certainly render the nazim more directly accountable to the people.[551] It is not the purpose of this study, however, to address the advantages and disadvantages of different electoral systems with regard to accountability. The focus here is on some of the most important *legal aspects* of such electoral processes.

The legal framework for local government elections in Pakistan is dispersed amongst different documents.[552] While the Constitution contains several individual rights such as the right to be treated in accordance with the law (s. 4) and the right to equality before the law and equal protection of the law (s. 25), no provision guaranteeing the *right to vote* and to be elected in a general manner can be found. Nor does the NWFP Local Government Election Ordinance 2000 (which has been enacted by the governor of the province on the instructions of the chief executive of Pakistan) guarantee explicitly the right to vote to every citizen above a certain age. Instead, it states that union council

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550 For general considerations on electoral systems and accountability see BLAND. General information on this subject can also be found in the handbook on electoral design of the INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE (IDEA International).

551 ICG argues that the mechanism of indirect election of the nazim makes it easier for the federal government to influence the outcome of local elections (INTERNATIONAL CRISIS GROUP, Devolution, p. 11).

552 For North West Frontier Province: the NWFP Local Government Election Ordinance 2000 (on direction of the Chief Executive), The NWFP Local Government Election Rules 2000, the LGO and the Pakistan Penal Code.

elections shall be based on adult franchise (s. 10) and that a person shall be entitled to be enrolled as a voter if he (a) is a citizen of Pakistan, (b) is not less than eighteen years old and (c) fulfils other such conditions that the chief election commissioner (who is appointed by the chief executive of Pakistan) may specify (see s. 18(2)). Point 'c' obviously provides for a large potential for the chief election commissioner (and, of course, the chief executive) to influence the outcome of elections.[553] Seemingly, *the right to contest for elections* can be quite easily restricted, as s. 14 contains a long list of requirements for a person to qualify to be elected and some of them are not very clear, and are therefore prone to misuse for political ends. Again, the decision-making authority for enrolment and even for removal of elected local government officials lies with the chief election commissioner.[554]

While the respective laws at least elaborate an albeit minimalist right to vote and provide for mechanisms aiming at ensuring that elections be equal, free and secret (see, for example, ss. 165 et seqq. LGO), they fail to *provide effective mechanisms and remedies for compliance with the law.*

- Several practices are *punishable* as 'electoral offences' under the respective election laws and the LGO as well as the Local Government Election Ordinance even provide for a special summary procedure with regard to most of them (see s. 178 LGO, s. 35 NWFP Local Government Election Ordinance). However, no provision is made as to under which conditions and by whom *an election can be declared null and void*. This case is regulated only under the NWFP Local Government Election Rules 2000 (chapter X: Election Disputes). Section 71 declares that 'No election shall be called in to question except by an election petition made by a candidate for that election'. The provision thus excludes the

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553 ICG claims that the military indeed manipulated the outcome of the first local government elections, see INTERNATIONAL CRISIS GROUP, Devolution, p. 11.

554 The chief election commissioner, according to s. 15 of the NWFP Local Government Election Rules 2000, has the right to disqualify any candidate and moreover to remove even elected members of local governments (!) if they are found by him to have contravened to the provisions stated in s. 14.

'normal' voters (as well as those who were refused to be included in the voter list) and the state as possible 'watchdogs', i.e. as petitioners in an election dispute. The election petition, according to s. 71(2) of the Election Rules, shall be presented to a tribunal appointed by the chief election commissioner (opening up once more a possibility for him to influence the dispute) and a fee of one thousand rupees has to be paid for the petition (making it difficult for poor people to file a petition). Once these hurdles are overcome, the tribunal can declare an election as a whole to be void if it is satisfied that the result of the election has been materially affected by reason of (a) the failure of any person to comply with the provisions of the Ordinance or the Election Rules; or (b) the prevalence of extensive corrupt or illegal practice at the election.[555]

- It is also not clear as to how these provisions regarding election disputes (chapter X of the mentioned Election Rules) relate to the constitutional provisions regarding the jurisdiction of the High Court. Under s. 199 of the Constitution, a High Court may 'make an order:

> (a) on the application of any aggrieved party,
>
> i. directing a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of the Federation, a Province or a local authority, to refrain from doing anything he is not permitted by law to do, or to do anything he is required by law to do, or
>
> ii. declaring that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a Province or a local authority has been done or taken without lawful authority and is of no legal effect,
>
> (b) [...]

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555 Note that lit. a and b are incoherent as every corrupt or illegal practice automatically results in non-compliance with the Election Ordinance and Rules (lit. a) and therefore it makes no sense to require 'extensive' corrupt or illegal practice in lit. b.

> (c) on the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II.
>
> [...]'

Overall, the election dispute resolution mechanisms are rather unclear and incoherent. This – together with the fact that the courts, even where legally mandated to act, are not reliable in Pakistan –[556] is hampering the functioning and the credibility of the system, as the documentation of the case of 'gross violation of women's electoral rights' within NWFP sadly shows that women have been forcibly deprived of their electoral rights in twenty-one union councils of the districts Swabi and Mardan, and in 34 union councils of the district of Dir.[557] In these districts,

> 'various agreements were signed sealing the fate of women voters and candidates, barring the women voters and contesting women candidates to participate in the Union Council Election. In addition, women of the said area were threatened with dire consequences that they shall be burnt alive if they step-out of their houses. Local Men were made to stand outside the houses of women voters and women candidates, chanting slogans and threatening the women inside, forcing them not to participate in the election process. The local police has stood hands down and has not restrained the crowd from the harassment of women.'[558]

Although these proceedings clearly violate several provisions of the Constitution[559] and diverse electoral laws,[560] and even though the state was fully informed about the situation in these districts,

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556 See, e.g., INTERNATIONAL CRISIS GROUP, Judicial Independence.

557 See the publication of AURAT PUBLICATION AND INFORMATION SERVICE FOUNDATION.

558 See the petition filed in Peshawar High Court, cited in AURAT PUBLICATION AND INFORMATION SERVICE FOUNDATION, p. 40 et seq.

559 See sections 4 (right to be treated in accordance with the law), 9 (liberty), 15 and 19 (freedom of movement, speech and expression), 25 (equality before the law, no

> 'the state remained a silent spectator to these blatant violations of women's electoral rights. A few concerned individuals within government, upon request by civil society, did write to Election Commission urging that the elections in the concerned union councils be declared null and void, but it is apparent that no decision to this effect was taken at the highest levels of government. According to media reports, the NWFP Governor merely 'expressed his sorrow' over what had transpired, while the Federal Government made a mild request to the NWFP government to 'talk to the concerned people in Dir to dissuade them from doing an illegal act'! [...]
>
> The attitude of the Election Commission of Pakistan (ECP) has been equally, if not more, reprehensible. Despite numerous reports in the press and repeated requests by civil society, CCWR personnel and federal ministers, it has maintained a deafening silence on the issue and determinedly refrained from taking any action whatsoever. During this entire period, there has been only one written response from the ECP to a complaint from the CCWR, and that also almost two months after the complaint had been made and only because of the intervention of a federal minister! The terse note advises the writer to file a complaint in court under the Local Government Elections Ordinance, 2000, and the Pakistan Penal Code.
>
> In May 2001, two registered female voters of a Union Council in District Swabi, with the support of human rights activists and organisations, filed a constitutional writ petition in the Peshawar High Court and prayed for the elections in their area be declared null and void.' **561**

In May 2004, still no decision was taken with regarding this subject. This example highlights the importance of the existence of effective mechanisms for enforcing compliance with the enacted laws (legal accountability, see below, Chapters III.2.c and III.3).

An additional aspect must be mentioned with regard to the political accountability of the executive head, the nazim. The local election of the nazim is seen as a big step towards enhanced accountability.

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discrimination on the basis of sex alone), 34 (principle of policy, participation of women in all spheres of national life).

560 See, e.g. the NWFP Local Government Elections Ordinance, 2000, sections 22 (corrupt practice), 25 (undue influence), 27 (prohibition of canvassing), 28 (disorderly conduct near polling station), 29 (tampering with papers), 33 (breach of official duty), 34 (assistance by government servants).

