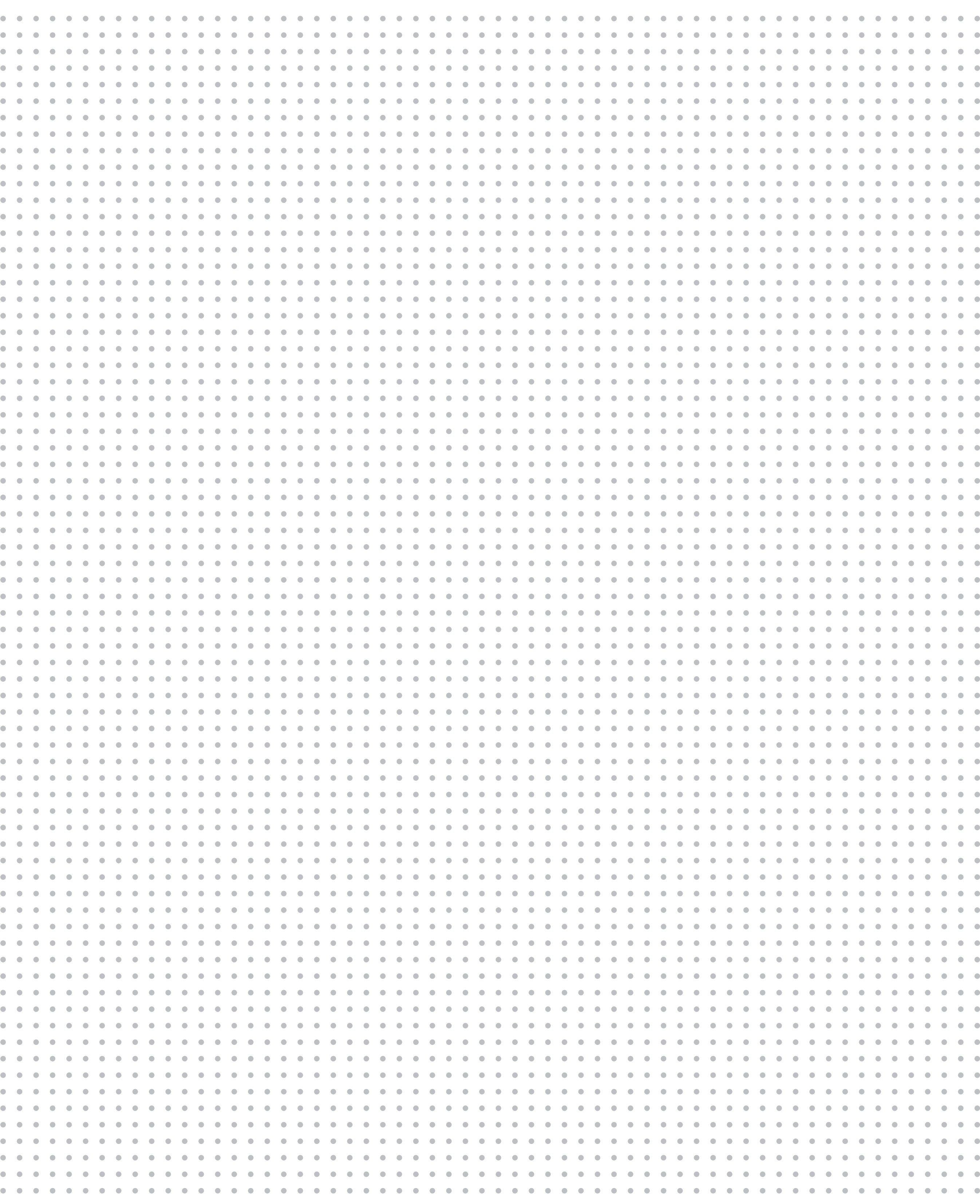
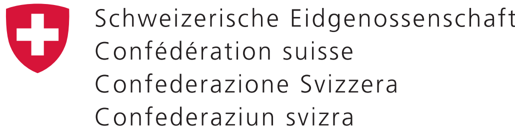
Good Local Governance

Swiss Experience

Toolkit





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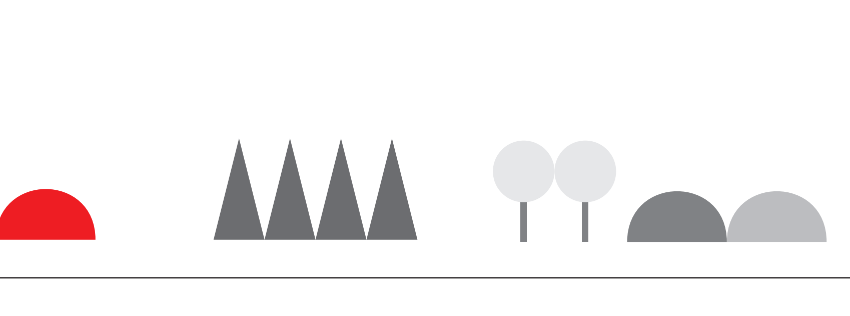
2017



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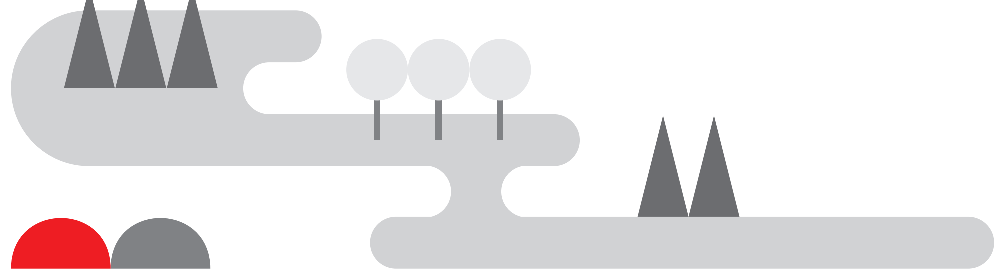

Foreword

All states have a need to regulate the interaction between the different layers of the state and the organisation of the decentralised administrative units. Even if the regulations in Switzerland and Serbia are different, both states strive towards serving the public interest, they want to fulfil their tasks for the well--being of their people and a functioning economy.

Based on typical examples, the toolkit illustrates how the local level is organised in Switzerland and how the various challenges resulting from the quest for good local governance are faced. The idea is not to copy the Swiss model, but to trigger the dialogue with our Serbian partners about how they could optimise their organisation in the framework of the principles of good governance.

Questioning the political organisation is an ongoing task, the state and its municipalities are never definitely organised. The toolkit shall contribute to that ongoing and dynamic process, both in Switzerland and in Serbia.

We stay committed to further support this process in Serbia.

Ursula Läubli
Director of Cooperation
Swiss Cooperation Office Serbia

Author's Preface

In the context of development cooperation, the good governance principles accountability, transparency, participation, non-discrimination and efficiency are often promoted as guidelines for improving the functioning of the state and – thereby – the lives of its citizens. It is, however, not easy to build a bridge from these abstract principles to their concrete implementation. Each of the principles relates to a multitude of questions of Public Law and Administration.

This toolkit is a selection of authors' experiences with concrete examples from the context of Swiss local governance. In Switzerland, both politics and science hold the concept in highest regard. Lessons learned from Switzerland therefore might be of interest also for other countries.

The toolkit is not meant to be a template for solving problems in other contexts. It is rather about showing a concrete Swiss approach with regard to specific questions which are also likely to be relevant in other states. The toolkit will strive to ask the same questions resulting in locally adapted answers. Ultimately, these answers cannot be given by foreign experts, they need to be developed by the concerned persons, on-site.

For each of the diverse questions, the toolkit shows *one* possible solution without proclaiming that this is the only or the best solution. Switzerland is a federal country and each of the 26 cantons remains competent to regulate the organisation of its territory, including the municipalities, their organisation and their relation with the canton. Widely differing models of local governance can be found in the different regions, depending on the respective understanding of the concept of municipal autonomy that has grown historically. Each of the models has its pros and cons, but ultimately all of them have proven to be operational. This shows that there is no single solution to the challenges of good local governance.

The toolkit presents how the good governance principles are implemented at the local level in the Canton of Bern. It is a mere snapshot and should not lead to the – incorrect – conclusion that this decentralised organisation is set in stone. Reviewing the developments of a longer time period it becomes apparent that many convictions are being replaced by new ideas. But these changes do not happen from one day to the next. They develop over decades and centuries. In Switzerland success lies not in big reforms, but in small but continuous steps that lead to pragmatic changes. The decentralised organisation of the state is seen as a guarantor for stability and continuity, at the same time allowing steady adaptation to new circumstances.

In the long run, such changes should always be oriented towards the vision of a good state. The principles of good governance are an attempt in formulating such a vision and the toolkit should help to undertake small steps towards achieving the vision.

This toolkit was used for the first time in Serbia, in the European PROGRES (EU and Swiss financed development Programme), where practitioners of 34 municipalities were encouraged to develop ideas about how to improve good governance in their daily work, based on inputs given by the Swiss experience. This Serbian endeavour led to an internal publication which will be used in a follow-up project to disseminate this valuable experience to other municipalities.

Our thanks go to Ueli Seewer, Bern, Switzerland, for his inputs from the perspective of a business economist, to Sadie Plant, Biel, Switzerland, for her professional assistance with translation from German to English and to the Swiss Agency for Development and Cooperation (SDC) for making this publication possible.

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PART 1

Accountability

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1.1 Definition of the Principle

Accountability is a complex concept which is difficult to grasp without an in-depth knowledge of theories of state power. In simple terms, accountability means that it must be possible to hold the state accountable and call it to account. This demand is based on the notion that state power is not absolute power, but is rather (and ideally) power bestowed by the people and (again ideally) exercised in the public interest on their behalf. There is a contractual relationship between the people (the citizens) and the state which means that state officials have the responsibility to fulfil their mandate and can be held to account in the case of poor performance[1].

Because there is a significant power gap between the people and the state, state power is decentralised by being divided into several organs and different tiers of government (principle of horizontal and vertical separation of powers). This results in a complex system comprising the local level as well as central government and the local population. Municipalities should be accountable to those below them (the population) as well as those above them (the central government). Decentralisation is intended to strengthen control from below, but this can never do away with the need for control from above. A clear concept of accountability (who is accountable for what and to whom?) is therefore indispensable.

To put it simply, accountability means:

- That responsibility is clearly assigned,
- That responsibility is exercised transparently, and
- That sanctions, both political and legal, are in place in order to ensure accountability.

Accountability can be divided into the following elements:

- The allocation and funding of tasks (assignment of responsibility to the local level)
- Local bodies and their responsibilities (allocation of responsibilities at the local level)
- Transparency (presented in Part 2)
- Political sanctions
- Legal sanctions

1 This chapter is based on STRECKER, MIRJAM, Accountability of Local Governments – Legal Challenges, Bern 2011, accessible at http://www.zb.unibe.ch/download/eldiss/09strecker_m.pdf.

1.2 The Allocation and Funding of Tasks

Local accountability assumes that certain tasks are to be left or assigned to the local level by central government (see 1.2.1), which equips it with its own means of generating resources, or with sufficient funding for the fulfilment of the task (see 1.2.4). Finally, the local level is to be protected from interference by higher levels of the state (see 1.2.5).

1.2.1 The municipality as a tier of government in its own right

Switzerland is a federal state, composed of 26 cantons. Under the Federal Constitution, the internal organisation of each canton is the canton's own responsibility. Each canton organises the nature of its local government itself (all cantons have a system of local government in place). In Switzerland, therefore, the canton should be seen as the central government in relation to the municipality. The existence of municipalities and some essential features of municipal structure are regulated by cantonal law on municipalities and other cantonal laws (see section 1.3 for the details of this structure). Municipalities are legal persons in their own right; their leadership is locally elected.

Lessons learned

- The municipality is designed to be a legally independent tier of government.
- The municipality has its own power base.
- When local bodies feel primarily accountable to the electorate in their own municipality (and not to the central government), the need to be receptive and responsive to citizens and clients is emphasised.
- Continual political pressures ensure that local services are provided economically.

1.2.2 Which tasks are proper to the municipality?

In Canton of Bern, municipalities assume responsibility for the following areas:

- Management duties (registering inhabitants, processing citizenship)
- Education (kindergartens, schools, after-school clubs, libraries)
- Sport and culture
- Social care (individual care, institutional care such as children's day care and youth work etc.)
- Public safety (policing, fire brigade, civil protection, disaster control)
- Planning and building regulations (building permission, sometimes a matter for the canton)
- Local public transport (usually in cooperation with other municipalities)
- Waterways
- Water supply
- Sewerage
- Waste collection
- Other functions

The way in which tasks are divided between the canton and municipality is not however set in stone. It has developed over time, and continues to change. Roles are allocated in the context of a political process (cantonal constitutional and legal process) and are subject to political considerations. However, discussions regularly revolve around the following criteria:

- The principle of subsidiarity means that tasks are undertaken at the lowest political level wherever possible, which is to say that a task should only be centralised when it can no longer be effectively carried out on a lower level.

- The principle of fiscal equivalence requires the interests of funders and users to coincide, and the principle of coherence ensures that this is also true for funders and those ordering the service. The allocation and funding of tasks should always be considered as outcomes of these two principles taken together.

In the (political) process these principles may be used to support arguments for a particular task to be assigned to a specific government level. They are however too abstract to serve as a legal basis for defining the tasks proper to a tier of government.

Lessons learned

- The allocation and funding of tasks are like Siamese twins.
- The allocation and funding of tasks are the result of a political process and should as far as possible be conducted on the basis of objective criteria (subsidiarity, fiscal equivalence).
- Many municipalities are so committed to fulfilling tasks assigned by the canton that they have barely enough funding to complete the tasks they wish to take on for themselves. This can often lead to considerable frustration and demoralisation on the ground.
- While municipalities are relatively autonomous in terms of their organisation and the tasks they take on, financial shortfalls can mean that only very limited use can be made of this autonomy.

1.2.3 How are the municipality's tasks defined?

a The municipality's own tasks, and those delegated to it

In terms of accountability, it is vital that 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, the question 'to whom accountability is directed' must be a clear outcome of the legal system: where local government is responsible for carrying out a task according to instructions from a higher level of the state, the responsibility remains to a large extent with (and accountability is directed to) the latter. If local government is responsible for carrying out tasks under its own remit and according to local needs, accountability is directed to the local population. In other words, the legal system not only needs to clearly define the task that needs to be fulfilled, but must also show whether the local level is acting as an agent of the central state administration or as an agent of the local citizens. Relevant to this question is a distinction often made between a municipality's own tasks and those which are delegated to it. The municipality's own tasks can be voluntary (in which case the municipality's discretion extends to both "whether" and "how" public tasks should be performed) and mandatory tasks (in relation to which the municipality's discretion is confined to the question of "how" a public task should be performed). In terms of delegated tasks, the municipality fulfils a mandate it has been given by a higher level of the state (instructed and supervised under the auspices of the superior state level). A special central government administrative move involves lending out administrative bodies: in this process a local government body is put at the disposal of a higher level of the state and therefore acts on the instructions of this higher level too.

The relationship between the legal definition of a task, local autonomy, and the direction of accountability can be illustrated as follows (distinctions between different types of tasks are not fixed):

Degrees of local autonomy, and to whom accountability is directed

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

Examples

- Own voluntary tasks: building and running a multi-purpose hall (the municipality itself decides whether or not this task falls to it.
- Own mandatory tasks: adoption of planning rules (zoning and building regulations), employment law, and the municipality's own rules about its internal organisation (municipalities have a considerable degree of discretion in terms of how they can fulfil these tasks).
- Delegated tasks: schools, water supply, social care (cantonal laws and ordinances contain detailed requirements concerning the ways and means in which tasks are performed.)
- Lending out administrative bodies: levying cantonal and federal taxes (a municipal body functions almost as a cantonal law enforcement agency and is subject to its legal powers).

b Assigning delegated tasks

Experience has shown that the assignment of tasks to the local level is far more difficult in practice than it appears in the abstract. While abstract principles (such as those of subsidiarity and fiscal equivalence) may provide sensible guidelines (for the legislature), they do not offer any clear notion of how responsibilities should be distributed in particular cases. From the point of view of accountability, the enumeration of particular responsibilities is indispensable. This does not necessarily mean that the powers of a given sector should be handed to the central state (or a higher level of the state), or left to local government, in their entirety. It is often necessary for different levels to cooperate in the fulfilment of a certain task (joint tasks), but even (and especially) then, the spheres of responsibility of each participating level of government need to be clearly defined.

Since this usually requires detailed regulation, and also because the allocation of certain tasks changes from time to time, the constitution contains only very general statements about municipal tasks. The concrete allocation of powers is regulated by sectoral legislation (e.g. laws dealing with schools, social services, water supply etc.). Such a solution may diminish the clarity of local tasks, but it reduces the risk of conflict between the provision of local tasks and sectoral legislation, and in concrete cases can therefore clarify the extent and limits of the local sphere.

Lessons learned

- The tasks of local government arise from the whole body of higher level sectoral legislation and local regulations and decisions.
- Legislation states whether a municipality can or should be responsible for carrying out a task, or whether a task should be performed at the higher level.
- The more mobile a society, the greater the need for provisions to be made at higher legislative levels. This constantly erodes municipalities' ability to legislate for themselves.

1.2.4 How are the municipality's tasks funded?

Details are presented in Part 5.

Controversy continues to surround the increasing tendency of central government to make substantial demands without providing funds to meet the additional costs they entail. Municipalities can then find themselves confronted with the problem that they have to offer new functions or perform existing ones to higher standards without having chosen to do so, and without having access to the necessary resources. This ultimately leaves municipalities with no choice but to compromise on the tasks they themselves choose to fulfil.

1.2.5 How can the municipality defend itself against threats to its existence and interference in its areas of responsibility?

The very existence of the municipality is protected in law, as is the scope of its responsibility.

a Guarantee of existence

The constitution of the Canton of Bern guarantees the continued existence of municipalities (guarantee of existence). A municipality cannot therefore be dissolved against its will (which is to say, against the will of its electorate).Whether or not the guarantee of existence is too loose, in the sense that under certain well-defined circumstances municipalities can be forced to merge with each other against their will, is currently a matter for discussion. A decision to merge made at the cantonal level would have to be put to a facultative referendum by the parliament: a simple decision by the cantonal government would not suffice. This shows the importance attached to the very existence of the municipality.

b Municipal autonomy

In addition to this guarantee of existence (which is not in place in every canton), the autonomy of all Swiss municipalities is protected in the Federal Constitution too. The concept of municipal autonomy refers to the ability of municipalities to manage their own affairs in accordance with local conditions. Municipal autonomy is however only guaranteed "according to the provisions of cantonal law", which means that it is the canton that establishes this autonomy in accordance with its constitutional and legal framework.

According to the rulings of the Federal Supreme Court, a municipality has autonomy in those areas in which cantonal law permits some considerable discretion in terms of how it makes decisions about its own tasks or those assigned to it.

The standard formulation used by the Federal Supreme Court on the scope of municipal autonomy runs as follows:

> “*A municipality is autonomous in areas for which cantonal law does not provide conclusive regulations, but leaves regulation wholly or partly to municipalities which also have some considerable discretion in terms of its exercise. The protected area of autonomy can concern the power to adopt or enforce local regulations or to apply appropriate discretion when implementing cantonal or federal law. Similarly, the municipality has financial autonomy insofar as its income and outgoings are not determined a higher legal level. Although it is entitled to a certain degree of appreciation or discretion, the municipality is not however autonomous where there is a prevailing need for uniform regulation at a cantonal level, or where local character is not at issue.*”

In terms of legislation (or planning) and the application of the law, this formulation can mean that:

- A municipality has legislative autonomy in areas not largely or wholly regulated by cantonal or federal law. This capacity can apply to a matter as a whole, as well as to a particular area of cantonal or federal legislation.
- A municipality has autonomy in the application of legislation if it is applying its own (autonomously formulated) communal law, or if it applies provisions of cantonal and federal laws which do not regulate an issue conclusively but leave significant discretion to the municipality in terms of decision-making.
- Municipalities have no autonomy (e.g. to levy cantonal or federal taxes) where they are charged with the execution of certain tasks; in this sense they are purely executive bodies with no or only very limited room to take their own decisions.

Typical areas of autonomy in Bern's legal system include large areas of construction and planning (building regulations, especially regulations concerning building inspections and planning zones), municipal organisation, public service employment law, the management of municipal assets, political rights, local policing, citizenship, sport, culture, all utilities, and waste disposal.

Should the autonomy of a municipality be infringed, or its existence brought into question, recourse can be sought in an independent court (in the last instance, in the Federal Supreme Court).

Lessons learned

- The local level and the scope of its responsibility must be defended against the intervention of the central state (with the chance to seek redress against such interference in an independent court).
- The "generosity" which subjects central state intervention to legal oversight gives a significant boost to the self-confidence of the local administration and is crucial to its effective performance.

1.3 Municipal Bodies and Their Responsibilities

The principle of the separation of powers requires the distribution of state power across several bodies (see section 1.3.1). This means that bodies can only be held accountable if a clear understanding of jurisdictional order is in place (see section 1.3.2) and if no violations of their areas of responsibility are permitted (see section 1.3.3).

1.3.1 What are the bodies of the municipality?

According to the principle of the separation of powers, state functions are classically divided into three types of body: legislative, executive, and judicial. It is however important to make further divisions too. The judiciary is not necessarily located at the local level - in Swiss municipalities, judicial functions for example are not exercised by a municipal body, but in the courts at a higher level of the state.

Bodies possible in a Swiss municipality:

- The electorate (*die Stimmberechtigten*)

  The electorate is not simply the beneficiary of the municipality's services, but its highest body too. It is composed of all adult residents who are also Swiss nationals (in some cantons, municipalities can give voting rights to foreign nationals too). The electorate expresses its will either by voting, or at municipal assemblies (*Gemeindeversammlungen*, assembly of all citizens, where all voters can participate), which are held at least twice a year.

- The municipal parliament (*das Gemeindeparlament*), legislative body

A municipal parliament is not mandatory: in Switzerland there are many small municipalities which, as a rule, have no parliament (in which case legislative functions are exercised by the municipal assembly). If a municipality does have a parliament, this must have at least 30 members. The members of a parliament have to be voted in by the electorate. The electoral process is laid down by the municipality in its electoral regulations.

- The municipal council (*der Gemeinderat*), the executive body

The municipal council, i.e. the executive body of municipality is a board of at least three, and generally five to seven members, over which the president of the municipality presides. Like the parliament, the executive has to be voted in by the electorate (although there are cantons which allow municipal parliaments to elect the executive). The municipality can decide on its own electoral procedures (proportional, majority rule with additional protection for minorities).

- Committees with decision-making capacities

Depending on how they are designed, committees can provide broad political support or facilitate the deployment of specialised knowledge. They have an important role in municipalities with assemblies, but they also have a place in parliamentary municipalities. Standing committees differ from working committees. Committees can be elected by the parliament, the executive, or the electorate (in municipalities without a parliament). Here too, the electoral procedure is determined by the municipality. Elections of committee members are usually by majority vote, with provision for minority protection. Many bigger municipalities select committees on the basis of proportional elections to the executive or, where appropriate, the parliament. Standing committees require a legal basis (a simple decision is not sufficient), and must be given their powers by a body which has both the jurisdiction and the authority to establish committees.

Examples

The education committee is responsible for the employment of teachers; the building committee has the independent capacity to grant planning permission (in accordance with the law).

- **The auditing body**

  This body must be independent of the administration and its members must have the relevant expertise; in this respect the requirements are stricter for larger municipalities than smaller ones. The auditing body is elected by the electorate; in municipalities with a parliament, this means that they are elected by the parliament.

The definition of bodies extends to employees who are authorised to represent the municipality in its dealings with third parties. Here again it is the municipality that determines the way in which appointments are made. Managers are sometimes elected; regular staff are usually employed on public law contracts. Municipalities are obliged to make a publicly accessible register of their bodies (local authority directory); (see Part 2).

There are numerous possibilities for organising the structure of a municipality, the following figure shows the structure of a typical Bernese Municipality with a municipal parliament.

The Bodies of the Municipality

Lessons learned

- While the cornerstones of an organisation's structural accountability (principle of separation of powers, the electorate as the highest body, transparency of the chosen systems) are specified at a higher legal level, the municipality retains responsibility for its own organisation.

- The structure should be clearly arranged.
- A large number of committees can sometimes lead to cumbersome processes. The advantage of committees lies less in their ability to improve the quality of outputs than in the fact that they can anchor local government processes in the population. This generally compensates for any negative effects committees may have on the municipality's ability to act.
- An independent and specialised body of qualified auditors is crucial to a municipality's ability to supervise its own "financial accountability". Such a body reinforces the municipality's sense of responsibility and relieves the canton of the need to oversee financial affairs.

1.3.2 Incompatibility, ineligibility of family members, and obligations to withdraw

Several mechanisms serve to ensure that people in public office cannot assume too much power, and are not unduly influenced by private interests.

The accumulation of power is curbed by regulations concerning the incompatibility of one person holding several offices at once (see a) below), and the barring of family members from holding positions in certain specifically defined bodies (see b) below). Special measures are in place to restrict the influence of private interests on the decision-making capacities of those mandated to act (see c) below).

a Incompatibility

Regulations about incompatibility prevent members of certain decision-making bodies from being members of other bodies at the same time. It is not possible to be a member of the municipal parliament, the executive, or a committee with decision-making capacities while simultaneously being:

- An executive at a higher governmental level: this is to ensure the separation of powers between different levels of government. It should however be noted that it is permissible, and also frequently the case, that municipal officials (executive and legislative members) can have a cantonal legislative mandate at the same time.

- The cantonal supervisor of the municipality or their deputy (de-concentrated cantonal supervision of municipalities, so that supervisory independence can be guaranteed).
- A person directly performing a municipal task under the auspices of one of the aforementioned municipal bodies and beyond a certain level of engagement (currently defined as annual earnings exceeding CHF 25,000 annual salary).

An additional incompatibility rule stresses the particular significance of auditing bodies: members of these bodies cannot at the same time be members of the municipality's executive, committees, or staff.

Finally, the principle of the separation of powers is guaranteed by the fact that a member of the municipal executive cannot be a member of the municipal parliament at the same time.

Municipalities can use their own regulations to make further rules about incompatibility.

Should someone be elected in spite of an existing incompatibility, the relevant election is unlawful and to be annulled by the cantonal supervisory body as a matter of official course or as the result of a complaint.

b Ineligibility of family members

In simple terms, the regulations barring relatives aim at preventing a family or a few families from dominating the municipal executive and/or the auditing body. The regulation runs as follows:

The municipal executive cannot be composed at the same time of:

- Immediate relatives and in-laws
- Full and half-siblings
- Married couples
- People who live together in a registered partnership or de facto (common law) relationship.

Here too the regulations governing the auditing body go somewhat further: ineligible for election to an auditing body are immediate relatives or in-laws, full or half-siblings, married couples, people living together in a registered partnership or de facto (common law) relationship with:

- A member of the municipal executive,
- A member of a committee, or
- A representative of the municipal staff

If the rules excluding relatives are infringed, the legal remedies are the same as those applying to infringements of the incompatibility rules (annulment of the election of the official). The municipality must

regulate the procedures that apply when someone barred on family grounds has been elected. It is normally the case that whichever eligible person has received the most votes is elected; in the case of a tie, lots are drawn as a rule.

C The obligation to withdraw

While the rules concerning incompatibility and family members generally make certain people ineligible for election to certain positions, the rules about the obligation to withdraw stipulate the particular circumstances in which people who hold municipal office must be free of conflicting interests.

The obligation to withdraw primarily concerns those with a direct personal interest in a particular issue.

Also obliged to withdraw are:

- Relatives of people with a direct personal interest (in accordance with the regulations barring family members).
- Legal representatives (e.g. those with legal responsibility or guardians), statutory representatives (e.g. chair of the board of a limited company) or contractual representatives (e.g. lawyers) acting for people whose personal interests are directly affected by the transaction in question.