561 AURAT PUBLICATION AND INFORMATION SERVICE FOUNDATION, p. 2.

However, such *elections are meaningful only insofar as the elected person disposes of effective steering capacity* regarding his staff (here: the local administration). The (indirectly) elected district nazim is responsible for the effective functioning of the district government (s. 18(1a) LGO), as well as for the improvement of governance and delivery of services in the ambit of the authority decentralised to the district (s. 16(3) LGO). As we have seen above, his information channels to the bureaucracy are quite restricted, at least in NWFP. His possibilities to sanction officers that are not working properly, however, are even more restricted:

- The DCO, as well as the EDOs (the latter at least in NWFP), form a part of federal and provincial cadres and are appointed by the provincial government (see s. 28(1) LGO) without consultation or right of refusal of the nazimeen (see s. 25 of the NWFP DRB, together with schedule IV). The same is true for the district police officer. For other officers on basic pay scale (BPS)-17 and above, the provincial government must at least consult the respective nazim (see schedule IV). Officers on BPS-16 and below are posted by the EDOs in consultation with the DCO (schedule IV).[562] It results that the nazim only has a say (i.e. must be consulted)[563] as far as officers on BPS-17 and above are concerned, the DCOs, EDOs and POs excluded. At the time that the field study was carried out, there were huge problems in NWFP because of the provincial government posting and transferring officers against written objections of the respective nazimeen as a means to jeopardise opposition nazimeen.
- A nazim can request the transfer of the DCO and EDOs and he can initiate the DCO's and EDO's performance evaluation (the so-called annual confidential reports, ACR). But the transfer only goes

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562 MANNING et al. point out that although the competence of the province to transfer staff is formally limited to senior staff, in fact it extends to the lowest levels of the district structures. 'By the threat of an unpleasant transfer, or the promise of an attractive one, the senior staff member can be pressured to arrange the transfer of a junior employee, below grade 16' (p. 38).

563 The term 'consultation' being interpreted as formality without legal effect by the provincial government.

through if the provincial government concurs (see s. 30 LGO), and the nazim's performance evaluation is only valid if countersigned by the chief secretary and chief minister of the provincial government (see s. 34(a) LGO).

The problem of the missing possibilities of the nazim to discipline the district administration and the overwhelming temptation for the province to use transfers as a covert policy instrument is widely recognised.[564] ADB et al. conclude that

> 'the result is confused and competing lines of control: For instance, while the DCO reports to the district nazim, he or she remains part of a federal employee cadre for whom promotions and transfers are determined by authorities outside of the district, undermining the reporting relationship to the district nazim.'[565]

And MOHAMMAD WASEEM[566] points out that

> '[w]hat has happened is that the power balance [between the bureaucracy and the political bodies, remark of the author] has not changed. The man who is now in-charge, the DCO, he is appointed, he is recruited, trained, appointed, answerable to, dismissed, if he is going to be dismissed by, retired by a central bureaucracy, the establishment division in Islamabad, Federal Public Service Commission in Islamabad. The man belongs to and enjoys the support of and draws on the legitimacy of the central, all-Pakistan basis bureaucracy, the most well established organisation in the civil sector, if you want to call it a political party, is the civilian bureaucracy and he is a worthy member of that particular bureaucratic hierarchy. The state is behind DCO. [...] On the other hand, you cut the arms and cut the legs of nazim, he is not supposed to be a member party in the locality and anywhere else, he is not institutionally connected with other organizations across the locality, nowhere. Here is the loner. He has to operate on his own. [...] He lacks organized support base. He even lacks the support of that particular district where he is a nazim [...] because they have not elected him. The indirect elections bring out this magic.'

The weak position of the nazim towards the administration undermines the whole system of accountability, as the chain of accountability can only be as strong as its weakest link.

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564 MANNING et al., p. 38; CHEEMA et al. p. 22; ADB et al., History, p. 55; PARACHA, p. 26.

565 ADB et al., History, p. 59.

566 See Friedrich Naumann Stiftung (ed.), p. 90 et seq.

In conclusion, the legal order provides for an only minimalist right to vote and falls short in protecting that right. In addition, it is questionable whether those that have been elected really do have effective steering capacity over the local administration.

Illustration 21: Political sanctioning of persons in Switzerland

Just like in Serbia and Pakistan, citizens in Switzerland have the opportunity to sanction the most important public officials by not re-electing them.

The Constitution of the canton of Bern in Art. 115(5) provides for mandatory elections of the municipal council and parliament. Article 23 of the Law on Municipalities (GG) requires that citizens elect at least the following officials: the chair of the municipal assembly, the members of the municipal council and (in parliamentary municipalities) the municipal parliament as well as (in assembly municipalities) the members of the auditing organs[567] (Art. 23 (1)(a) and (b) GG). Regarding arrangements for the electoral process (e.g. first-past-the-post system or proportional representation) the municipalities are at liberty to select as they see fit. However, they must obey the general, federal election principles (general, equal, direct, free and secret ballots).[568]

The entitlement to vote on municipal matters depends on the cantonal entitlement to vote. In order to prevent election and voting tourism, an additional three month minimum residency requirement within the municipality is in place (Art. 14 KV BE). The right to vote on cantonal matters is afforded to all Swiss citizens who reside in the canton of Bern and are of 18 years of age or more (Art. 55(1) KV BE).

Remarkable in comparison to the examples from Serbia and Pakistan is the considerable legal significance that Switzerland grants the

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567 In parliamentary municipalities the parliament elects the audit organ, provided the municipal Statute does not specify otherwise (Art. 23(2) GG).

568 POLEDNA, with further references.

protection of political rights (the term political rights should be taken to mean on the one hand the active and passive right to vote, but on the other hand also the instruments of direct democracy → Illustration 22): As far as political rights are provided for by cantonal or municipal laws, the constitutional *guarantee of political rights* (Art. 34 BV) applies: under Art. 34(2) BV, the guarantee of political rights protects the freedom of the citizen to form an opinion and to give a genuine expression of his or her will. According to established case law of the federal supreme court, every person entitled to vote has 'the right to demand that no election or voting result be accepted which does not reliably and accurately represent the free will of the electorate'.[569] This *leitmotif* has been substantiated further by the federal supreme court in various respects and a number of defence, participation and performance claims have been derived,[570] that on the whole should guarantee *unobstructed access to political rights*[571] and the *genuine expression of the political will.*[572]

Under this conceptualisation, the right to vote displays *a dualistic* legal *nature:*[573] it is, simultaneously, *a constitutional right of the individual*[574] and a *power* of the entire electorate *as an organ of the state* (*Organkompetenz*).[575]

The significance of political rights is also expressed especially in the arrangement of the legal remedies available for infringements of these

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569 Cf. instead of many BGE 124 I 55 E. 2a p. 57.

570 TSCHANNEN, Staatsrecht, p. 629.

571 This keyword encapsulates the right to the correct composition of the electorate, the protection of the right to vote, the protection of the signature collection for initiatives and referenda, the right to commence initiatives and referenda.

572 This keyword encapsulates the protection from interference by public authorities and private individuals, the right to demand compliance with the principle of unity of form and unity of matter, the right to due to process in elections and voting proceedings and the correct determination of the results (see TSCHANNEN, Staatsrecht, p. 629 et seq.)

573 TSCHANNEN, Staatsrecht, p. 596.

574 TSCHANNEN, Staatsrecht, p. 597.

575 Cf. e.g. BGE 119 Ia 167 E. 1d p. 171 et seq.

rights: under Art. 189(1)(f) BV the infringement of federal[576] and cantonal provisions on political rights can be brought before the federal supreme court by way of a voting complaint (*Stimmrechtsbeschwerde*). The federal supreme court examines compliance with cantonal law also below the constitutional rank in unrestricted scope of review.[577] In addition, as a result of the dualistic legal nature extended rules for standing apply: all persons entitled to vote may file a complaint, independent of whether they are themselves materially affected by the contested action; with their complaint they may also pursue purely public interests. In particular, also political parties as well as initiative and referendum committees, to the extent that they are active in the relevant municipality or canton, may file complaints. The voting complaint is therefore of considerable political significance. It protects 'not only the individual political rights of every citizen, but also the proper functioning of the democratic decision-making process.'[578]

It can be concluded that – in sharp contrast to Serbia and Pakistan – the legal framework in Switzerland accords special attention to the right to vote and provides for a comprehensive judicial protection of that right, reflecting its importance with regard to accountability.

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576 The fact that the violation of federal provisions can be claimed before the federal supreme court is new. Up to the judicial reform (*Justizreform,* which came into force on 1 January 2008) the voting complaint was limited to cantonal elections and voting; with regard to federal polls it was in part foreseen that legal disputes were to be determined by political (!) instances (see HALLER, St. Galler Kommentar BV, Art. 189 (Justizreform), para. 32, p. 1981.

577 Usually the federal supreme court in its examination of cantonal acts is restricted in its scope of review: while it is at liberty to determine if cantonal constitutional law was applied correctly, its scope of review for assessing the application of cantonal law of the statutory or ordinance level is restricted to questions of arbitrariness. These extended rules for standing too show the significance that is attached to political rights. For the federal supreme court to set aside a democratically determined decision, it is not sufficient, however, to come to a finding of a procedural error. Rather, the alleged irregularity must be substantial and influence on the result of the electoral or voting process must be a theoretical possibility (vgl. Häfelin/Haller/Keller, para. 1400). This shall ensure that votings or elections do not need to be unnecessarily repeated.