People obliged to withdraw have to make a public declaration of their interests. They must have nothing (further) to do with the matter, which means that they can neither participate in preparatory proceedings nor make presentations nor participate in deliberations or decisions. They have no right to inspect the minutes, but may however make a statement on the matter before leaving the room.

If a decision is made in violation of the obligation to withdraw, it should be annulled on the basis that the error could have played a decisive role in the outcome. The matter will be reviewed in the first instance by the cantonal supervisory body, and in the second instance through the (independent) administrative court.

Lessons learned

- Criteria for withdrawal/incompatibility/barring of family members must be clear, objective, and practical.
- The grounds for withdrawal and the definition of those subject to the obligation to withdraw must be rigorously formulated without exceptions.

- Infringements must expect clear legal consequences.
- Compliance with these regulations is of fundamental importance: these are rules which strengthen the people's trust in the political process and administration.
- Authorities should keep strict order here: a single infringement of these requirements can damage the trust that has been built up for years.

1.3.3 How are responsibilities distributed amongst municipal bodies?

a Municipal regulation (within the framework of cantonal requirements)

Municipalities are largely free when it comes to the allocation of responsibilities. However, higher level law makes the following stipulations:

- The electorate takes all fundamental decisions (which means that they are subject to mandatory referenda). Fundamental decisions are:
  - The election of members of the municipal executive as well as members of the parliament (where there is a parliament)
  - The election of auditing bodies (where they are not elected by a parliament)
  - The adoption and amendment of municipal statute
  - The amendment of local tax rates
  - The abolition of the municipality (e.g. in connection with a merger) and changes to the area covered by the municipality.
- The municipal executive plans and co-ordinates municipal activities.

Further requirements arise from case law on the separation of powers and the principle of legality. These rulings tend to give all important, basic legal decisions to the legislature (e.g. what are the rules about who must pay what charges). It is however worth mentioning that a municipality can take on new tasks on the basis of a simple decision of a competent body (for which it needs no legal basis); any expenditure the task then requires is decided upon within the framework of the electorate as specified by the jurisdictional order laid down in the municipal regulations.

Within these terms, the municipality can use the regulations governing its internal organisation to tailor its areas of jurisdiction according to its needs.

- As a rule, the municipal statute assigns significant legislative and financial responsibilities (e.g. decisions about estimates) to the municipal parliament.
- Municipalities have to give content to abstract provisions according to which the executive plans and coordinates local activities. Various instruments are put at the disposal of the municipal executive for carrying out these functions. Often the municipal statute also assigns powers to adopt secondary legal norms to the municipal executive (e.g. the power to decide on concrete tariffs for municipal fees, within the framework set out by the legislative body).

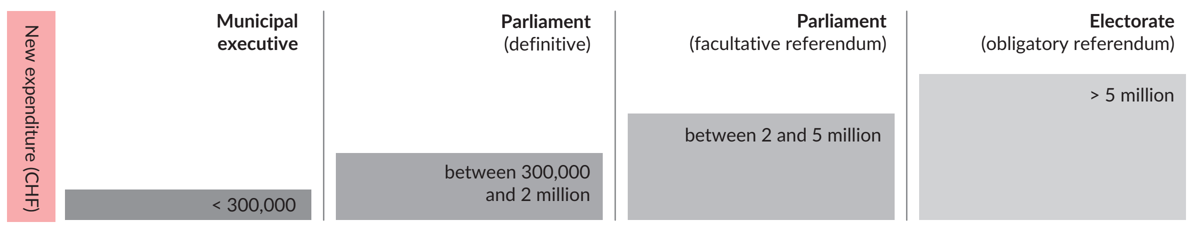
As long as the municipal statute makes no provision for another solution, the higher law provides for legislation to be made by the municipal parliament (or assembly). On the other hand, all powers not allocated to another municipal or higher body fall to the municipal executive.

This ensures a seamless arrangement of responsibilities.

b Jurisdictional order in the case of expenditure

The regulations governing the internal organisation of the municipality allow the electorate to allocate spending powers to various bodies. Higher law offers no guidelines about how allocations should be made. It does however set out in some detail how particular cases of expenditure should be handled. It is for example stipulated that a budget concerns only expenditure in the current year, while investments and expenditures that fall into a subsequent financial year are to be decided upon by the relevant municipal bodies as a separate credit commitment. This relieves the budget of political considerations. Bigger projects are dealt with in the context of a democratic decision-making process of debates about the expenditure they require (credit commitment). The risk that important expenditure might be "hidden" in non-transparent budgets can be avoided in this way.

The responsibility for decisions about new expenditure can be distributed like this (a new expense always arises when the expense is charged to the administrative account and some discretion can be exercised in relation to the timing and level of the expenditure):



Responsibility for other transactions, e.g. granting loans, entering into guarantees, participation in civil legal entities, legal transactions concerning property and land rights, investments in property, initiating or resolving legal processes, releasing public assets, and waiving revenue, is determined by evaluating their financial value as though they were expenditures.

The following figure shows an example of an order of jurisdictions of a Bernese Municipality with a Parliament:

Electorate	• Passing the municipal statutes • (potentially) Passing other municipal laws • Electing the parliament and executive • New one-off expenditure over CHF 5 million • Changes to the municipality's status/area • Change to the local tax rate • Further possible resposibilitites
Parliament	• Passing municipal laws (as far as not assigned to electorate) • Electing auditing body • New one-off expenditure between CHF 2 mil. and 5 mil. (subject to a facultative referendum) • New one-off expenditure between CHF 300,000 and 2 mil. • Decisions on budgets and annual accounts
Executive	• Planning/co-ordination of municipal activities • New on-off expenditure up to CHF 300,000 • All administrative powers not assigned by municipal law
Committee X, Y, Z with decision-making capacities	• Decisions on the use of allocated resources • Specific decisions in areas assigned by municipal law
Staff authorised to represent the municipality	• Responsibilities according to diagram detailing functions (functional diagram)

Lessons learned

- With regard to the distribution of responsibilities, municipalities should be given enough room for manoeuvre to allow them to take responsibility for their own organisation (organisational autonomy).
- The jurisdictional order should be seamless: as well as listing individual responsibilities, it makes sense to envisage the allocation of responsibilities in the abstract so as to ensure that for each particular case a responsibility can be determined (system of general clauses).
- The jurisdictional order should be clear: only one body at a time can be responsible for a decision (and so accountable for it).
- The agreed jurisdictional order cannot be changed on a one-off basis. Further delegations of responsibility can be made only within the framework of the law. The shifting of responsibilities on a case-by-case basis should only occur in the context of a formalised procedure (so for example in relation to a facultative referendum, see Part 3).
- The ways in which municipalities arrange their financial law responsibilities reflect their own perspectives and can differ widely on the basis of distinct political cultures and experiences.

1.3.4 Administrative organisation

From the point of view of accountability, it is not only important that individual bodies preside over clearly defined areas of responsibility; it should also be the case that areas of responsibility are established with sufficient clarity within the administration. On these grounds municipalities frequently adopt supplementary administrative regulations or diagrams detailing functions.

1.3.5 How can compliance with the jurisdictional order be legally enforced?

In Switzerland, compliance with the constitutional jurisdictional order is protected by the principle of the separation of powers. The individual therefore has a right to hold the state in compliance with the given jurisdictional order (in the legislative form it has been given by the relevant canton and municipality).

This right can be claimed in the first instance within the canton, and thereafter in the Federal Supreme Court, which can (in the final instance) repeal an act which violates the jurisdictional order.

Infringements of the jurisdictional order can be challenged by each and every member of the electorate in the municipality (in what is known as a citizen's complaint). The complaint is checked by a court independent of the administration.

Laws and decisions which infringe the principle of the separation of powers will be annulled by the court.

Lessons learned

- It can be very tempting to circumvent the jurisdictional order. It is rare that authorities act unlawfully for selfish reasons: they are more commonly motivated by the desire to achieve their political goals as quickly as possible in their own jurisdiction, which in their eyes allows a generous interpretation of the jurisdictional provisions. A functional legal protection of the jurisdictional order is therefore vital.

1.4 Information / Transparency

Transparency is a prerequisite of accountability. If it is not clear who is responsible for what in a system, or if it does not come to light what those responsible have in fact done, we can expect no accountability.

Details on this theme are presented in Part 2.

1.5 Sanctions

By definition, accountability presupposes that those who bear responsibilities must not only be answerable for their actions for the sake of transparency, but can also be held to account where necessary. In this respect, those commissioning a task - in the final instance, the electorate - must stipulate the requisite sanctions from the start. Both political and legal sanctions are necessary to ensure accountability. They can either be made against particular employees or against concrete actions (agreements, decisions, laws).

Overview of sanctions options

	Against persons	Against actions
Political sanctions (= political accountability)	section 1.5.1, a	section 1.5.1, b
Legal sanctions (= legal accountability)	section 1.5.2, a	section 1.5.2, b

1.5.1 How are political sanctions set up?

Political sanctions come into play when a principal (the one commissioning a task) is unhappy with the performance of an agent for any reason whatsoever. There is no objective scale to determine whether or not political sanctions are to be applied; the question is instead always to be decided in the context of a democratically legitimate (and itself "political") process.

Political sanctions can only be imposed by the competent body (the electorate, a municipal body): only such an organ has democratic legitimacy.

a Political sanctions against persons

Political sanctions are reduced to voting out of office (i.e. non-re-election) of:

- Members of the municipal parliament and the municipal executive
- Members of auditing bodies
- Members of committees

There is no provision for de-selection during a period of office.

Information on the details of the electoral process, the nature of active and passive voting rights, the legal protection of political rights (i.e. the legal means to ensure that an unhindered participation in votes and elections can proceed), will be presented in Part 3. In terms of accountability it is crucial that the electoral system allows sanctions to be applied against individual office holders.

Unlike an elected official, a municipal employee of a municipality cannot be politically accountable - employees are protected as much as possible from political pressure in order to ensure the integrity of the municipal administration. Legal sanctions are however applicable to all municipal employees.

b Political sanctions against actions (decisions, laws, etc.)

The legal system allows particular decisions made by certain bodies to be vetoed on political grounds. Swiss municipalities often take the chance to hold a facultative referendum. This instrument gives the electorate the chance to subject a decision for which the parliament is responsible to a formal procedure (the collection of a certain number of signatures) in order to make a referendum happen. This instrument of direct democracy is considered in more detail in Part 3.

Lessons learned

- Political sanctions can only be imposed by the body responsible for the appointment of a person or for taking a material decision.
- Political sanctions can only be imposed horizontally, i.e. between municipal bodies, because the political accountability of the municipality comes from the "bottom up", i.e. through the electorate. Political interference from a higher level of government would undermine local accountability. Supervision by a higher government level is confined to overseeing compliance with the law.
- Elections are central to accountability. The electoral system should be designed so as to make it possible for individual officials to be disciplined for any poor performance. Proportional representation can make this difficult.
- Municipal employees should not be subject to political sanctions (de-politicisation of the administration).
- The opportunity to call a facultative referendum puts the authorities under pressure to proactively align their decisions with the electorate in order to avoid defeat in a popular vote.

1.5.2 How are legal sanctions set up?

Legal sanctions stem from the principle of legality of state actions (rule of law). Legal sanctions can therefore be applied when parties do not adhere to the rules they have agreed - in the context of the state, this is when those with responsibilities have not adhered to the law. There are therefore objective ways of deciding whether legal sanctions should be applied.

The decision is made in the framework of a legal process (both sides to be heard, the decision to be supported by reasoning). Legal sanctions must be open to the review of an impartial court which has sufficient distance from the dispute (the administration is usually a party to questions of legal accountability).

a Legal sanctions against persons

Municipal bodies and their employees are subject to different forms of legal responsibility:

- Disciplinary responsibility

  Disciplinary responsibility serves primarily to ensure proper functioning of the municipal administration. All bodies and staff must perform their tasks and functions efficiently, effectively, on a legal basis, and in compliance with official orders. If someone does not fulfil these obligations, the municipality (as long as the relevant legal basis pertains) can use disciplinary means to hold them to account. In the case of a suspected violation of official obligations, the municipality can put a (legally formulated) disciplinary process in place, in the context of which the matter can be investigated and finally (if there has been a violation of official duty and where negligence can be attributed to the person being disciplined) any necessary measures can be taken. Sanctions range from a simple reprimand to fines and dismissal. Disciplinary measures must always be proportionate. Should the municipal legal framework not stipulate which body is responsible for disciplinary procedures, it is the municipal executive which is responsible for disciplining municipal personnel. The latter also initiates disciplinary procedures if the higher municipal body does not intervene effectively when the proper administration of the municipality is affected by gross negligence or seems seriously endangered. Disciplinary measures can be taken against municipal personnel as well as against politically elected bodies. Here the sanctions range from simple reprimands to fines and dismissal (which only arises in the case of serious negligence of official duty, and in addition must be applied by the cantonal administrative court).

- **Financial liability**

  Financial liability primarily concerns compensation for pecuniary losses. The municipality is liable for any damage that it, i.e. its bodies, their members, and their staff in the exercise of their official duties has been caused illegally to a third party. The municipality can seek redress against a person responsible for the damage if it has been caused deliberately or through gross negligence.

- **Criminal responsibility**

  Criminal law ultimately imposes sanctions on public bodies and personnel who have infringed certain central official duties (official offences such as for example embezzlement in office, abuse of office, charging of excessive fees, dishonest administration, accepting bribes, making bribes, forgery, breaking of official confidence).

b Legal sanctions against actions (decisions, laws, etc.)

The principle of the rule of law requires all state actions (decision, orders, legal regulations, etc.) to be made on the basis of and in accordance with the law. Checks on compliance with the rule of law (checks on legality) are made in several ways, either by the canton (as an act of state supervision, on the basis of an allegation or as a matter of official course) or on the basis of a complaint to the court by a person affected by an action taken by the municipality (judicial protection against the administration).

- **State supervision**

  When irregularities are found in a municipality, the responsible municipal body investigates the matter and takes the necessary measures. At issue might be financial irregularities, organisational shortcomings, abuses of various kinds, the incorrect issuing of permits, irregularities in the awarding of contracts, inadequate performance of any part of the administration, etc. As long as no other body has been designated by the municipality, responsibility for the necessary investigation lies with the municipal executive. Initial investigations can be informal. Small grievances can very often be settled simply and quickly and without the need for further measures. Grievances of a more serious nature require more thorough investigations to be made in the framework of a legal process (official investigation). On the question of the supervision of the administration and its implementation by political bodies, see Part 5.

  Cantonal regulators should only intervene if a municipality's own internal "watchdog" has not fulfilled or

cannot fulfil its duties (principle of subsidiarity). Following a formal process, the regulatory bodies of the canton can in particular:

- Issue instructions to remedy an unlawful situation: the regulatory authorities can for example require the municipality to undertake organisational changes, hold new elections, fulfil official tasks properly, make legally binding acquisitions, etc. The instructions are binding on the municipality.

- Annul unlawful decisions: in principle, such agreements or decisions enter into law if they are adopted by a municipality without being challenged. In this case, the regulatory authorities can, however, rectify the situation at a later date in order to ensure the restoration of a proper state of affairs.

- Put in place the necessary arrangements for failing municipal bodies: if an investigation finds that the municipal body is unwilling to make the necessary arrangements itself, the regulatory body can take direct responsibility itself. It can undertake all measures necessary to correct the shortcomings and which are not the responsibilities of the cantonal executive (see below).

Should a regulatory investigation find that the supervisory body has insufficient resources to meet its regulatory objectives, the cantonal executive can then be asked to take further measures. Here the law makes explicit reference to the appointment of a special administration with the right to annul unlawful orders and take further necessary measures, if proper administration cannot be guaranteed in any other way. While the law makes the cantonal executive responsible for such stringent measures, this does not mean that the decision is primarily political. The aim of these measures is to restore order within the framework of the law, but the intention of the legislation is that for such important decisions, the cantonal executive has to deal with the municipality in question itself.

In the exercise of their regulatory duties, all regulatory bodies must base their activities on the principle of municipalities' own responsibility for themselves and the principle of subsidiarity in terms of cantonal intervention. The latter is lawful only when order cannot be restored without it. Every cantonal intervention must take the form of an order against which an administrative appeal can be made to an independent administrative court.

Special regulatory instruments apply to financial regulations and in part come under the scope of specialised legislation.

- Judicial proceedings against the administration

Any party aggrieved by a municipal decision or law can challenge its legality by appealing to a higher administrative authority as well as further to an independent court.

In Canton of Bern, this higher administrative authority is the cantonal regulator, who can review decisions not only on the basis of their legality but also in terms of their advisability. This is an anomaly in the system: it should not be possible for the discretion of the cantonal regulatory body to override that of the municipal body.

Lessons learned

- Legal sanctions set out clear standards (what measures can be taken in which situations).
- Because in a decentralised state, political control comes from below, sanctions imposed from above are in principle confined to matters of legal accountability.
- Cantonal regulatory measures should only be taken by the canton if the municipality does not manage to help itself (principle of subsidiarity in terms of regulatory interventions).
- Regulatory measures must be checkable by an independent administrative court.
- Municipal decisions must be checkable by an independent judicial process.
- Regulatory control should be confined to the legality of the action in question. The advisability or adequacy of a decision is solely a matter for municipal bodies, whose political room for discretion must be respected by the regulatory bodies of the central state.

PART 2

Transparency

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2.1 Definition of the Principle

This principle brings together a variety of demands whose ultimate aim is comprehensible state activity. Transparency is integral to the principle of accountability: wherever bodies can be held accountable, there must be mechanisms of transparency, i.e. means of calling to account, so that any decisions about imposing sanctions can be made.

The primary demand for transparency is made in relation to organisation of state bodies and their processes (see Part 1, the "clear" allocation of responsibility). Mechanisms should also be in place to ensure that the requisite transparency prevails and, if necessary, is established between the municipal bodies (between the management and the executive, between the executive and the legislature, and finally in relation to the electorate). Since the municipality should be accountable not only to its citizens, but also to central government, transparency is not only required within the municipality (transparency between and amongst municipal bodies and citizens) but in vertical terms as well (between the municipality and central government).

The principle of transparency can be divided into the following elements:

- Transparent organisation, processes and procedures (section 2.2)
- General public access to state activities (section 2.3)
- The flow of information between municipal bodies (section 2.4)
- The flow of information between the municipality and the canton (section 2.5).

The instruments which serve the flow of information (section 2.4 and 2.5) can be categorised as follows:

- Standard information (information, which normally flows in proactively: i.e. there is an "duty to provide")
- Investigative instruments (information, which must be provided when an appropriate demand is made: there is a "duty to obtain")
- So-called "fire alarms", i.e. mechanisms through which third parties can ensure that information is in flow.

These categories are used in the following presentation of flows of information between municipal bodies as well as between municipalities and cantons.

Some remarks on the meaning of the principle of transparency in the Swiss context:

In simple terms, transparency can be understood as measures taken by the state (as well as the municipality) to build confidence amongst its citizens and, specifically, the electorate. Hardly anything is more damaging to the state and its authorities than the impression that it is behaving in opaque ways which cannot be fully comprehended and are ultimately arbitrary. This concerns both political affairs, and procedures between the state and its "legal subjects".

As it will be seen, the principle of public access is not yet recognised by all Swiss cantons. Cantons wishing to put this principle in place often face opposition from municipalities which are concerned that citizens' desires to see all possible documents will hinder management, and fear that anticipatory actions will become impossible if everything has to be made public in advance. In practice, when the principle of public access is put in place, municipal authorities find that even after several years under the new regime, very little of the old situation has changed. Requests for disclosure of certain documents are rare; the media ask to inspect a particular document from time to time, but it is interesting to note that little use of this right is made by the wider population.

In Switzerland, transparency (and with it trust) is not primarily achieved through the principle of public access, but rather through extensive *direct democracy* and the *system of concordance* within municipal governments. The large numbers of *committees*, which have many responsibilities in the municipalities, also contribute to this "indirect" transparency. The executive can be left to do its job safe in the knowledge that the last word will be had by the electorate, whether at the ballot box or in the municipal assembly: municipal councillors have to put all the arguments and facts on the table if they wants to achieve electoral success. It is also the case that because the members of the municipal council and the committees are drawn from several parties, knowledge is spread amongst many people: this ensures that information is not monopolised by a few and largely prevents misuse.

This broad distribution of information means that there is no great demand to exercise individual rights to obtain it.

2.2 Transparent Organisation, Processes and Procedures

2.2.1 The clear allocation of responsibilities

Fundamentally important to the transparency of state activity is the clear allocation of responsibilities in both vertical terms (municipality - central state) and horizontal terms (between bodies within the municipality). It must be clear who assumes responsibility for what. These issues have already been considered in relation to the principle of accountability (see Part 1).

As has already been presented in Part 1, section 1.3, the Swiss municipalities have room for manoeuvre in terms of their own organisation and the way in which they allocate responsibilities to particular bodies.

- Cantonal law sets out general regulations on the allocation of responsibilities which apply insofar as the municipality has not established its own regulations. Some of the electorate's fundamental responsibilities are stipulated in cantonal law (see Part 1, section 1.3.3).
- The organisation of the municipality is clear from its municipal statutes, which are publicly available as municipal law. Cantonal law requires municipalities to maintain a public register of bodies, and municipalities are also obliged to keep written records of all the tasks, obligations, powers and delegations of all the financial administration's staff. More and more municipalities have moved towards the use of functions diagrams to regulate the tasks of the individual bodies in the context of the whole administration (see Part 5, section 5.8.2).

The particular challenges which result from the numerous horizontal and vertical interactions between municipalities and the central state are discussed briefly below; because of the small scale of the country, these challenges are particularly important in Switzerland at the moment.

a Vertical interactions

As was explained in Part 1, it is important that tasks are clearly assigned in vertical terms. The allocation of tasks between the different tiers of government is not an exact science, but it is rather based on a certain understanding of the state; it has grown historically and remains very dynamic. Although the central government may assign responsibilities and the allocation of resources from the top down to all levels in more centrally organised states, the process is more complex in federal (and moreover highly decentralised) states. In Switzerland, the challenges are particularly great because there are not just two, but three tiers of government (federal - cantonal - municipal). For comparative purposes, the following discussion focuses on

the relationship between the canton and municipality. This relationship varies between cantons, but the following illustration gives some insight into the distribution of tasks in the Canton of Bern.

The existing allocation of tasks and finances has grown over time and by the 1990s had reached a level of complexity that rendered the system highly opaque. In 1994, the Canton of Bern launched a four-year process called the "allocation of tasks between the canton and the municipalities". This was the first systematic revision of the allocation of tasks and finances between the canton and the municipalities, and used the principles of subsidiarity and fiscal equivalence, amongst others, as its guidelines.

An evaluation of the status quo showed that in some cases the allocation of tasks could not be derived from cantonal laws. It also showed that some allocations were highly opaque and that in many cases the cantonal legislature unnecessarily curtailed municipal autonomy. In some cases, for example, a specific task was not only allocated to municipalities: it was also stipulated how the task was to be fulfilled by the municipality, while responsibility for its funding remained (mostly or wholly) with the municipality. In other cases, the cantonal legislature adopted detailed provisions regarding the organisation of municipalities or provided the canton with excessive supervisory capacities.

The result of the process was, first and foremost, to establish greater clarity about tasks and finances. Contrary to expectations, the process resulted in a quite extensive transfer of responsibilities from the municipalities to the canton (coupled with a corresponding shift of the tax burden) while only few tasks which had previously belonged to the canton were transferred to the municipal level. Moreover, it was not possible to completely disentangle the tasks in some important areas: kindergartens and primary education, social care, social insurance and public traffic were defined as common tasks. The process resulted in the adoption of a new Law on Equalisation of Finances and Charges (hereafter: FILAG) and the amendment of 15 sectoral laws. This did not, however, mark the end of such reforms. Indeed, the cantonal government stated that "the division of tasks between the canton and the municipalities [...] is a permanent task of the cantonal parliament, the cantonal executive council (hereafter cantonal government) and the cantonal administration". One outcome of the project was therefore the formulation of basic principles for future legislation, which were declared binding by the cantonal government.

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.

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 Cantonal Parliament).

Since 2000, the allocation of tasks has further been revised, for example in the area of policing (introduction of single police force). A recent evaluation of the FILAG has resulted in new proposals for reforms in several areas including primary schools, social care, public transport, roads, and asylum.

The allocation project made a systematic compilation and analysis of financial flows between the canton and municipalities in the Canton of Bern. Today there is a comprehensive balance sheet which combines all the effects of the reform of task allocation and financing. It shows the vertical redistributive effects for both the canton and all the municipalities, as well as the horizontal redistributive effects across municipalities. The ex-ante evaluation of possible models of allocating responsibilities makes it possible to simulate the impact in both vertical and horizontal terms. This *comprehensive balance sheet* can now be used to demonstrate the impact of specific reforms on the overall system. This transparency generally results in political decisions that are based in fact.

b Horizontal interactions

As well as intense vertical integration, the *horizontal interaction of municipalities* is increasingly regarded as a major challenge. Bearing in mind the small size of municipalities, and the ever-increasing mobility of the population, it is not surprising that the functional and institutional areas are becoming increasingly divergent. In this context most municipalities have chosen to pursue inter-municipal collaboration, in order to improve supra-local coordination, but also to implement economies of scale in municipal services. An investigation in sixteen larger and medium-sized Swiss agglomerations at the beginning of the 1990's found 444 systems of cooperation in place between core cities and surrounding municipalities. This kind of horizontal cooperation has augmented municipalities' scope of action, but at the same time, a de-facto intermediate level composed of "a complicated network of institutions, organisations, funding formulas, spatial perimeters and actors"[2] has emerged. Cantons as well as municipalities – and sometimes even the federation – are involved in these modes of cooperation. As a result it has become increasingly difficult to coordinate different policies, and responsibilities have become less and less imputable to a certain municipality (or even a particular level of the state). As the Swiss political scientist Kübler has 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.*[3]"

2 (Author's translation) 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.

3 KÜBLER, DANIEL, Agglomerations, in: KLÖTI, ULRICH; KNOEPFEL, PETER; KRIESI, HANSPETER; LINDER, WOLF; PAPADOPOULOS, YANNIS; SCIARINI, PASCAL (eds.) Handbook of Swiss Politics, 2nd edition, Zürich 2007, p. 263.

The entanglements are particularly pronounced in agglomerations, where approximately 75 per cent of the Swiss population live: it is in these areas that the functional and the institutional areas are the most divergent, and that improving governance has become an important new challenge for the Swiss political system. In order to deal with problems related to the "joint decision-making systems" which result from the extensive vertical and horizontal systems of cooperation, several strategies are currently being developed in order to:

- Adapt the institutional areas which have grown up historically to the newly developed functional spaces. Proposals range from merging municipalities to the complete redrawing of the cantonal landscape;

- Restore fiscal equivalence by disentangling responsibilities between cantons and municipalities and optimising systems of financial equalisation (including the participation of suburbs in central financing);

- Create transparent cooperation structures in agglomerations endowed with their own decision-making powers that bring together the numerous organisations of inter-municipal cooperation and thereby facilitate not only the coordination, but – equally important – the ability to impute responsibility.

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 areas with its consequence of an ever-increasing horizontal and vertical integration leads to a situation where it gets more and more difficult to allocate responsibility. This is regarded as a serious problem for the Swiss system. Reforms to restore transparency and accountability are necessary (and partly on the way).

Lessons learned

- The distribution of tasks is not set in stone, but must be continually dealt with from scratch.
- It must be ensured that responsibilities for tasks and for financing are in as much agreement as possible.
- Disagreement between institutional (decision-making) areas and functional (lived) areas puts transparency in danger because responsibility can no longer be attributed; appropriate models of cooperation (in the sense of multi-tier-governance) can mitigate against this risk.