578 HÄFELIN/HALLER/KELLER, para. 1980.

b. Political sanctions against actions

Besides the possibilities to cancel or not renew a mandate of an office-holder (see above lit. a), principals may also provide to withdraw only a part of the delegated powers. This is the case, for example, where the legal order provides for a *facultative referendum*,[579] i.e. a formal procedure granting citizens the right to decide on a political question that would normally lie in the competence of a public body, often the legislative body, if a certain proportion of citizens ask for it. Such instruments – if properly designed – have at the foremost a preventive effect: politicians will automatically try to orient themselves towards the 'will of the majority' because their political image is under threat in case they lose a referendum.

Again, such sanctions are only effective where they are at the disposal of the principal and where the procedure is transparent. The facultative referendum plays an important role in Switzerland (→ Illustration 22). Serbia has also introduced the possibility of launching a local facultative referendum (Art. 68 LSG). For the instrument to be operational, however, the municipalities need to enact additional provisions.[580] Pakistan, finally, also provides for a possibility to cancel local governments' actions on rather political grounds, but this instrument is not solely in the hands of the principal(s) (this example is dealt with under the vertical dimension, → Illustration 25).

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579 Besides facultative referenda, the legal order sometimes provides for other instruments of direct democracy such as the initiative and the obligatory referendum. Only the facultative referendum has an accountability-effect as it offers the possibility to sanction a decision taken by a political body. The instrument of the initiative allows citizens to bring a political question onto the political agenda if politicians are being inactive (i.e. the competence on certain issues is shared from the very beginning), the instrument of the obligatory referendum reserves certain decisions always for citizens. These instruments do not alter the system of competencies such as a facultative referendum and are therefore not considered here as mechanisms of accountability.

580 Cf., on this, STRECKER, Referendum and Citizen's Initiative, in: SDC/MSP, Review of Statutes, p. 19 - 35; see also SWISS AGENCY FOR DEVELOPMENT COOPERATION, MUNICIPAL SUPPORT PROGRAMME (eds.), Referendum and Civil Initiative, Kraljevo/Serbia 2006 (containing a commented model decision for Serbian municipalities wanting to regulate issues of direct democracy).

Illustration 22: Political sanctioning of actions in Switzerland

A facultative referendum in the Swiss context is an instrument of direct democracy allowing citizens to sanction or reject, in a popular vote, a decision taken by an organ of the state if a certain percentage of citizens ask for this by signing a referendum list. By subjecting certain decisions to the possibility of a facultative referendum, the citizens entrust their representatives with certain competences, but reserve a right to withdraw them in case a certain proportion of citizens is not satisfied with the use of the competence in a specific case. Regarding the model developed in Part I, we can say that the delegation of powers (competences) is made under a resolutive condition. Rejection of a specific decision or act in a referendum can be seen as a sanction.

The facultative referendum is one of several traditional direct democratic elements of federal and cantonal constitutional law.[581] While the GG requires municipalities to provide for an obligatory referendum – besides other issues – on the municipal statute, they may freely decide whether they want to provide for the instrument of the facultative referendum or not (Art. 14(1) GG: 'The municipal statute designates the decisions of municipal organs that are subject to a facultative referendum'). In case a municipality does provide for such an instrument, the GG provides that five per cent of the citizens can launch it within a time-frame of 30 days. Municipalities may facilitate the referendum by providing for a percentage lower than five per cent and a longer time-frame, they can however not introduce more restrictive conditions.[582]

Apart from that, municipalities are free to adapt the instrument to their needs. Variations exist in particular with regard to the matters that are subject to the referendum: while the facultative referendum is almost always foreseen against certain municipal regulations, often additional actions (notably financial decisions, e.g. decisions regarding new

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581 Besides the initiative and the obligatory referendum.

582 FRIEDERICH, Gemeinderecht, p. 173 para. 94.

expenditures, the budget and the communal tax rate)[583] are subject to the facultative referendum. Furthermore, the municipal statute may provide a possibility to launch a referendum against acts of other than the legislative body (this possibility is notably foreseen for new expenditures decided by the executive body). It is also possible to stipulate a facultative referendum against negative decisions.[584]

In practice, the facultative referendum plays an important role (at all levels of government) and is seen as 'an integral participatory instrument'[585] of the electorate. It offers citizens the possibility to decide about important questions. And – crucially – it is the citizens who by signing the referendum list decide what the important questions are, and not the public bodies.[586]

The significance of the facultative referendum is to be seen not only with regard to retrospective control of important decisions, but – probably more importantly – with regard to its preventive effect: representatives, whilst rendering their decisions, will anticipate the danger of a referendum and therefore will not easily adopt a solution

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583 CLAUDIA MANNHART GOMES, *Das Verwaltungsreferendum in Bund und Kantonen*, Abhandlungen zum schweizerischen Recht, Heft 732, Bern 2007, p. 183.

584 In late 2007 the municipality of Wohlen adopted a referendum against the municipal assembly's decision not to adopt a municipal zoning plan for a skyscraper building project. As a consequence the electorate had to vote at the polls over this decision (FRIEDERICH, Gemeinderecht, p. 173 fn. 185).

585 'Nicht wegzudenkendes Mitwirkungsinstrument', FRIEDLI, Kommentar GG, Art. 14, para. 3.

586 Referenda that may be introduced by the body that has adopted the decision/act at stake ('plebiscites') also exist in Switzerland. They are however deemed to be rather problematic: firstly, plebiscites run contrary to 'the idea of the popular rights that grant citizens direct access to politics, without the need for any approval by a public authority' (TSCHANNEN, Stimmrecht, p. 19, para. 18, translation by the author), secondly, such instruments are prone to be misused for political manipulation since participation remains restricted to cases where the political body expects voters to approve its decision (see e.g. LINDER, Demokratie, p. 328 and MANNHART GOMES, p. 36) and finally, such instruments lead to a redelegation of accountability from the representatives to the citizens which is undesirable with a view to a clear order of competences/responsibilities.

that would clearly not be supported by the majority of the electorate.[587] The instrument is further seen as an institutionalised means of ensuring a constant dialogue between rulers and the ruled as postulated by the concept of responsive government.[588] Finally, the existence of 'strong mechanisms for participation' – i.e. of mechanisms granting citizens decision-making-power – helps render mechanisms of 'soft participation' – i.e. mechanisms granting citizens the right to make proposals or comments, but not to decide – more weight: with the referendum hanging over the public authority like a sword of Damocles, it is very likely that the electorate's mood expressed in opportunities of soft participation will be heeded.

c. Legal sanctions

Legal sanctions presuppose that principals have not delegated pure authority without specifying what they want and what they don't want, but that they have formulated rights and duties of both principals and agents in advance and that office-holders agree to stick to these terms. In the state, the *principle of legality of state actions (Legalitätsprinzip*) serves this purpose. According to this principle, executive rulers are allowed to act only on the basis of law ('Gesetzesvorbehalt') and they are bound by law ('Gesetzesvorrang').[589]

With the decentralised state being a complex structure where (rule-based) delegation occurs not only between one principal (the people) and one agent (the state), but also between different state levels and different state organs, it is of utmost importance to have a clear picture on the relation between different and maybe conflicting rules: this relation must reflect the chain of delegation in order to be sure that the main principal does not lose control over the whole 'building'. In order

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587 LINDER, Demokratie, p. 329. This author, however, refers on the other hand to the danger of a blurring of the overall responsibility.

588 MANNHART GOMES, p. 40 citing J.P. MÜLLER, *'Responsive Government': Verantwortung als Kommunikationsproblem*, in: ZSR 1995 I, p. 3.

589 Cf. on the principle of legality TSCHENTSCHER, AXEL. *Grundprinzipien des Rechts.* Einführung in die Rechtswissenschaft mit Beispielen aus dem schweizerischen Recht, Bern/Stuttgart/Wien 2003, p. 155 et seqq.

to solve this problem, legal scholarship parts from the idea of a *vertical and a horizontal hierarchy of norms*: vertically, norms of an upper state level prevail over norms of a lower state level (if the authority acted within its jurisdiction). Horizontally, all norms adopted by a legislative body ('laws') must be in line with the 'Grundnorm', i.e. the norms reflecting the basic relationship between citizens and the state ('the Constitution') and all executive rules ('ordinances') must adhere to the Constitution and the law etc.[590]

Finally, the existence of a system of rules reflecting the chain of delegation is only effective if an objective application of these rules is guaranteed. The state (often the state administration) being party to disputes arising around the question of the use of public power, the importance of an *independent agent controlling legality of state action* cannot be overestimated.