2.2.2 Transparent processes and procedures

It is important that legal norms apply to procedures which lead to decisions, i.e. they must be announced in advance and cannot therefore be manipulated. Cantonal law sets out some basic rules on this:

- Municipal assemblies should be held at the times set out in the regulations, and in addition as often as circumstances require or if the municipal council considers an assembly necessary, and finally if at least 10 % of the electorate (the municipality can also set out a lower percentage) demand that an assembly is held.

- Municipal assemblies are to be publicly announced 30 days in advance. The invitation must state the nature of the business, and regulations on which the municipal assembly will vote must be announced 30 days in advance.

- The electorate can only take definitive decisions on the issues referred to in the invitation to the municipal assembly. The municipal assembly can advise on issues relating to matters which have not been announced in advance, and decide on their significance. The municipal council submits those deemed significant to be decided upon at a later assembly.

- The municipal assembly is quorate regardless of the number of people present. All votes on matters of fact are decided by majority. The chair agrees with the majority, and unless the municipalities have other rules, has the casting vote in the case of a tie.

- The municipal parliament, the municipal council, and the committees can make decisions when a majority of members are present. Votes are won on the basis of a simple majority, but the municipality can put other regulations in place. The cantonal law which states that the chair agrees and has the casting vote also applies here insofar as the municipality has no other rule in place.

- Cantonal law also makes provision for the municipal council and committees to make circular decisions if all members agree to this procedure. Municipalities can rule out circular decisions or stipulate further conditions on which they are to be made.

- In order to preclude subsequent amendments of the decisions of the responsible bodies, cantonal law stipulates that any significant modification of a decision based on matters of fact must be resubmitted to the competent body. In practice, defining a significant modification in individual cases often proves difficult. In terms of financial decisions, any deviation of more than 10% counts as a significant modification.

- Cantonal law also contains detailed provisions for the implementation and determination of the results of elections from which the municipalities can diverge in part (see Part 3, section 3.2.2).
- Of particular importance is the transparency of the budgeting process; for this see Part 5, in particular section 5.5).
- Cantonal law thus sets out all the essential requirements for decision-making. Municipalities may diverge from these requirements in part, but they can only do so on a legal basis (agreed by the electorate).

Lessons learned

- It is important that the regulations concerning decision-making are established in advance, so that the process cannot be manipulated in individual cases.
- In order to avoid any gaps, it makes sense for the canton to regulate procedural benchmarks; where there is room for different regulations, the municipality is however able to diverge from cantonal regulations (in a municipal regulation which must be decided by the electorate).

2.3 Public Access to State Activities

One of the central principles arising from the concept of transparency is that the general public should be informed about government activity.

In Switzerland, the principle of public access in relation to the administration was only introduced in 1995 in the Canton of Bern, and was not implemented at the federal level until 2004. Even in 2016, some cantons had still not introduced the principle of public access.

The constitutionally guaranteed freedom of information only covers the right to access information from “freely available sources” (Art. 16, Section 3 of the Federal Constitution). This includes parliamentary debates, court proceedings, the companies' register, tax register and the land register. The debates held in parliamentary committees (including any confidential reports that are considered by such committees), the registry office register, and penal institutions are not considered “freely available sources”. In particular,

under the jurisprudence of the Federal Supreme Court (which is heavily criticised by scholars), freedom of information does not apply to private or media claims to access information about internal administrative processes.

Until very recently, the "principle of confidentiality with a caveat on publication" (Geheimhaltungsprinzip unter Öffentlichkeitsvorbehalt) applied to information held by the federal administration. Only with the enactment of the federal Freedom of Information Act, which came into force on 1 January 2005, was the right to access the federal administration's documents granted, regardless of a justified interest being in place (restrictions of this right for reasons of a primarily private or public nature are listed comprehensively in the Act).

In 1995, the Canton of Bern became the first Swiss canton to make the shift from the principle of confidentiality with the proviso of publication to that of public access with the proviso of confidentiality (Revision of the cantonal Constitution and the cantonal Information Act). The cantonal Constitution under Art. 17.3 now grants a comprehensive right of access to documents, and Art. 70 compels cantonal authorities to provide sufficient information. The Information Act sets out further details of these provisions and extends their application to the municipalities. These legal instruments establish various claims for direct as well as indirect transparency:

- Direct transparency concerns keeping track of individual documents or procedures directly (known as *unmittelbare Öffentlichkeit*, see 2.3.1),

- Indirect transparency can be further divided into:
  - Active information (through state authorities, see 2.3.2), and
  - Passive information (the provision of information on request, see 2.3.4).

2.3.1 Direct transparency

What are the opportunities to keep direct track of state activities?

In the first instance cantonal law stipulates that all the laws enacted by a municipality are valid only if they have been published in line with the rules. Regulations (the municipal laws which are decided upon by the electorate) have to be made public at least 30 days before they are decided. The *financial plan*, the *budget* (i.e. the annual estimates of expenditure) and the *annual accounts* are public.

Another important cornerstone is the public nature of parliamentary proceedings as well as those of municipal assemblies. In the case of audio-visual recordings, the municipal assembly can determine

whether individual members of the electorate are able to refuse permission for their statements and votes to be shown. The media can make audio-visual transmissions of parliamentary meetings as long as they do not interfere with their operation. Not only the meetings of the municipal legislature are public; municipalities must also ensure access to the base on which the decisions of the municipal assembly and parliament are made.

While the meetings of the municipal legislature (parliament or municipal assembly) have to be public, the meetings (as well as the *minutes* of the meetings) held by the municipal executive (council) as well as the committees are in principle confidential. The municipality can however provide for these meetings to be made public, although to the authors' knowledge no municipality has done so to date. The *decisions* of the municipal executive (council) and the committees are however public. The reason for declaring meetings of the executive (which is collegiate in Switzerland) and the committees confidential is to protect decisions from any great politicisation and facilitate open discussion without this meaning that every outcome appears in the next day's newspaper.

2.3.2 Indirect transparency – active information

To what extent is the municipality obliged to actively inform the public about its activities?

The cantonal Information Act (*Informationsgesetz*) governs the principle of transparency, the duty to inform, and the right to access the documents of all cantonal and municipal authorities. Authorities are defined not only as municipal bodies, institutions and other entities which come under municipal law, but also private bodies to the extent that they are engaged in the fulfilment of public duties delegated to them.

The Information Act *requires municipal authorities to provide information about municipal affairs as long as there are no prevailing public or private interests*. There is therefore always a balance to be struck between the public interest of information and all other public or private interests, and inevitably it is sometimes the case in practice that uncomfortable truths are kept “under wraps”.

Municipalities' way of dealing with information varies according to their capacities. In order for a municipality to present itself to the outside world with a single voice, it is important to regulate *who* can give information about *what*, and *when* and *how* they can do so. To this end, larger municipalities have an *information concept*; smaller municipalities generally give responsibility for external communications to the municipal president. These days, most municipalities also have their own websites.

Official publications take the form of official gazettes, and they are regulated by the (cantonal) Law on

Municipalities. The official gazette has to be distributed free of charge to all businesses and households in the area, and its contents are therefore assumed in legal terms to have been read by everyone. It can include an unofficial section, but this must be clearly differentiated from the official part. There can be no articles or commentary expressing editorial opinion, nor classified ads or any articles which might disturb public law and order, are discriminatory, or indecent. Articles by municipal authorities in the pursuit of their duties in respect of information according to the Information Act are however permitted.

The publication of the official gazette is a *municipal task*. A combined official gazette can be produced by several municipalities within the same administrative region.

The municipalities have the *exclusive right* to publish the official gazette (monopoly). They can exercise this right themselves or delegate certain services in conjunction with the publication of the official gazette (printing, distribution, management of advertising, etc.) to a third party (publisher model). They can however also hand over the right to publish the official gazette to a third party under public law (concession model).

2.3.3 The particular obligation to provide objective, factual information

In the run-up to votes and elections, the authorities (and all persons or businesses entrusted with the fulfilling of public tasks) can find that their tasks concerning information bring them into a state of tension with the federal constitutional protection of voting and electoral freedom.

This fundamental right acknowledges that "the electorate has the general right to insist that no vote or election result is recognised which has not been conducted by the free will of the electorate (…) In addition the decision of the electorate must be based on the freest and most comprehensive possible process of opinion making (…)."[4]

The authorities are compelled to provide factual and objective information at all times. Ahead of elections and voting they must exercise particular restraint, but at the same time they must also, and particularly in relation to votes on factual decisions, fulfil their duties with regard to the provision of information, that is to inform the electorate about the advantages and disadvantages of the various possible solutions under consideration.

In practice, therefore, dealing with information in the run-up to ballots tends to be something of a balancing act, and the municipalities are well advised to act with caution if in doubt. When a proposal is narrowly

4 Federal court decision (BGE) 124 I 55, S. 57.

accepted or defeated as the result of a vote, it is frequently the case that a dissatisfied member of the electorate initiates a judicial review on the basis that the authorities were too strongly involved or one-sided in the campaign.

The result of a vote can however only be overturned by a court if on the one hand it can be proved that there was a *significant lack* of, for example, factually correct information in the run-up to a vote, and on the other hand that there is a credible *possibility* that the alleged irregularities had an influence on the result.

2.3.4 Indirect transparency – passive information

To what extent is the municipality obliged to grant interested parties access to information on request?

According to Art. 17, Section 3 of the cantonal constitution, anyone has the right to inspect official documents (here too, as long as there are no prevailing public or private interests). The cantonal constitution thus guarantees the principle of public access as a *constitutional right* of the individual, which applies *regardless of one's ability to demonstrate a reasonable personal interest or connection to the information in question*. This right to inspect documents is enshrined in the Information Act.

Extensive protection is preserved for personal data under the *data protection legislation*. Access to documents involving particularly sensitive personal data always requires the express consent of the person concerned. In practice, there is often an uneasy relationship between the duty to disclose information according to the Information Act and the regulations concerning data protection.

The Information Act specifies what is meant by *prevailing interests*. A prevailing *public interest* exist in particular when:

a. The premature disclosure of internal working papers, proposals, designs, and the like, has a significant effect on the decision-making process;
b. The population would be damaged in some other way, particularly by endangering public safety;
c. An excessive burden would be placed on the authorities.

Prevailing *private* interests are in particular those involving:

a. The protection of the personal private sphere;
b. The protection of personal privacy in administrative or judicial procedures which are not enshrined in legislation, except when the inspection of documents is justified by a specific public interest or result of the regulations of procedural law;
c. Commercial or professional confidentiality.

These exceptions apply *only to that part of a document subject to protection* or a disclosure, and are valid only *as long as the prevailing interest in the confidentiality remains justifiable*.

Details of the inspection of documents (jurisdiction, procedures, deadlines) are set out in the cantonal regulations of the Information Act.

Should a request to inspect documents be rejected, the decision takes the form of an order which is subject to appeal. The recipient of this order can lodge an appeal for it to be subject to judicial review.

For administrative and judicial procedures which are not closed, it is not the provisions of the Information Act, but rather those of the relevant procedural law, which apply. As a rule, the relevant procedural law grants the right to inspect files only to those involved in the procedure, insofar as they can demonstrate a reasonable interest.

2.3.5 Provisions for the documentation of information

Transparency is also served by provisions which guarantee the retention of state information. Cantonal law includes:

- The requirement that *minutes* on the consultations of the municipal bodies must be kept. The municipality regulates the form, the minimum contents and the approval of the minutes.
- Requirements on *filing and archiving*. According to the cantonal law on archiving, all bodies (including those of the municipality) are obliged to secure, order, and retain documents which are relevant to the accountability of state activities and/or to the study of the cultural heritage of the Canton of Bern. For the municipalities these obligations are set out in relatively high detail in the regulations.

2.3.6 The role of the media

The media has a fundamental role to play in democratic states: even with extensive rights to access information, citizens have no chance of dealing with the wealth of available information on their own. The media have the function of taking up all aspects of social issues, uncovering abuses, and using mass communications to feed into public debate. In this way they serve above all the development of political opinion and the control of parliament and the administration. Because of their fundamental role in the functioning of democracy (and also because of their “factual” power), the media are sometimes described as the fourth "estate" or pillar of the state.

So that the media can perform these functions, they are protected by the federal constitutional guarantee for the *freedom of the media* (this protection includes freedom of the press, radio and TV, editorial confidentiality which protects journalistic sources, and the proscription of censorship).

Lessons learned

- In Switzerland, several different elements (instruments of direct democracy, concordance system in municipal executives, numerous decision-making committees) ensure that information cannot be "monopolised" by a state body.
- Fears that the principle of public access would flood the administration with requests for information have not been realised. On the contrary, the legal rights which have been established in law are used with astounding infrequency.

2.4 Flows of Information between Municipal Bodies

Not only citizens need to be informed. Every government body that is mandated to hold another government body to account must have a corresponding opportunity to be informed as well. In fact, the whole government process must be *transparent*, so that different actors can play their part, particularly – in the context of accountability – in order to judge the deeds and misdeeds of others.

2.4.1 Standard information processes ("duty to deliver")

a What standard information flows are in place between the administration and the head of the executive?

The municipal council constitutes the head of the (hierarchically constituted) municipal administration. According to cantonal Law on Municipalities, it is responsible for governing the municipality and planning and coordinating its activities. This responsibility is normally exercised through the use of orders and controls. The organisational framework of the municipalities (the municipal statutes) usually obliges the administration to report on its ongoing affairs to the municipal council (in the sense of a controlling instrument) at regular intervals and, in extraordinary circumstances, outside this rhythm too.

An important area of executive responsibility is financial budgeting. In principle, the municipalities (the municipal council as the executive leadership) assume responsibility for their finances. They ensure that public funds are managed with care, used economically, protected against mismanagement and subjected to meaningful and comparable accounting. Within the municipality, cantonal law gives the municipal council the responsibility for financial budgeting. This responsibility only extends, however, as far as the municipal council is responsible for organisational and supervisory matters. Should the electorate or the parliament reject a tax increase necessary according to the financial plans, for example, the municipal council can of course not be held responsible if the budget does not then balance. To ensure the comparability of municipal finances, the canton sets out detailed rules which combine to make an important contribution to transparency. So for example in terms of the accounts there is a duty to log financial transactions on a daily basis. For each entry, there must be a receipt etc. (see also Part 5, in particular section 5.5).

b What standard information flows are in place between the executive and the legislative?

As well as continual reporting, the following instruments should be mentioned:

- *Standing parliamentary committees with an "information gathering mandate"*: in its supervisory role, the municipal parliament can monitor the activities and finances of the executive. As a rule, these political controls come retrospectively, primarily with the goal of creating transparency (as a confidence building measure). The parliament has *standing parliamentary regulatory committees* for this purpose, which have the right to access all the information necessary for them (or their delegates) to fulfil their tasks.

  As a rule, parliamentary committees - and the parliament - cannot revoke or modify decisions of the executive (beyond their areas of responsibility), but only - which is still a lot - make relevant recommendations and request the parliament to impose appropriate sanctions (e.g. request that an invoice is not approved).

- Every municipality has to have a specialised, professional *auditing body*. This body has to be selected by the electorate or parliament and can take the form of a parliamentary committee (or a committee of the electorate), or the municipality can engage external auditors. The auditors' mandate is to check the formal and material correctness of the budgeting and accounts and at least once a year it carries out an unannounced interim audit. The auditing body reports to the relevant body (usually the legislature) and makes a proposal, prior to which the municipal council is informed and given an opportunity to comment. As with the regulatory committees already mentioned, the auditing body has extensive powers to access information. It can inspect any documents necessary to the fulfilment of its task.

- Transparency is also served by the requirement that with all decisions connected immediately or at a later date with municipal revenue or expenditure, the decision-making body must give prior information about costs, follow-up costs, financing and impact on the budgetary balance sheet.

2.4.2 Investigative instruments ("duty to obtain")

a In which ways can further enquiries be made, if need be, between the executive and the legislature?

In the first place, anyone, including the members of the municipal legislature, has the general right of access to information (compare above section 2.3). In addition, the municipal legislature has specific rights to gather information.

- Parliamentary instruments
  The individual members of the municipal parliament have various ways of getting information from the executive. The municipalities have a free hand with regard to the design of their parliamentary instruments, but as a the rule they use the following instruments:

  - As far as the executive area of responsibility is concerned, the parliamentary instruments are often set up as simple requests for information. By means of a postulate the executive can be required to examine a particular issue and report to parliament on its outcome.
  - Within the scope of parliamentary responsibility or that of the electorate, it is possible to exert legally binding influence by using the instrument of a motion, provided that the majority of the parliament supports the request.

- In municipalities which have no parliament, any municipal citizen has the right to submit an application to the municipal assembly (within the scope of the electorate's responsibility). By means of an application, it can be requested that an item of business that is not on the agenda (for a coming municipal assembly) is dealt with as long as the majority of the municipal assembly supports the request. In practice, this right is frequently used to obtain information on specific matters (including those beyond the executive's area of responsibility).

- For the clarification of matters of greater consequence the municipal parliament can ultimately set up a *parliamentary enquiry* and equip it with the appropriate rights to access information. In municipalities without parliament, it is possible for the electorate to set up a special enquiry.

ⓑ In which ways can further enquiries be made, if need be, between the executive leadership and the administration?

In its supervisory role, the municipal council has *the right to inspect all documents as far as necessary for the fulfilment of this role*. The right to inspect therefore goes further than that afforded to all people under the principle of public access. It should be noted however that this right to inspect extends to the municipal council as an authority, not to its individual members. Individual municipal councillors are not therefore permitted to make their own enquiries about the activities of another municipal councillor without first obtaining a mandate to do so from the municipal council itself.

If irregularities in a municipality are detected (or suspected), cantonal law requires the relevant municipal body to clarify the matter and take the necessary measures. Municipalities may for this purpose conduct or facilitate *official investigations*. These investigations are governed by the same rules that apply to administrative court processes; the relevant authorities therefore have a comprehensive right to inspect documents and can also use coercive measures (for example examining a party under threat of criminal sanctions if the truth is not told). In practice, difficulties often arise in relation to the question of how much access there should be to reports made as a result of official investigations. Here there has to be a compromise between the public interest and the (private) interests of those under investigation (data protection).

2.4.3 Fire alarms

Municipalities are free to create special institutions or bodies which have the mandate to bring abuses to light. Some larger municipalities have an ombudsman, whose main function is to provide advice or arbitrate in conflicts. A side-effect of an ombudsman's work may be that irregularities are brought to light in the course of reporting to the parliament, for example if an unusual number of conflicts arise within a particular administrative body.

The ombudsman's mandate is usually broad. Anyone can seek the ombudsman's advice on all matters pertaining to the municipality. The ombudsman's role is usually to arbitrate free of charge, but ultimately only to advise. Ombudsmen have extensive access to documents, and report to the municipal legislature on their activities. Their position in the municipality must be as independent as possible from the administration, so they can do their job credibly.

2.4.4 Overview of the instruments which serve the flow of information between municipal bodies

To summarise, the following instruments serve the flow of information between municipal bodies:

	Standard information flows	Investigative instruments	Fire alarms
Service providers to head of executive	Regular reporting Detailed regulations in terms of financial budgeting	Parliamentary instruments (requests, motions, postulates) and rights to make proposals to the municipal assembly Appointment of special (parliamentary) investigation committees	Media
Executive to legislative body	Regular reporting Standing parliamentary committees Auditing bodies (and their reports) The obligation of decision-making bodies to orientate themselves according to the costs, follow-up costs, financing, and implications for balanced budgets	Supervision (in connection with the right to inspect all documents) Official investigations	Media, individual ombudsmen

Lessons learned

- Transparency cannot be established with a single instrument, but is rather the result of a system which combines several different instruments. 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 to the sanctioning mechanisms and the latter must correlate to the relevant areas of responsibilities.

- There is a tension between demands for transparency and protection of the private sphere (data protection).
- It is not the quantity, but the quality of information that is on offer.

2.5 The Flow of Information between Municipalities and the Central State

Since municipalities are institutions of cantonal law, they are subordinate to cantonal supervision. In this context supervision is to be understood in terms of the municipality as a whole, rather than within a particular unit of the hierarchical organisation.

Cantonal supervision has 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, cantonal oversight is also seen as a necessary counterweight to municipal autonomy. In the words of Wismer, "because municipal autonomy is of such great importance, it requires due attentiveness of the state".[5]

2.5.1 Standard information flows between municipalities and the canton

The canton has several means of keeping itself informed about what is going on in the municipalities:

- First of all, the most important legal basis of a municipality, its statutes, have to be subject to examination by the canton prior to its adoption by the citizens. The municipalities may voluntarily send other legislation to be checked by the canton.
- Secondly, several municipal legal acts are subject to cantonal endorsement after their adoption (and as a prerequisite of their enforcement). This is the case – again – for the municipal statutes and for other acts if special legislation provides for such a duty. So, for example cantonal construction law stipulates that plans and local municipal regulations concerning construction are subject to cantonal approval.

5 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).

- The endorsement of such legislation may only be rejected by the competent cantonal body if the act in question is illegal or inconsistent. As long as a provision may be interpreted in a lawful manner, it is to be approved, even if the canton considers it inexpedient.
- The canton also reserves the right to approve particular transactions which directly affect it, such as if the municipality wishes to open a new school class (the canton contributes 70% of teachers' remuneration, so cantonal authorisation is here in line with the principle of fiscal equivalence). Such a case concerns the political decision-making of the canton, which (of course) is not limited to the question of legality.
- Until recently the yearly accounts of the municipality also needed to be approved by the canton (*Passation*), but as a rule the canton no longer checks municipal accounts: this task is now done by the municipal auditors. The canton can still intervene should irregularities occur.

2.5.2 Investigative instruments of the canton

Besides these *standard procedures*, the canton has several *investigative instruments* at its disposal:

- The cantonal regulator may visit a municipality at any time, undertake vigorous controls, ask questions, and verify whether the municipal administration is conducted correctly. Practice has however shown that such snap inspections rarely uncover failings, and often leave municipalities with a false sense of security.
- Whenever there is a reason to believe that the correct functioning of the municipal administration is in danger due to illegal behaviour of municipal bodies or that it is otherwise seriously endangered, *and* at the same time the municipality does not tackle the problems itself, the competent cantonal body may initiate a supervisory investigation. 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: correct functioning is primarily a municipality's own responsibility, and it is only where a municipality does not assume that responsibility that the canton is entitled (and obliged) to investigate (and take any necessary measures). An investigation can be opened either at the request 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 any measures to be taken against the municipality at a later stage.
- Finally, special inspections can be made of financial matters.

Information does not, however, flow only in one direction, i.e. from the municipalities to the canton. In practice, the cantonal administration's role in supporting and consulting with the municipalities is almost as important. The cantonal administration, for example, provides model regulations for municipalities and systematically informs the municipalities about all matters of relevance to them. So that the right information can be found when required, it is categorised using the same system as the legal framework, which has proved very useful in practice. 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."[6]

It can be concluded that the canton has a broad set of informatory measures that allow it to respond to different kinds of situations at its disposal. The standard procedures can serve as general indicators; the investigative instruments can be used in situations where a closer look is required. An additional analysis of sectoral legislation dealing with supervision would show that in the Canton of Bern, many provisions deal with municipal supervision (be it informally, in a general way, or in special situations). This does not, however, threaten municipal autonomy. It is very important that cantonal law defines the areas and scope of cantonal supervision, because these provisions define the limits of cantonal supervisory power and thereby the extent of municipal autonomy.

Lessons learned

- The canton has a tendency to overstep the limits of legality and extend its supervisory role beyond the limits of usefulness. This contradicts the idea that municipalities need to be accountable for policy decisions to the local population while the canton must be responsible only for ensuring that municipalities adhere to the framework of higher law.
- Informal exchanges of information and the flow of information from the canton in the everyday life of the municipalities is of great importance to successful cooperation in vertical terms.
- Supervision of the municipalities has to be conducted according to the principle of subsidiarity: the canton should be active only insofar as a municipality does not have its eyes open to any abuses or cannot deal with abuses on its own.

6 WICHTERMANN, Kommentar GG, Art. 85, para. 4, citing WISMER, Staatsaufsicht, p. 124 (translation by the author).

PART 3

Participation

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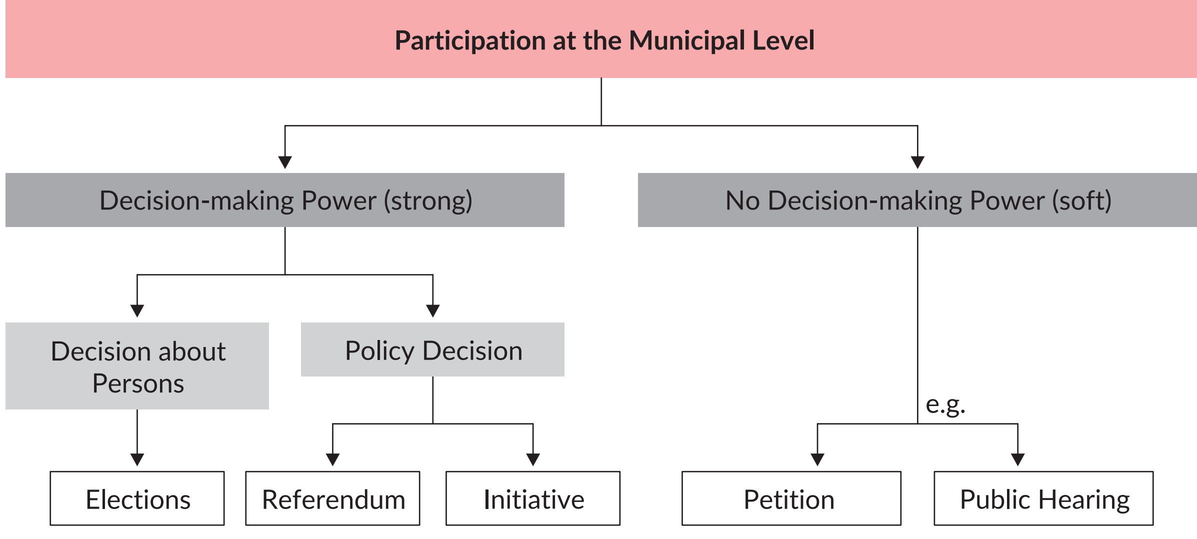
3.1 Definition of the Principle

Participation describes all the formal rights of the electorate and the wider civil society to participate in any possible form in the decision-making processes of the municipality.

Participation can concern direct decision-making (*strong* participation) or the ability to contribute to decisions to be made by others (*soft* participation).

- Strong participation refers to the electorate, as the highest body of the municipality, making its own decisions on matters which can either concern decisions about personnel (this concerns elections), or policy (this concerns initiatives or referenda as instruments of direct democracy).
- With soft forms of participation, the participants can share their requests and preferences with the competent body, but it is up to the authority to take decisions and therefore the responsibility remains with this body (e.g. with the municipal parliament or the municipal council, or a municipal council's committee).

The instruments of municipal elections and direct democracy that confer decision-making powers on the electorate (strong participation) are presented in section 3.2 below. Without claiming to be comprehensive, section 3.3 presents some instruments of soft participation.



3.2 Participation with Decision-Making Powers (Strong Participation)

3.2.1 Common features

a Who has the right to participate in decision-making processes?

The prerequisite for participation rights in the sense of strong participation is the right to vote on municipal matters. Cantonal law specifies to whom this right belongs.

Voting rights in municipal matters are held by those who have resided in the municipality for three months and who are entitled to vote in cantonal matters. The three month limit ensures that there is no "voting tourism". In cantonal matters, the electorate is composed of all Swiss citizens of at least 18 years old.

People who are declared incapable, or people who are under guardianship are excluded from the electorate.

There have already been several attempts to allow the municipalities to extend voting rights on municipal matters to foreigners. This would however require a change to the cantonal constitution, and referenda on amendments to the cantonal constitution have so far been rejected.

b Voting rights and the democratic legitimacy of state decisions

It should be emphasised that voters in the Swiss concept do not "participate" in the state decision-making processes from the outside, but rather form the supreme body of the state (at every state level: in the federation, in the cantons, and also in the municipalities). Because the voters express their will "as a body", their decision has the greatest possible democratic legitimation.

c Legal protection

Switzerland gives considerable legal significance to the protection of political rights (the term political rights should be taken to mean the active and passive right to vote, as well as the instruments of direct democracy). To the extent that political rights are provided for by cantonal or municipal laws, the federal constitutional guarantee of political rights applies: under Art. 34 (2) of the Federal Constitution, 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.