Typically, a legal order provides for different categories of legal *sanctions against persons*: penal sanctions in case of abuse of authority and related offences, disciplinary sanctions that might be applied against office-holders by their superiors in legally defined cases and pecuniary sanctions in case a public official causes (financial) damage.[591]

The fundamental importance of the principle of legality, however, is to be seen in the consequences it provides for *illegal actions* (i.e. actions that are not based on a valid legal norm): such actions are either challengeable in court or (in severe cases) even void in law. This is – provided that effective independent court protection exists – of course a strong mechanism to hold governments (and – in case a court has jurisdiction to judge also on the constitutionality of laws – even the representatives), accountable to the terms of their office.

According to FLINDERS,[592]

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590 Cf. on the idea of the hierarchy of norms, KELSEN, p. 228 et seqq.

591 Personal liability of office-holders is usually limited to cases of gross negligence of the office-holder.

592 FLINDER, p. 132 et seq.

> '[j]udicial mechanisms of accountability are vital and potentially powerful for a range of reasons: First, they provide a core *auxiliary precaution* to prevent the abuse of power and to ameliorate the accountability of ministers and officials. Second, judicial mechanisms, like judicial review, are non-parliamentary. In court, ministers are not protected by a party majority, their parliamentary privileges are absent and issues rarely become entwined in party political point scoring. Third, judicial mechanisms are powerful due to their wider ramifications. They possess the potential to elucidate wider notions of public accountability by empowering the public with formal rights and clarifying procedures. Finally, the courts have coercive powers that empower them with the capacity to deliver explanatory, informatory and amendatory accountability. The courts can compel any public body to perform certain duties, release information or refrain from acting in a certain way.'

MULGAN[593] also insists on the importance of legal accountability mechanisms:

> 'Judicial review through the legal system and the courts is in some respects the most powerful form of external review of executive action. [...] Indeed, an effective, independent judicial system is a fundamental prerequisite for effective executive accountability.'

Some even qualify the essence of legal accountability, namely that government is bound by law and that there are limits on law-making power, as 'universal human good':[594]

> 'When the rule of law is understood to mean that the government is limited by the law, […], Thompson is correct that it is a universal human good. The heritage of this idea, which first became firmly established in the Middle Ages, preexists liberalism; it is not inherently tied to liberal societies, or to liberal forms of government. Everyone is better off, no matter where they live and who they are, if government officials operate within a legal framework in both senses described, in the sense of abiding by the law as written, and in the sense that there are limits on law-making power.'

Given this great importance attributed to legal accountability in literature, it is interesting to see that both Pakistan (→ Illustration 23)

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593 MULGAN, p. 76.

594 TAMAHANA, p. 137

and Serbia[595] are not attributing much importance to this topic, and in Switzerland only recent reforms have contributed to a coherent system of legal accountability (→ Illustration 24).

Illustration 23: Legal sanctioning of actions in Pakistan

The Constitution of Pakistan guarantees its citizens the right to be treated in accordance with the law (s. 4(1): 'To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan'). This section is stated sometimes to be the equivalent of the principle of the rule of law.[596] Furthermore the

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595 In 2005, the court system in Serbia was under reform. The Law on the Organization of Courts, which was adopted in 2001 (Official Gazette of the Republic of Serbia No. 63/01 of 8 November 2001), inter alia, provided for the creation of a specialised administrative court. Implementation of that Law was originally scheduled for 2002 but was postponed first until 2004 and then until 2007 (see ABA/CEELI, p. 17). In 2008, the administrative court was still not in place (see SIGMA, *Serbia - General Administrative Law Framework Assessment May 2008*, accessible at: http://www.sigmaweb.org/dataoecd/48/58/41637760.pdf (accessed 7 September 2009), p. 10). In the meantime, first instance jurisdiction over administrative disputes (including administrative decisions of municipal governments) is exercised by district courts which are not specialised in administrative law (SIGMA, a.a.O., p. 10; ABA/CEELI, p. 17). ABA/CEELI note that 'the regular implementation of these decisions remains a challenge. The government is reportedly prone to delay or obstruct the decision of the court in these types of instances' (*ibid.*). The just cited SIGMA assessment paper summarises the state of judicial review as of 2008 with the following words: 'The current arrangements for judicial review of administrative decisions have many flaws: a too narrow concept of reviewable administrative acts; no full redress because courts have no independence in establishing the facts; the absence of an obligation to hold oral hearings on *ex ante* requests; the absence of an obligation to publicise the decision; etc. These flaws and some others render judicial review inadequate and severely weaken administrative accountability. [...] The system remains weak and cannot guarantee full and adequate protection of citizens' rights and legitimate interests from unlawful actions and decisions of state authorities and other public bodies; it therefore jeopardises the rule of law and legal certainty in administrative decision-making.' (p. 11).

596 See FAQIR HUSSAIN, *Public Interest Litigation in Pakistan*, in: YASIN/BANURI (eds.), p. 64.

Constitution creates somewhat of a hierarchy between the fundamental rights (chapter 1 of part 2 of the Constitution) and other law in that it states that any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by chapter 1 of part 2 of the Constitution shall, to the extent of such inconsistency, be void. There are, however, numerous exceptions to this rule (see s. 8(3) of the Constitution). It cannot really be said, however, that there is a hierarchy between the federal laws (i.e. acts of the federal parliament) and ordinances of the executive, since a state of emergency allows the chief executive not only to override laws, but even to amend the Constitution. We can therefore say that – at the time the field study was carried out – there was no hierarchy of norms in place that would have allowed the ultimate principal, the people, to keep control.

The Constitution then creates a hierarchy between federal and provincial norms in stating, in s. 142:

> 'If any provision of an Act of a Provincial Assembly is repugnant to any provision of an Act of Parliament which Parliament is competent to enact, or to any provision of any existing law with respect to any of the matters enumerated in the Concurrent Legislative List, then the Act of Parliament, whether passed before or after the Act of the Provincial Assembly, or, as the case may be, the existing law, shall prevail and the Act of the Provincial Assembly shall, to the extent of the repugnant, be void.'

Furthermore, the Constitution states that the executive authority of every province shall be so exercised as to secure compliance with federal laws which apply in that province (s. 148 of the Constitution). It is not explicitly stated in the Constitution to what extent the executive authorities are obliged to adhere to the provincial laws (s. 129 of the Constitution only states that the executive authority of the province 'shall vest in the Governor and shall be exercised by him, either directly or through officers subordinate to him, in accordance with the Constitution'). Accordingly, in NWFP, the LGO and the respective rules have been enacted by the governor of NWFP without being laid before the provincial assembly. Section 3 of the LGO states that the provisions of the LGO 'shall have effect notwithstanding anything contained in any other law for the time being in force'.

Hence, with regard to the federal and provincial level, it seems that there exists a hierarchy between the laws of the two levels, but otherwise there is no hierarchy of norms within each level of government which would reflect the chain of delegation between the people and the state bodies, i.e. a hierarchy that would clearly give acts of the legislative body primacy over acts of the executive body.

Regarding the relation between provincial and *local government's laws*, the LGO clearly states that the local governments shall function within the provincial framework and adhere to the federal and provincial laws. As for the other provincial and federal levels of government, however, the LGO does not state clearly that the nazimeen and (maybe more importantly) the local administration are bound by the decisions and/or bye-laws or resolutions or any other acts enacted by the local government's councils. In practice, it is often reported that nazimeen and the local administration do not pay much attention to these acts.

Even if the above mentioned principles of legality and of the hierarchy of norms existed perfectly on paper, it would not change much, as there would still be no independent bodies to check the conformity of government actions with agreed standards (i.e. with the terms agreed on in the different 'basic relationships').

According to s. 199 of the Constitution, high courts may, if satisfied that no other adequate remedy is provided by law,

> (a) on the application of any aggrieved party, make an order–
>
> > (i) directing a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of the Federation, a Province or a local authority, to refrain from doing anything he is not permitted by law to do, or to do anything he is required by law to do; or
> >
> > (ii) declaring that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a Province or a local authority has been done or taken without lawful authority and is of no legal effect; or
>
> (b) on the application of any person, make an order –
>
> > (i) ...

> (ii) requiring a person within the territorial jurisdiction of the Court holding or purporting to hold a public office to show under what authority of law he claims to hold that office; or
>
> (c) on the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II of the Constitution.

According to s. 201 of the Constitution a decision of a high court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding for all courts subordinate to it.

The supreme court can decide on the same cases as high courts with the restriction that only cases of public importance are heard (see s. 184(3) of the Constitution).

Hence in principle, i.e. on paper, a system for legal review of government action exists. The LGO does however not mention the relation between the LGO and the formal court system. It institutes an informal dispute resolution mechanism, the mushalihati jargas (or: mushalihati anjuman), for amicable settlement of disputes which however are competent only for the resolution of disputes between individuals, whether of civil or criminal nature. Disputes between citizens and the state do not fall within their jurisdiction (see s. 103, Explanation).

In addition, it is notorious that the courts in Pakistan are not playing their role. ZIA/AHMED/MIRZA[597] describe the situation in the following words:

> 'The independence of the judiciary and the ineffective functioning of the judicial system have also been key areas of concern. The establishment of a parallel judicial system through the creation of the Federal Shariat Court (FSC), as well as the tendency of every government to set up special courts and tribunals, has affected the independence of the judiciary. With some exceptions, the judiciary has been seen as supportive of the executive/bureaucratic and military interventions in the democratic system. The lack of efforts to strengthen the main

597 ZIA/AHMED/MIRZA, p. 12.

> judicial system have also resulted in its inability to provide effective access or justice to large sections of the population. A recent policy paper submitted to the government found that the legal system and rule of law in Pakistan were in a state of extraordinary disrepair and the list of shortcomings formidable. These included, for example, deep and widespread delay in cases; among the lowest rations of judges to the population in the world; a very high proportion of frivolous litigation; overcrowded, chaotic and poorly maintained judicial facilities; high costs of litigation; incompetent legal support, maladministration, and outright illegality in the courts.'

Many cases (mostly of nazimeen complaining that the province is interfering in their business) have in fact been pending before the Peshawar high court in 2004, but, according to an advocate in Peshawar, nobody can tell how long it will take until decisions will be issued.[598] The passivity of the state (and the courts) with regard to the various gross violation of women's electoral rights that has been presented above (→ Illustration 20) shows that legal accountability has not yet developed, at least not in a manner that gives equal protection to all citizens or actors. NRB initially planned to reform the judiciary at the local level within its devolution plan 2000 but then postponed these reforms in order to coordinate them with an over-all reform of the judiciary in Pakistan.[599] Such a reform is urgently needed.

Illustration 24: Legal sanctioning of actions in Switzerland

According to Art. 5(1) of the Federal Constitution 'the state's activities shall be based on and limited by the rule of law'. This provision institutes the *principle of legality of state action*: the state may only act on the basis and within the limits of the law. More specifically, the principle requires a legal basis of general-abstract character which has been adopted within legally correct procedures, which disposes of sufficient democratic legitimisation (important norms must be enacted

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598 Interview with QAZI ANWAR, Advocate, held in Peshawar, June 2004.

599 See GOVERNMENT OF THE ISLAMIC REPUBLIC OF PAKISTAN, Local Government Plan 2000, p. 8.

by the legislative body[600] whilst less important norms may be adopted by an executive body) and which is of adequate clarity.[601] The fact that all rights and duties of the state and the citizens, but also the internal organisation of the state are granted by virtue of the Constitution and the laws is seen as the distinctive attribute of a state governed by the rule of law as opposed to an authoritarian state that faces its citizens as subjects and in which the rulers may act without any legal basis or even consciously against the law as they think best.[602]

To avoid conflicts between norms, the Federal Constitution parts from a *hierarchy of norms* which reflects – in a vertical sense – the composition of the Swiss state and – in a horizontal sense – the chain of democratic legitimisation: federal law takes precedence over contravening cantonal law (Art. 49(1) BV) and the latter over municipal regulations, while within each state level, constitutional provisions (the Federal Constitution, cantonal constitutions, municipal statutes) take precedence over laws adopted by the legislative body (federal laws, cantonal laws, municipal regulations) and the latter over (federal, cantonal and municipal) ordinances adopted by the respective executive bodies.[603]

For the principle to be effective there is a need to provide for its legal enforcement. For this purpose, on the one hand, (in larger municipalities) permanent parliamentary commissions exist that are concerned with legal supervision, but alongside this the legal supervision through the cantonal administration also performs an important function (→ Illustration 26). The ‘best and most zealous

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600 See Art. 164(1) of the Federal Constitution regarding the federal level. This requirement is also applicable to the cantonal (FEUZ, p. 200) and the municipal level, with a few, sometimes important, exceptions. For example, a regulation adopted by a municipal executive but subject to a facultative referendum is put on an equal level as a regulation adopted by a legislative body, even if no referendum has taken place (WICHTERMAN, Kommentar GG, introduction to Arts. 50- 60, para. 14, with reference to BGE 120 Ia 266).

601 See TSCHANNEN, Staatsrecht, p. 550; TSCHANNEN/ZIMMERLI, p. 120.

602 TSCHANNEN, Staatsrecht, p. 87, para. 21.

603 HANGARTNER, St. Galler Kommentar BV, Art. 5, para. 25.

guardians [of the principle of legality]'[604] are, however, the individuals who defend each of their interests with legal means. For this reason, the Federal Constitution recently laid down a *guarantee of access to courts* (Art. 29a BV). According to this article, 'in a legal dispute, everyone has the right to have their case determined by a judicial authority. The Confederation and the Cantons may by law preclude the determination by the courts of certain exceptional categories of case.'

According to KLEY, this guarantee 'opens the path to justice for all disputes that fall under the guarantee':[605] it contains the right to have the legal issues associated with the dispute and the facts that underscore this dispute, to be examined comprehensively by an independent court. In particular, it subjects actions of the public administration to independent judicial control.[606]

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604 See HANGARTNER, St. Galler Kommentar BV, Art. 5, para. 13.

605 KLEY, St. Galler Kommentar BV, Art. 29a (Justizreform), para. 3 (translation by the author).

606 KLEY, St. Galler Kommentar BV, Art. 29a (Justizreform), para. 5, with reference to BGE 130 I 327 E. 4.2. However, to be functional, the guarantee needs to be complemented by the guarantees provided for in Arts. 29 and 30 of the Federal Constitution. Art. 29 provides for general procedural guarantees: 'Every person has the right in legal or administrative proceedings to have the case treated equally and fairly, and judged within a reasonable time' (para. 1). 'The parties have the right to be heard' (para. 2). 'Every person lacking the necessary means has the right to free legal assistance, unless the case appears to be without any chance of success. The person has moreover the right to free legal representation, to the extent hat this is necessary to protect the person's rights' (para. 3). From para. 1 in particular the following is deduced: The prohibition of the formal denial of justice, the prohibition of delays in legal proceedings, the prohibition of exaggerated formalism, the prohibition of unlawful restrictions of examination rights (cognition), the right to a correct composition of deciding bodies, and the right to appeal (GEROLD STEINMANN, St. Galler Kommentar BV, Art. 29). Art. 30, under the heading 'judicial proceedings', reads as follows: 'Every person whose case must be judged in judicial proceedings has the right to have this done by a court that is established by law, has jurisdiction, and is independent and impartial. Exceptional tribunals are prohibited.' (para. 1). 'A person against whom a civil action is brought has the right to have the case heard before the court at the person's domicile. Legislation may provide for another jurisdiction' (para. 2). 'The court hearing shall be public, and the judgement shall be publicly proclaimed. Legislation may provide for exceptions.' (para. 3). Under the federal supreme

The provision has considerable influence on cantonal procedural law, which until recently had still excluded considerable parts of the public administration from legal review by administrative courts. The canton of Bern for example, had to adapt its Law on Administrative Procedure to the new conditions set out in Art. 29a of the Federal Constitution.[607]

Despite its fundamental importance however, the principle of legality is not conceived as a constitutional individual right, but as a general legal principle of conduct by the state (*allgemeiner Grundsatz staatlichen Handelns*). As such, it is applicable to all state levels,[608] but its violation can only be subject to verification by the federal supreme court if – at the same time – a violation of an individual constitutional right is at stake.[609]

In conclusion, at cantonal level, a few exceptions aside (disputes of a political nature), the most recent changes in the law (due to the federal guarantee of access to courts) have brought about an effective regime of legal protection against actions of the public administration. For this reason the problem, that the federal supreme court considers breaches

court's case law 'the fundamental principle of publicity is a rejection of all kinds of secret justice (*Kabinettsjustiz*); the publicity serves the purposes of a correct, legal and fair court proceeding, of illustrating and controlling the operation of the judiciary and the finding of justice and, finally, of the administration of justice as a foundation of a democratic state based on the rule of law' (GEROLD STEINMANN, St. Galler Kommentar BV, Art. 30, para. 28, translation by the author). The objective scope of application of para. 3 is, however, disputed (STEINMANN, op. cit., para. 34).

607 See MÜLLER, MARKUS. FELLER, RETO. *Bernische Verwaltungsrechtspflege*, Bern 2008, p. 3. The revised Law on Administrative Procedure has entered into force on 1 January 2009.

608 Municipal regulations are considered as law in terms of Art. 5 of the Federal Constitution (BGE 133 I 77 E. 3.1, p. 80).