Federal Supreme Court case law establishes that 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'. This *leitmotif* has been further substantiated by the Federal Supreme Court in various respects and a number of defence, participation and performance claims have been derived which, on the whole, should guarantee *unobstructed access to political rights and the genuine expression of the political will.*

Under this conceptualisation, the right to vote is both a *constitutional right of the individual* and a *power* of the entire electorate *as a body of the state ("Organkompetenz").*

The significance of political rights is also specified in the arrangement of the legal remedies available for infringements of these rights: under Art. 189(1)(f) of the Federal Constitution, the infringement of federal and cantonal provisions on political rights can be brought before the Federal Supreme Court by way of an electoral complaint ("*Stimmrechtsbeschwerde*"). The Federal Supreme Court makes an unrestricted examination of the case, and extended rules also apply: any person entitled to vote may file a complaint, regardless of whether they are themselves materially affected by the contested action; a complaint may also concern purely public interests. In particular, political parties as well as initiative and referendum committees, insofar as they are active in the relevant municipality or canton, may file complaints. The electoral 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.

d The importance of communication rights as a prerequisite for effective participation in the decision-making process

The protection of the right to vote is not however sufficient to guarantee the democratic nature of opinion-forming. In order for voters to be able to organise themselves (for example, in political parties or in other interest groups), it is necessary in particular to protect what are known as basic communication rights (freedom of assembly, freedom of the press, freedom of information, freedom of opinion etc.). These are guaranteed in Switzerland at the level of the Federal Constitution, and their function for the democratic process of opinion-forming is given the utmost importance by the judiciary.

3.2.2 Electoral rights

The right to elect is probably the most important (and in many systems, the only) instrument the electorate has to hold the state or the holders of political mandates to account. The extent to which the right to elect can be made use of in order to "influence" the system depends on its particular design.

ⓐ The right to elect and to right to stand for elections

The *right to elect* is part of the general right to vote. This means those who are entitled to vote in the municipality (see section 3.2.1, a) are also entitled to elect the municipal authorities.

The *right to stand for elections* in municipal authorities is set out (as a minimal standard) in cantonal law:

- Members of the municipal electorate can be elected to the municipal council, the municipal parliament, the presidency and the vice-presidency of the municipal assembly;

- Members of the federal electorate are eligible for election to committees with decision-making powers (regardless of whether their political domicile is in the relevant municipality). Municipalities can however limit voting rights to members of the municipal electorate.

- All competent people, even those not in the electorate, are electable to committees without decision-making capacities. Because these committees do not take decisions, but "only" prepare business for the relevant bodies. This concerns a form of soft participation for which the right to vote is not a necessary requirement.

Municipalities determine the *length of terms of office* of their own bodies, up to a maximum of six years. There can be no maximum age for eligibility for election to the most important bodies, because this would breach (federal constitutional) laws against discrimination.

The ability to stand for re-election can be limited by municipal law, but only for one term. If the municipality makes no stipulations, people can be re-elected without restriction.

ⓑ Elections on the municipal level

Cantonal Law on Municipalities states that the electorate chooses at least the following authorities:

- The president of the municipal assembly

- Members of the municipal council (as a collegiate body) and the municipal president

- Members of parliament (if a municipality has one)

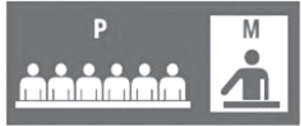
- Members of the auditing bodies (unless a municipality has a parliament, in which case the parliament elects the auditing body)

Municipalities are free to regulate their electoral procedures. If a municipality has no rules of its own, the cantonal laws on political rights apply.

To the authors' knowledge, municipal parliaments are always elected by *proportional voting*[7], and municipal councils use either *majority*[8] or *proportional systems* (as a rule, smaller municipalities choose to adopt majority voting, while larger ones use proportional systems) with some municipalities combining both procedures (e.g. using proportional voting for the election of the municipal council, and a majority vote for the election of the municipal president).

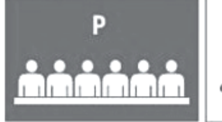
Wahlsysteme für Gemeinderäte

1 Proporz über alles — Beispiele:



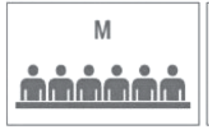
Bern, Thun, Langenthal, Muri, Worb, Ittigen, Köniz

2 Majorz für Präsident, Proporz für übrigen Rat



Münsingen, Kirchberg, Hindelbank

3 Majorz für alle



Burgdorf und viele kleine Gemeinden

(Image: Bund-Grafik, Source: Der Bund, 24.10.2013)

Election systems for members of the municipal council

1) Only proportional voting (examples: Cities of Bern, Thun, Langenthal, Municipalities Muri, Worb, Ittigen, Köniz)

2) Majority voting for president, proportional voting for the other members (examples: Municipalities Münsingen, Kirchberg, Hindelbank)

3) Only majority voting (examples: City of Burgdorf and many small municipalities)

The municipality is also free to choose the electoral procedures which apply to elections to *committees*, and here too in practice both systems (proportional and majority) are being applied.

When regulating their elections, municipalities must however adhere to the applicable constitutional requirements for all elections (that ballots are universal, equal, direct, free and secret).

7 In the case of proportional voting, the available seats are first distributed to the lists according to the share of the vote. Only in a second step are the seats then allocated to the list of candidates. There are various different ways of determining the share of the vote.

8 In majority voting, seats are distributed amongst the candidates who have received the majority of votes.

C Majority voting

In majority voting procedures, seats are distributed amongst the candidates who have received a majority of votes.

The constituency consists of the entire municipality. A subdivision into different constituencies is not allowed. It is possible to dedicate a seat to individual areas of a municipality (known as local minority protection), but in practice this is rare.

The organisation of the electoral process differs from municipality to municipality. In its simplest form, elections are conducted through the *municipal assembly*[9]. Often, and especially in bigger municipalities, elections are conducted at the *ballot box*. *A typical electoral process*[10] (majority, at the ballot box) looks - in a simplified form - like this:

- **Submission of nominations**. The parties (which, in smaller municipalities, are often "only" local interest groups) submit their nominations and designate a representative who can make legally binding declarations on behalf of the party or interest group. A nomination may contain as many names as there are seats to be allocated. No name may be listed more than once on a nomination. Each nomination must be signed by a certain number of voters and submitted to the municipality by a deadline prior to the election as specified in the regulations.

- **Inspection/correction of nominations**. The nominations are checked and/or corrected by the municipal administration. The representative is given a short period within which to correct any deficiencies (often only a very short time e.g. three days).

- **Election materials**. The nominations are listed in the following order on the voting slips: first the existing holders of office, in alphabetical order, and then the new candidates, also listed alphabetically.

- **The election**. Members of the electorate complete the voting slips. There can be as many names of candidates on the slip as there are members of the relevant body to be elected. Each name can be

9 Regulations for majority voting (from the model regulations drawn up by the Canton):
The president invites the electorate to nominate candidates, and makes these available for inspection. If there are no more candidates than available seats, the president declares the candidates to be elected. If there are more candidates than seats, the assembly votes by secret ballot. The counting officers distribute the voting slips, and reports the numbers to the municipal scribe. Voters can enter as many names on the voting slip as there are seats to be filled; only those who are candidates can be elected. The counting officers collect the slips, and the counting officers as well as the municipal scribe check that there are no more slips than were first distributed. Invalid slips are removed, and the result is announced.

10 There follows a description of the method which is applied if a municipality has made no other arrangements. The practice is very diverse and difficult to grasp.

entered only once. Voters personally put the slip into the ballot box. Electoral secrecy must be guaranteed (i.e. it cannot be possible to find out who has voted for whom).

- Determining the result. The result is determined by the municipal administration (or a standing elections and voting committee). The counting is public, but spectators cannot participate in the count or disturb it. Elected is the person who has the absolute majority of votes[11]. If more candidates have an absolute majority than there are seats, the one who has the most votes is elected. A recount is conducted if the result is very close (with less than 0.1 per cent of the votes differentiating the elected person and the one not elected).

- Second round. If the first round of voting does not result in all the seats being taken, a second round is conducted. Only those who participated in the first round and did not achieve an absolute majority can participate in the second round. In the second round, a candidate is elected if he or she has a simple majority of votes. If several candidates have the same number of votes, the result is decided by lot.

- Announcement of results. The result of the election is communicated to the public through the media and the Internet. Those elected are informed of the result and of the possibility of rejecting the election as well as about provisions on incompatibility. The local authority publishes the results in the Official Gazette at the latest by the end of a period laid down in the regulations.

- Appeals. There is a period of appeal (30 days) in which appeals against the election result can be lodged. It is also possible to complain about deficiencies that occurred in the run-up to the election, as long as these did not occur more than 30 days before the results were determined. If a person is of the opinion that an error has been made in the run-up to the election 30 days or more before it was held, the issue must be raised separately (i.e. prior to the election).

- Official publication. After the appeal period has expired (or after the judicial review of any complaints received by the courts), the relevant authority (usually the municipal council) officially fixes the election result and publishes it in the Official Gazette.

d Proportional voting

The election is carried out according to the same steps as for majority voting. The differences to the majority voting method are shown below:

11 An absolute majority is calculated as follows: the total number of votes is divided by the available seats, and result then halved. The nearest round number is the absolute majority.

- **Submission of nominations**. Each nomination must be clearly distinguished from other nominations. On each nomination, the names of the persons proposed by the corresponding grouping for election are listed. A person may only be named on one list. If the political group has already had a seat, it does not have to submit any signatures of voters.

- **Inspection/correction of nominations**. The proposed nominations are checked and/or corrected by the municipal authority. In the case of any deficiencies, a deadline for rectification (often very short, for example 3 days) is given to the representative, with the possibility of submitting alternative proposals. The adjusted electoral proposals are called lists. These are assigned numbers. Lists may be linked to one another by means of a concordant declaration of the representations of both lists (known as connected lists) up to a period stipulated in the regulations.

- **Voting materials**. The lists are published, and all connected lists are made known. The electorate is given blank and pre-printed slips (compiled by the parties and submitted to the municipality in compliance with formal requirements). The order of the candidates listed on the individual lists can be freely chosen (unlike in majority voting).

- **The election**. Voters complete the voting slips. Each member of the electorate selects a list (by entering the relevant number on the voting slip), as well as the candidates. The name of each candidate can be entered twice on the voting slip (accumulation). It is also permitted to vote for candidates on other lists (substitution). If the list on a pre-printed voting slip is used, names can be entered twice, pre-printed names can be crossed out, and names from another list can be entered. The number can also be crossed out and replaced with another one. In extreme cases, a voter can vote for a political party by list, but then only enter candidates from another party on the list.

  The voter personally puts the completed voting slip into the ballot box. Electoral secrecy must be guaranteed (i.e. it cannot be possible to find out who has voted for whom).

- **Announcement of results**. The municipal administration (or a standing elections and voting committee) announces the results. The count is also public in this case. Each valid name on a voting slip counts as a vote for that candidate. If a voting slip contains less names than there are seats to fill, the blank fields count as additional votes for the list whose number is on the voting slip. For the allocation of seats, the total of all the valid votes (for candidates and additional votes) for all the lists are divided by the number of seats to be allocated, plus one. Each list is allocated as many seats as the result, rounded up to the next whole number, is expressed in the total number of votes (candidates and additional votes) the list has obtained (so-called party votes). Then the number of party votes in each list is divided by the number of seats already allocated to it, plus one. The list that has the largest number is given an additional seat. This procedure is repeated until all seats are distributed. Connected lists are treated first as a single list. The

seats from each list are given to the candidates who have received the most votes. Candidates not elected are substitutes in the order of the votes obtained. In the case of a tie, the result is determined by lot unless the affected candidates reach agreement among themselves.

The subsequent steps are the same as with majority voting.

e Protection of minorities in the case of majority voting

A special feature is to be pointed out: if municipalities use majority voting for the parliament, the council, or committees, cantonal provisions on the protection of minorities apply. These provisions are intended to ensure that political minorities who achieve a certain electorate strength are entitled to representation (in other words, these provisions should prevent the extreme situation arising in which a party with only 51% of the votes takes all the seats - "the winner takes it all").

However, the most effective way of achieving minority protection is the introduction of a proportional system. The provisions on minority protection weaken the results of majority voting in favour of minorities, but to a lesser extent than in the case of proportional voting.

Political minorities are groups of voters who are organised as associations with political aims and make a claim for representation. Whether this claim can be accepted is decided on the basis of party votes (in the case of secret votes), or on the basis of votes for candidates (in the case of open votes), or - if the election is conducted by a body other than the electorate - depending on the number of party votes obtained in the latest election of the electoral organ. The claim is assessed according to a formula which is not shown in detail here (see Part 4).

The municipality can make provisions for further minority protection measures in their statute.

Lessons learned

- The higher level of the law determines who can be elected to which municipal posts (active voting rights as a prerequisite of eligibility, family or professional incompatibilities, limitation of length of office, prohibition of accumulated powers).
- The municipalities do however have great room for manoeuvre in terms of the design of electoral processes.

- They are therefore free to decide whether their officials are to be elected by majority vote or proportional representation.
- While with proportional voting the election procedure guarantees that parties (electoral groupings) are represented in the municipal executive (council) on the basis of their strength (share of the vote), for majority voting the law provides specific mechanisms for the protection of minorities.
- Because multi-party government is always in power at every level in Switzerland, these minority protections are intended to mitigate against the possibility of a winner-takes-all situation (in which a slim majority could take all seats).