609 TSCHANNEN/ZIMMERLI, p. 131, para. 31. A violation of the principle of legality can be asserted in connection with a violation of a civil right or liberty, as well as in connection with a complaint over the division of powers or in certain areas of concession law (*Abgaberecht*); severe violations can be brought before the federal supreme court under a complaint of arbitrariness (see with full details BGE 127 I 60 E. 3a p. 67). However, compliance with the principle is examined comprehensively in cantonal judicial review procedures.

in the principle of legality only in connection with other breaches of fundamental rights, takes a back seat.

d. Conclusion

To guarantee accountability *legal as well as political sanction possibilities are required.* Political sanctions are necessary in order to provide the system with legitimacy and ultimately to connect the state at least periodically – with instruments of direct democracy moreover continuously – back to the people. The existence of effective legal sanctions is a basic requirement not only for the exercise of political sanctions, whose effectiveness depends decisively on the arrangement of and compliance with legal duties (for example regarding the electoral process) and in more general terms for transparency and predictability of state dealings, but ultimately for the functioning of a system based on the division of powers. If a power-separated organisation, in breach of the rules of the game is consistently undermined, the system will collapse like a house of cards. LAUTH therefore denotes the category of judicial sanctions, as the 'indispensible core of the division of powers',**610** and as such as the central requirement for a system promising accountability.

The illustrations have shown that in fact in all three countries political sanctions – at least in the form of periodic elections – are provided for. Yet the electoral systems in Pakistan (rather opaque) and in Serbia (under large influence of the party) do not prove to be beyond reproach. Above all, the respective legal systems do not offer, even to some extent, a sufficient degree of protection of the fundamentally important right to vote, while this protection is very far-reaching in Switzerland.

The situation regarding legal sanctions is even worse. While Switzerland has a well-developed (but still not perfect) system of legal protection, neither in Pakistan nor in Serbia can it be assumed that violations against the legal order, and with this also an unlawful handling of the 'accountability mechanisms', which were recently introduced, have any predictable consequences. A justice reform would,

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610 'Unverzichtbarer Kern der Gewaltenteilung', LAUTH, p. 69.

in both countries, be conditio sine qua non for the further development of a state based on 'good governance principles', which promises its citizens accountability. In the words of Serbia's president, BORIS TADIC: '[...] without legal order and awareness on significance of the rule of law there is no possibility for further democratization of the society in Serbia which is why a resolute reform of judiciary must take place'.[611]

3. Vertical dimension

In the vertical dimension, the same categories of sanctions are, in principle, conceivable as in the horizontal relations. This means that, here too, we can distinguish between legal and political sanctions, each directed either against a person or an act. In this way the superior level can be empowered,

- due to political reasons, to dismiss a local official (or any local authority) (*political sanction against a person*, → Illustration 25);
- due to political reasons, to annul a local action (e.g. the decision of an authority or a local general-abstract act) (*political sanction against an action*, → Illustration 25);
- due to legal reasons, to remove a local official (*legal sanction against a person*, → Illustration 26);
- due to legal reasons, to annul a local act, under the scope of internal legal control or external judicial control by independent courts of (also) the central state (→ Illustration 26).

As, in a (politically) decentralised state, political control is effected from the bottom-up, sanctions by the higher tiers of state should generally be limited to 'legal accountability'. Only in exceptional cases, namely if a public authority functions simultaneously as an extended arm of the superior level (agency lending), are political sanctions compatible with the idea of local accountability. But here too, such

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611 Reported by the Ekonomist Media Group on 30 October 2008, see: www.ekonomist.co.yu/en/news/serbia/67479.html (accessed 3 September 2009).

sanctions should only be possible against specific decisions, and not (or, at any rate, only in cases of objectively ascertainable serious lapses) against persons, at least to the extent that the persons to be sanctioned have received their 'mandate' from the local electorate.

Finally, it must be pointed out that accountability on identical issues cannot run in two diverging directions: therefore only one level should command the authority to sanction (in the sense of a final decision) for a particular situation.

In the remaining illustrations considerable differences with regard to the arrangement of vertical sanctions in Pakistan (→ Illustration 25) and Switzerland (→ Illustration 26) will appear.

Illustration 25: Political sanctioning of local governments (persons and actions) in Pakistan

Interestingly, the LGO – while it is its aim to pass the political control over to the local citizenry – leaves the province (and more generally the upper tiers) different means to hold local governments (lower tiers) *politically* accountable. At the same time, as we have seen above (→ Illustration 23), *legal* accountability of local governments is very limited. In the following, some of the political mechanisms shall be shortly analysed:

External Recall of the District Nazim. According to s. 23 LGO, the chief executive of the province together with the majority of the provincial assembly, can recall a zila nazim, if in the opinion of the chief executive, the continuance in office of the respective zila nazim is against the public policy or interest of the people or he is guilty of misconduct.

The grounds on which recalls are possible raise several questions: First, what exactly is public policy? And what exactly is the interest of the people? And: are they not supposed to be the same, in other words: should public policy not be in the interest of the people? If yes: why the use of the word 'or'? Second, what exactly is misconduct? Obviously, these grounds are very vague and therefore not appropriate for keeping

the recall business at an objective level. From a legal perspective, it does not make much sense to state reasons for recall that are impossible to verify:

- If one wants to restrict recall procedures to certain situations only, then the reasons must be stated much clearer and there must be a body[612] to check objectively whether the grounds are given or not. This would move the recall procedure towards a two-stage procedure where in the first stage it is established whether the grounds for recall are given (*legal accountability*) and – supposed the grounds are given – in a second stage there is a vote on the political question whether the incumbent shall stay in office or not (*political accountability*).
- If the recall procedure, however, is conceived as a 'pure' mechanism for *political accountability*, then there are good reasons for not restricting it to any specific grounds. Similar to elections, recall procedures as a political instrument do not need to be based on 'objective facts'. A union councillor may (or may not) elect a nazim because he does (or does not) like him personally or because he (dis)agrees with him on political issues. So why should the same union councillor not be able to recall the elected nazim without any specific ground? In this case, however, the body mandated to recall should be the same as the electoral college. If we mandate an architect to build our house we are not very pleased if a third person dismisses our architect (without our approval or even against our will). Those that have mandated an agent should be the ones that are in a position to cancel their confidence. This is clearly not the case here as the district nazim is elected by the union councillors but can be removed of office on political grounds by the bodies of the province.

This instrument therefore creates a dual accountability of the zila nazim, thereby undermining the political accountability of the zila nazim to his electorate. Why is it that a political body that is completely

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612 This body must be different from the body judging on the question of recall or not, otherwise, the accusing and the judging body are the same.

different from the electoral college of the nazim is entitled to remove the same of his office? Why is this decision not to be taken in the final instance by the electorate? By what legitimacy do the provincial political bodies act?

Another example is the possibility of *setting aside an order*. According to s. 25(1) LGO, the local government commission may, on its own accord or on receipt of information or on an application, take notice of an order or decision of general application passed by a zila nazim and recommend to the chief executive of the province for its annulment, if in the opinion of the commission such order or decision of the zila nazim is against the public policy or interest of the people.

This instrument – again admitted under extremely vague conditions – creates a possibility for upper tiers to politically control not only persons (the nazimeen) acting within lower tiers, but also their specific actions (though at least two bodies must act in accordance, making it more difficult to set aside orders). While it would make sense to establish an independent body responsible for controlling the *legality* of lower government tiers' actions, this instrument, giving (mainly) political bodies powers to quash decisions on rather political grounds ('against the public policy or interest of the people') runs completely contrary to the idea of passing political control over to the local citizenry.

In addition, the chief executive and the minister of the province both have a final say in disputes that may arise between different local governments, between a local government and the province as well as between local governments and the citizens. The chief executive of the province, e.g., intervenes as 'final instance' in procedures before the local government commission, if the local government commission fails to settle a dispute (see s. 132(d) LGO).[613] Seemingly, for the procedure before the zila mohtasib (i.e. the local ombudsman),[614] the

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613 For more information on the local government commission see above, p. 205.

614 Section 134 LGO states that in every district there may be a zila mohtasib (district ombudsman). This specific 'accountability'-institution has the mandate to undertake investigations into any allegation of maladministration on the part of any

minister of local government, in his function as chairman of the local government commission (s. 131(a) LGO), is empowered to take the final decision. The powers of the chief executive and the minister of local government to take the final decisions reverses, to a large extent, the achievement of having quasi-independent bodies such as a local government commission and an ombudsman. Bearing in mind that most of the conflicts that are brought before the local government commission (at least in NWFP) arise between local governments and the provincial government, the chief executive of the province, since being party in these conflicts, may not be the optimal person to decide on those matters. Again, except with regard to 'maladministration issues', which are at least defined in s. 2(xvii) LGO (whenever certain standards, such as, e.g., 'inefficiency', 'incompetence', 'ineptitude', 'unjustice' are hardly measurable objectively), no clear standards have been defined on which the minister of local government or the chief executive of the province, as the case may be, should judge the matters lying before them. In the absence of such standards, the decisions of the

office or local government or any of its officers or employees (see 3rd Schedule, s. 4(1) LGO). The mohtasib can act on a complaint by any aggrieved person or on his own motion. In addition, on a complaint of an official employed at any level of local government, he can undertake investigations into allegations of an unlawful or motivated order passed by a nazim, naib nazim or any superior or supervisory officer (subsection 2 of the same provision). The mohtasib shall moreover present an annual report to the zila and tehsil councils respectively, stating the objectives achieved during a year including the relief provided to the complainants having grievance against maladministration (s. 16 (1)). These reports shall be released for publication and copies thereof shall be provided to the public at reasonable price (2). Finally, the mohtasib may, from time to time, make public any of his studies, research, conclusions, recommendations, ideas or suggestions in respect of any matters being dealt with by the office. The zila mohtasib is 'selected' by a selection committee comprising (a) a judge of the high court nominated by the chief justice of the high court, (b) a member of the public service commission and (c) any other person nominated by the provincial government. Formally, the zila mohtasib then is 'appointed' by the zila council, although the zila council has no means to influence the selection process. He shall also take oath before the zila council (3rd schedule, s. 1). The selection process brings some degree of independence (although the influence of the provincial government is significant), which is coupled with limited immunity of the mohtasib (see 3rd schedule, s. 18 LGO). According to ADB et. al., History, p. 73, in 2004 no province had appointed yet a zila mohtasib.

chief executive and the minister will inevitably be politics-driven, giving the province one more instrument of political control of diverse actions of local governments.

Finally, according to s. 197 LGO, the provincial government 'may provide for the *removal of any difficulty* which may arise in giving effect to the provisions of the [Local Government] ordinance'.

In the absence of clear standards for reviewing local government actions and for recalling nazimeen, the chief executive of the province (i.e. the governor who in turn is appointed by the president of the federation) and the minister (who is hierarchically subordinate to the chief executive) have virtually unlimited powers to hold local governments (including political representatives of the local citizenry) politically accountable.

Illustration 26: Legal sanctioning of local governments (persons and actions) in Switzerland

As has already been mentioned above (→ Illustration 17), Bernese municipalities are subject to cantonal supervision (Art. 85 GG). Which instruments are now at the canton's disposal for instances of irregularities within municipalities?

First of all, the *principle of subsidiarity* applies. According to Art. 86 GG, if irregularities are found in a municipality, the competent municipal organ investigates the matter and takes the necessary measures (Art. 86(1) GG)). Municipalities may conduct official inquiries (*amtliche Untersuchungen*) for this purpose.[615] The local self-responsibility that comes to bear in this article (as a legal duty)[616] is the

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[615] These are carried out under a formal procedure (Law on Administrative Procedure; VRPG).

[616] If the responsible municipal organs fail to perform their internal supervisory duties or if they fail to provide for an organisation that is conducive to detecting irregularities, they are in breach of their public duties. This may lead to the respective legal consequences for the persons responsible.(WICHTERMANN, Kommentar GG, Art. 86, para. 2).

logical counterpart to the right of local self-government. The canton may only intervene if the municipality itself fails to meet its supervisory duties or is unable to do so.[617]

The cantonal supervisory authorities[618] dispose of several *sanctioning instruments*, besides the denial of approvals and other authorisations (where such approvals or authorisations are provided for → Illustration 17). However, these sanctions may only be applied if an investigation by the supervising body has been conducted and the municipality has had the opportunity, within a formalised procedure, to respond to the reproaches.[619] Under Art. 89 GG the supervising organs have, in particular, the right to

- order the rectification of unlawful circumstances (Art. 89(1)(b)): the supervisory body may for instance ask the municipality to implement organisational changes, hold by-elections, carry out execution tasks properly, purchase items where there is a legal obligation to do so, etc.[620] The orders are binding for the municipality;
- revoke unlawful decisions (Art. 89(1)(c)): If a municipalities' decisions or orders are not contested subsequent to their release, they will generally become final and legally binding. The supervisory authority may, however, as far as it is indispensable for restoring order,[621] intervene at a later stage;
- issue indispensible orders instead of late municipal organs (Art. 89 (1)(d) GG): if an inquiry reveals that municipal organs are unwilling

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617 WICHTERMANN, Kommentar GG, Art. 86, para. 1, with references.

618 The supervisory duty generally lies with the government prefect (*Regierungs-statthalter*), except in cases where special legislation assigns the supervisory function in certain areas to a different cantonal body (e.g. the educational directorate for the school sector, the cantonal department for water and waste for sewerage, etc.).

619 WICHTERMANN, Kommentar GG, Art. 89, para. 5.

620 WICHTERMANN, Kommentar GG, Art. 89, para. 9.

621 This is only to be assumed under the requirements, which would also apply for a resumption of proceedings (WICHTERMANN, Kommentar GG, Art. 89, para. 10).

> to pass indispensible orders themselves, the supervisory authority may act on its own accord. It can take all necessary actions that are indispensible to rectifying the irregularities and do not fall within the jurisdiction of the *Regierungsrat.*

If it emerges, during the course of a supervisory inquiry, that the instruments available to the supervisory authority are insufficient in order to meet the objectives of the supervision, then there is a possibility of applying for further measures from the *Regierungsrat* as the highest ranking cantonal supervisory body. The GG (Art. 90) specifically refers to the annulment of unlawful regulations (Art. 90(a)), the appointment of a special administration, to the extent that a proper administration cannot be guaranteed in any other way (Art. 90(b)), and reserves the right for further measures (Art. 90(c)). If the GG names the *Regierungsrat* as responsible for these drastic measures, it does not mean that this relates to purely political decisions. These measures, too, must serve the objective of restoring orderly conditions, and must be geared towards the legal framework; the legislature however wanted the *Regierungsrat*, i.e. the cantonal executive organ and not a mere office of the cantonal administration, to stand face to face with the municipalities in such radical acts.[622]

In the exercise of their supervisory duties all supervisory organs must consistently gear their activities towards the principle of municipalities' self-responsibility and the principle of subsidiarity of the cantonal intervention. Cantonal intervention is only lawful to the extent that it is indispensible to restoring order. Every cantonal intervention must take the form of an order (*Verfügung)*[623] against which an administrative appeal to the *Regierungsrat* is possible (Art. 91a GG). The *Regierungsrat's* decisions can be made subject of an appeal to the cantonal administrative court, with the exception of supervisory measures that are 'primarily political in character'[624] (Art. 77(e)

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[622] WICHTERMANN, Kommentar GG, Art. 90, para. 1.

[623] WICHTERMANN, Kommentar GG, Art. 89, para. 6.

[624] What exactly this means will need to be decided on by the courts. In its message to the cantonal parliament, the *Regierungsrat* explains: 'Supervision is an essential

VRPG). As far as encroachments on the municipal autonomy are at stake, an appeal to the federal supreme court is possible (Art. 89(2)(c) of the Law on the Federal Supreme Court, BGG).

There are special supervisory instruments in the field of financial supervision (Art. 76/77 GG) and in part under the scope of special legislation.

While all the mentioned measures are aimed against actions of the municipality (except for the – merely temporarily – supersession of all organs under a 'forced administration'), the GG also provides for *measures against persons*, for cases where the source of an irregularity lies with a person. Under Art. 82 GG the cantonal prefect (i.e. the cantonal official competent for general supervision of municipalities) initates disciplinary proceedings if the proper administration of the municipality is disrupted or appears seriously at risk due to a gross breach of official duties[625] and the superior municipal organ fails to step in effectively (Art. 82(1) GG; so-called disciplinary intervention). Disciplinary measures may be aimed towards municipal administrative personnel as well as against politically elected organs.[626] In this context the possible sanctions range from mere warnings over to fines and even to dismissal (whereby the latter remains only a possibility in instances

element of political leadership. On the one hand, the hierarchical supervision (*Dienstaufsicht*) between two bodies that are part of the same administrative organisation is at stake. On the other hand, bodies of a polity also exercise supervision (*Verbandsaufsicht*) over organisations that are mandated to carry out administrative tasks of this polity. The question whether supervisory measures are to be ordered is to be decided according to the overall situation whereby political considerations may play an important role. It is in the responsibility of the *Regierungsrat,* e.g., to determine (as the last cantonal instance) the budget and the tax rate of a municipality in case the municipality does not provide itself for appropriate remediating measures or if a municipal budget is missing.' (REGIERUNGSRAT DES KANTONS BERN, Vortrag VRPG, p. 16).

625 The breach of an official duty is only on hand if a legal provision that establishes such a duty is breached.

626 WICHTERMANN, Kommentar GG, Art. 82, para. 6.

of qualified breaches of official duties, which must moreover be applied for from the cantonal administrative court).[627]

To sum up, the principle of subsidiarity, a clear assignment of competences, clear standards, formal (and thereby for both parties fair) procedures and ultimately the opportunity of judicial review of supervisory measures ensure the canton's supervisory role is limited to the essentials. At the same time the canton has, if necessary, at its command, fairly far-reaching intervention possibilities and as a result is able to guarantee the proper operation of the administration.

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627 Art. 82(2) read with Art. 81(3,4) GG, WICHTERMANN, Kommentar GG, Art. 81, paras. 26, 27.

CONCLUSIONS

I. GENERAL CONCLUSIONS

1. The quest for accountability (or the promise of beeing accountable) is intimately connected with the idea of delegation. A state that claims to be accountable to the people accepts that state power is neither original nor absolute but on the contrary delegated and limited.

2. Acts of delegation may conceptually be captured using the principal-agent-theory: A principal (A) delegates power to his agent (B) and expects B to use the power in A's interest. In order to make sure that B does not abuse of the delegated powers, A will insist in having the right to being informed by the agent (i.e. *to call the agent to account*) and to sanction the agent in the case of misconduct (i.e. *to hold the agent to account*).

3. In the case of a state, extensive powers are transferred. Mere information and sanctioning rights would not be sufficient to keep control over this powerful agent. Therefore, the idea of *dividing powers* (both: horizontally and vertically) becomes an important issue. The idea of dividing powers is considered in this study as a pre-requisite of any system promising state accountability. At the same time, a system based on this idea will inevitably be complex, since it involves multiple principals and agents. Accountability can only be expected if the powers and relationships between the different actors are set out clearly.

4. The principal-agent problem as well as the problems arising out of power concentration will appear (independent of culture) similarly everywhere. Accordingly, the safeguards (division of powers, information, sanctions) will be the same everywhere, independent of culture. The conceptual framework developed on the basis of these considerations in Part 1 (see p. 22) and the requirements developed in Part 3 may serve as an initial point of reference for tackling questions regarding accountability in a decentralised state

systematically. The most important criteria for a system promising accountability that result directly from the conceptual framework are presented in the form of checklists in section II of these conclusions.

5. The conceptual framework is based on the contractual doctrine. According to this doctrine, two (fictional) generally equal parties negotiate the transfer of rights (from A to B) in return for the concession of information and sanctioning rights (from B to A). As such it can be safely assumed that the contract will only be concluded if both parties concur. The formation and detailed terms of the contract are - in other words - the *result of a negotiation process among equal partners*. In states that have until recently been authoritarian and centrally organised, this assumption is generally not met. This may explain why not only the implementation of the idea of dividing powers, but also the arrangements of the safeguards (information and sanctions) in the examples of Pakistan and Serbia, are in many respects insufficient. On the other hand it may explain why the Swiss system, despite being tainted with stains, has, in its fundaments, proven itself: it is the result of a long historical process, at the beginning of which stood not a strong central state, but to the contrary, strong municipalities.

6. The analysis has shown that fundamental principles and institutions of the democratic and modern constitutional state can be traced back to the idea of accountability. This applies for instance to the principle of division of powers, the rule of law, the significance of political rights, only to mention the most important. The *modern democratic constitutional state* can therefore be seen as *a possible* – not necessarily the only – *model of an accountable state*.

7. The analysis, however, has also shown that by merely declaring the mentioned principles not much is gained. *Decisive is, rather, their legal arrangement in detail:*

   - *Vertical division of powers* is not yet achieved when local elections are held. It requires the development of a local structure and an unambiguous assignment of responsibilities.

And it requires effective legal protection of the local scope for action. The same is true with regard to the *horizontal division of powers*: It is not sufficient to stall a majority of organs. Horizontal division of powers requires the setup of a clear system of powers at the local level and, again, effective legal protection of this system.

- For implementing the *doctrine of publicity*, mere obligations of the state to inform the public are in themselves not worth a lot. The temptation to inform uncritically and euphemistically seems apparent; and in the worst case lurks manipulation. But even the installation of formal rights of access and inquiry (transparency of proceedings or access to documents of the administration, MP's right to ask questions, etc.) are of little use if the relevant rights can be denied, by virtue of exemption clauses, with practically no necessary efforts to justify or explain.
- The organisation of *sanctions* is also a tough issue. Political sanctioning rights in the hands of the electorate (such as elections and, as the case may be, instruments of direct democracy) are only effective if the citizens can, based on a free formation of their opinion, give genuine expression to their will and if this will can also be enforced against the will of the state. Supervisory measures of the higher-ranking level of state are only justifiable as long as objective standards are available for making a judgement. Are such yardsticks missing, then supervision risks turning into political control or interference (and thereby undermining the local electorate's sanctioning rights). The effectiveness of judicial protection, finally, depends on the independence of courts but also to a large extent on the procedural provisions that govern access to courts (rules of standing, reviewability, deadlines, costs, etc.).

The observation made earlier that legal scholarship has not (yet) contributed significantly to the debate on good governance is all the more deplorable.

8. Accountability of the local level is, first and foremost, a *challenge for the central state*. It is the central state that has to ensure that the most important cornerstones are set out for the local level and that they are binding. It is no coincidence that in Switzerland the principle of division of powers, the doctrine of municipal autonomy, the legal protection of political rights, the principle of legality of state actions and the guarantee of access to the courts are codified at the level of the Federal Constitution and that the principle of publicity of the administration is at least codified at cantonal constitutional level.

9. Finally: accountability is not something that is either given or not. And it is definitely not something that can be achieved within a tight deadline. It is, rather, an ideal that ought to be pursued, and remains to be a *continuous challenge*. 'Established democracies' too, find themselves incessantly confronted with problems of accountability.

II. CHECKLISTS

The following checklists are an attempt to recapitulate the results of the study. They may serve as a benchmark for analysing strengths and weaknesses of existing legislation, but also as guidelines for lawmakers when designing legal frameworks (matrix, but also sectoral legislation) for local governments. It must, however, be emphasised again that (also) the checklists must be taken as a systemising conceptual framework that makes no claim to being complete. In this sense, the requirements set out in the checklists are to be seen as necessary (albeit not sufficient) conditions a legal framework must fulfil in order to expect accountable local government.

Checklist A – Division of Powers

	Various actors	**Clear allocation of responsibility**	**Protection from interference**
Vertical	Is there a local structure with its own power basis that is capable of forming its own will?	Does the local structure have its own clearly demarcated sphere of responsibility?	Is the local sphere of responsibility guarded effectively against encroachments by other levels of state?
Horizontal	Are there different organs at the local level?	Is there a clear and settled system of powers?	Does the violation of the system of powers have consequences?

Checklist B – Calling to Account

		Standard information (direct and indirect active information by agents)	**Opportunities of following up (passive information by agents)**	**Indirect information channels of the principal**
Vertical		Is there a duty of the local level to routinely inform the superordinate level of state of important developments?	Does the superordinate level have instruments at its hands to obtain further information, if necessary?	
Horizontal	State - citizen	Are the meetings of the representative organ as well as the corresponding minutes thereof public (or secret only under clearly defined and narrowly curtailed exceptions)? Is there a duty for the state to inform the public regularly and objectively?	Does the individual effectively have access to official public documents?	Does the state create conditions for an independent press?
	State-internally	Are sensible and transparent internal reporting processes in place between principals and agents (between organs, e.g. legislature and executive as well as within an organ, e.g. within the executive between the top levels of the executive and outsourced administrative units)?	Do state-internal principals have corresponding questioning rights at their disposal?	Are there mechanisms that allow the citizens' feedback to flow into the system (box of grievances, citizens reports cards, ombuds-institutions, etc.)?

Checklist C – Holding to Account

		Political sanctions		**Legal sanctions**[628]	
		Against persons	Against actions	Against persons	Against actions
Vertical		Are no political sanctions of the superordinate level against locally elected persons stipulated?	Are political sanctions against actions limited to situations in which the local level acts as extended arm of the superordinate level?	Are the sanctions against elected persons restricted to clearly outlined, objectively verifiable, serious misconduct? Can the sanctions be reviewed by an independent body?	Are sanctions against unlawful actions at local level stipulated? Are there clear benchmarks for the assessment of legality of actions by the state? Can the sanctions be reviewed by an independent body?
Horizontal	State - citizen	Do citizens have an effective chance of periodically sanctioning at least the most important persons in positions of responsibility (by not re-electing, dismissal)? Are there provisions in place to guard against manipulation of procedures or their results?	Do citizens have the possibility of sanctioning, by majority resolution, important actions of the state? (compulsory or facultative)		
	State-inter-nally	Do state-internal principals have the possibility of sanctioning their agents independent of whether legal duties are breached and is the possibility limited to cases in which the agents are acting within the sphere of responsibility of the principals?	Do state-internal principals have the possibility of sanctioning actions of their agents independent of whether legal duties are breached and is this possibility limited to cases in which the agents acted within the sphere of responsibility of principals?		

628 The requirements for the vertical and horizontal dimension are identical because legal sanctions may only be imposed on the basis of objectively verifiable criteria.