3.2.3 Instruments of direct democracy

In many political systems, elections are the only means by which the electorate can influence political events (representative democracy). In the Swiss system, the electorate has not only elections, but several instruments of direct democracy at its disposal at all levels of the state, i.e. means which enable them not only to elect their representatives, but also to decide on certain questions themselves. Below the most important instruments of direct democracy (initiatives, referenda, and the right to make proposals in municipal assemblies) are presented.

a Initiative

The initiative enables the electorate to vote on any subject within the sphere of competence of the municipal parliament or the municipal assembly, if sufficient signatures for the request are collected. That voters have the opportunity to have an active influence on the municipality by means of an initiative is enshrined in cantonal law.

Ten per cent of the electorate, or a smaller number stipulated in the regulations, can use an initiative (i.e. by signing the initiative) to call for the adoption, the amendment or the repeal of a regulation or decisions within *the competence of the electorate or the municipal parliament*.

A valid initiative must be submitted to a vote if it concerns a matter for a mandatory popular vote, or if the municipal parliament does not agree with it. This means: With an initiative, the voters can not only express a

wish to the competent authorities; they can also decide on the matter (i.e. they can fulfil their wish), insofar as the municipal parliament does not agree with it. The electorate can thus by-pass the municipal parliament with this instrument. The decision taken by the electorate is binding for the municipality. An initiative must meet certain requirements in order to be valid, the most important being mentioned below:

- It must *either* take the form of a general proposal, or a specific draft provision (*unity of form*). A general proposal is more abstract and requires implementation by the relevant municipal body if it is adopted (e.g. introduction of a municipal parliament). A specific draft provision (e.g. to reduce the municipal council from seven to five members) can be implemented directly. The two forms cannot be combined.

- It must respect the principle of the *unity of matter*, which states that an initiative may not involve several items at the same time (for example, an initiative may not call for a reduction of the size of the municipal council from seven to five members, and simultaneously to introduce a full-time office for the president). This provision is intended to protect the voters from the risk of an unclear expression of their preference. They must be able to vote clearly and just once, yes or no, and the question of who is for the reduction of the size of the council but against the introduction of a full-time bureau for the municipal president cannot be expressed with a single yes or no).

If an initiative does not meet these requirements (or has other formal deficiencies or violates the overriding law), it is *declared invalid* by the municipal council. The initiative committee (the organisation which has collected the signatures and represents the signatory of the initiative) is to be heard beforehand (granting the right to be heard). The declaration of invalidity shall be in the form of an order and may be submitted to a judicial review by means of a complaint.

If they do not accept the demands of the initiative, the municipal authorities can ask the electorate to reject it. They can also make a *counter proposal*.

The municipal authorities can (or must, as a consequence of their obligations with regard to information) *present their view* to the electorate and give the reasons why the municipal council or, if there is one, the municipal parliament, rejects the initiative, and why the counter proposal should be adopted instead. The municipality does however have to offer the initiative committee the chance to set out its arguments for the adoption of the initiative, so that they can be included in the election material. In practice, the initiative committee is often given the chance to write the relevant text itself: this avoids the risk of the municipality exerting an undue influence on the process (e.g. by a one-side representation of the matter).

A *vote* is then held on the initiative and any counter proposal. It is important to ensure that the electorate, when they vote for an initiative and a counter-proposal at the same time, can express what outcome they

would prefer in the event that both proposals are adopted (i.e. in preference to the status quo). The relevant procedures for determining the will of the electorate have to be stated in the regulations.

b The right to make a proposal in the municipal assembly

Every member of the electorate has a right to make a proposal in the municipal assembly.

With a proposal, voters (similarly as with an initiative) can put any matter they wish on the agenda. At the end of the agenda of any municipal assembly, any matter for which the electorate has responsibility can be listed under "any other business". As long as the proposal is valid (i.e. does not contradict higher law etc.), the assembly is asked whether it considers it "worthy of consideration". If the majority of those present hold the proposal to be worthy, it will be put on the agenda for a future municipal assembly and then voted upon. The decision of the electorate is binding for the municipality.

The right to petition also means that the electorate can - and this in practice is of even greater significance - make any proposal they like in relation to issues on which they are asked to vote by the municipal council.

c The referendum

While the initiative and the right to make a proposal both give the electorate the active opportunity to put matters of the municipal agenda and decide on them, the referendum makes it possible to *veto* (or endorse) a decision of the municipality. There are two forms of referenda: the mandatory and the facultative.

- The mandatory referendum

  A mandatory referendum concerns matters which must always be put before the electorate to be decided upon. In fact these issues (along with the voting in elections) constitute the remit of the electorate. The cantonal Law on Municipalities stipulates which matters have to be decided by the electorate. As well as mandatory elections, they are:

  - The adoption and amendment of statutes
  - The alteration of the tax rate
  - The introduction of procedures to constitute, abolish or alter a district, or to merge municipalities
  - The municipality's position in relation to a merger of municipalities (voluntary or ordered by the canton)

- Building and planning regulations
- In municipalities which have a parliament, the Statute may allow the above mentioned items including the adoption and alteration of the Statute to be subject to a facultative referendum (instead of a mandatory referendum).
- The municipalities can however subject other matters to mandatory referendum, and often do so: the electorate is normally competent to decide on new expenditures above a certain rate by voting in mandatory referenda, e.g. (see Part 1).

- The facultative referendum

  A facultative referendum is held only when the electorate seeks to oppose a decision and collects sufficient signatures to do so. In contrast to mandatory referenda, a vote does not therefore result in every case, but only when the electorate, with their signatures, request one. Whereas the right to launch an initiative and the right to hold a mandatory referendum on certain issues is compulsory in every municipality, municipalities can themselves decide:

  - *Whether or not* they choose to make provision for a *facultative referendum* in their regulations as an instrument of direct democracy and, if they do choose to do so,
  - *Which matters* can be dealt with by a facultative referendum. They usually concern matters that are within the responsibility of the municipal parliament such as e.g. all municipal regulations, but also matters concerning immovable property etc. Rather rarely it is the case that decisions of the municipal council can be subject to facultative referendum.

A facultative referendum can as a rule be called *only by the electorate*. In the absence of a relevant basis in the regulations[12], it is not permitted for an authority itself to engender a referendum (known as a plebiscite).

The importance of the facultative referendum stems not only from its ability to exercise retrospective controls over important decisions, but – perhaps more importantly – from its *preventive effect*: representatives, when making decisions, will anticipate the risk of a referendum and therefore will not easily adopt a solution that would clearly not be supported by the majority of the electorate. 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[13]. Finally, the existence of 'strong mechanisms for participation' – i.e. of mechanisms granting citizens decision-making-power – helps render

12 Such instruments are however rather frowned upon. If an authority is given responsibility, then it must also take this responsibility. With regard to accountability, it is undesirable if this responsibility can be ducked in individual cases, at the discretion of the authority.

13 J.P. MÜLLER, 'Responsive Government': Verantwortung als Kommunikationsproblem, in: ZSR 1995 I, p. 3.

the mechanisms of 'soft participation' – i.e. instruments granting citizens the right to make petitions or comments, but not to decide – more weight: with the referendum hanging over a public authority like a sword of Damocles, it is very likely that the electorate's mood as expressed through the opportunities it has for soft participation will be heeded.

d Further instruments

Municipalities are free to provide for further instruments of direct democracy, and sometimes do so in practice. There is for example the instrument of the constructive referendum, with which the electorate not only confirms or rejects a municipal decision, but can also make a counter proposal to a decision made by an authority. However the use of this instrument is problematic in practice, because politically negotiated solutions (compromises) which have been dealt with by the parliament can be subsequently circumvented ("cherry-picking").

3.2.4 Participation in decision-making committees

Broad support for local politics is achieved in Switzerland not only through the direct democratic instruments, but also through the very widespread committees (the municipalities usually have numerous committees with decision-making powers, which ultimately distributes "power" amongst many players). As well as involving the population in municipal policy, the committees also facilitate the use of existing expertise, which is particularly important in small communities.

Municipalities themselves regulate which committees they set up and what their tasks are. The decision-making responsibilities of the committees have to be stated in a municipal legal act adopted by the legislative body. Typically, committees are set up to deal with the following areas:

- Finance
- Construction and planning
- Education
- Security
- Supply and disposal
- Business, tourism, culture
- Voting and elections

Lessons learned

- Because the electorate is responsible for decisions on important matters, it has at its disposal proactive means of determining what is important to it and whether something should come on to the political agenda, and must not be subject to the arbitrary power of the authorities.
- This right to initiate procedures is subject to a limit based on the principles of public law that confines it to matters which fall within the jurisdiction of the electorate or the parliament.
- Should these instruments be used to put any objects (i.e. also objects from the jurisdiction of the executive body) to a popular vote, this would completely eliminate the well-founded separation of powers of responsibilities.
- The electorate can – by using its right to make proposals - shape almost any issue on which it is entitled to a say in the municipal assembly (i.e. the citizens' meeting) in great detail, but it cannot intervene on matters that belong to the jurisdiction of the executive (municipal council).

3.3 Participation without Decision-Making Powers (Soft Participation)

3.3.1 Who can participate?

The circle of those authorised to participate is broader here than is the case with instruments of strong participation. Not only the electorate but, in principle, anyone - all residents and legal persons (companies, NGOs) of a municipality - can, depending on the particular instrument, participate. There are many instruments of soft participation - here the municipalities can be as creative as they like. The most important are presented briefly here.

3.3.2 The right to petition

The Federal Constitution guarantees anyone (including foreigners and minors) the right to appeal to the community (at every level: federal, cantonal, or municipal). On the municipal level, this right is also enshrined in cantonal Law on Municipalities. The authorities must recognise a petition, but those submitting it have no legal right to a response. No one can be disadvantaged by submitting a petition.

3.3.3 Participation in the legislative process

Because municipal regulations are often subject to mandatory or facultative referenda, it is most important for the authorities that they can "feel the pulse" of the population at an early stage in order to minimise the risk of losing a popular vote (which is often taken as a political defeat).

If municipal regulations are amended or adopted (to a politically relevant extent), the municipality often organises an orientation assembly or guarantees the parties and the population the opportunity to put their point of view at an early stage in the context of a consultation process. The involvement of the parties and people often takes place without specific regulatory basis, but larger municipalities make some provision for consultation procedures.

The authorities are free to accept or reject inputs to the consultation process. They do well, however, to inform people about the basis of their decisions to accept or reject such input with transparency, because this makes them more acceptable and so reduces the risk of defeat in a vote. Larger municipalities do this in the form of a consultation document, which informs about the inputs to the consultation process and also about the ways and means of taking them into account, and giving the reasons for why they have not been taken into account. This document is then made public.

3.3.4 Participation in the planning process

Cantonal building and planning law commits the municipalities to involving the population in the planning process at an early stage.

Participation has to be guaranteed in the enactment of and significant changes to the municipal structure plan (strategic plan), building regulations, and the communal land use plan (as well as special land use plans).

Participation may be granted by submitting planning proposals for discussion at a municipal assembly or a special orientation meeting, or by making the documents about a planning proposal available to the public for a specified period.

Participation involves the ability to make objections and suggestions, which must be brought to the attention of the authorities responsible for decision-making (e.g. in the form of minutes of the assembly or orientation meeting, or in the form of a summarised report). The minutes and the report are public. Here, too, dealing with the inputs of the population is the responsibility of the authorities responsible for the relevant planning. The municipalities can also carry out more extensive participation procedures. In particular, the municipal authorities can call on residents of a particular neighbourhood to deal with their own planning issues.

3.3.5 Participation in the administration

Soft participation can in principle be implemented in all areas, not only in the context of making laws or planning procedures, but also in terms of "simple" administrative responsibilities. So for example the preparation of big projects often involves consultation procedures. The population can also be included by the use of surveys or orientation meetings. This involvement as a rule takes place whenever a project is likely to result in a popular vote sooner or later (e.g. when it may involve a decision about expenditure).

There is also the possibility of implementing a *consultative vote*, in which a question is voted on without the result of the vote being binding for the municipality. Because the result is not legally binding, but does have a politically binding effect (political pressure on the responsible authorities to take the result into account), these consultative votes are only permissible when they are provided for in the Statute, and if they are conducted in line with the normal voting procedures.

The municipalities in Canton of Bern do not generally use instruments of soft participation in the budgetary process (participatory budgeting), because the electorate has extensive direct democracy instruments (mandatory and facultative referenda) over the granting of new expenditure. In 80% of Bernese municipalities, the electorate votes on the budget proposals in a mandatory referendum. The concordance system and the preparation of the budget by finance committees ensure that the electorate and the various political parties are involved in the budgeting process.

3.3.6 Participation in "production"

Finally, the possibility of participating in the fulfilment of tasks should be mentioned, in the sense that the municipalities often use third parties to fulfil their tasks (see Part 5). Here the municipalities have most of all to take care that *they*, and not the third party, determine which tasks are carried out, to which standards, and at what price. There are also cases in which the municipalities carry out tasks in Public Private Partnership (PPP) cooperation with third parties. The challenges associated with this approach are discussed in Part 5.

Lessons learned

- The political process has to serve the people, not the authorities or parties. It is therefore important that all reforms are underwritten by a notion of who imagines what to be the case and which solutions are in the general interest.

- The Swiss system of direct democracy means that the role of “soft” participation has less importance than it would have in a purely parliamentary system.
- The forms of soft participation help to ensure that themes are given an early airing in civil society. They allow input to be made at the earliest opportunity, and ensure that official proposals are made in such a way that they would be accepted in a (possible) referendum.
- The positive effect of this system is to align politics to the needs of the society. On the negative side, the authorities tend not to aim at visionary, desirable goals, but from the outset tend rather to limit themselves to feasible goals.
- “Soft” participative processes require those responsible always to be aware of who holds what opinions and how divergent views can be assessed. The legitimacy of a participating organisation behind a position is always in question: does it really represent this or that section of society or economic interest, and only this? Might there be a “silent” majority which cannot or does not wish to express itself through this process? Such questions are always to be clarified.
- Because there are so many instruments of strong participation in the Swiss context, the authorities have an incentive to take account of the arguments put forward in the context of soft participation.

PART 4

Non-Discrimination

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4.1 Definition of the Principle

No specific region has a homogeneous population. The principle of non-discrimination is designed to prevent individuals from being disadvantaged on the basis of inherent personal characteristics which cannot be changed by choice. These may include biological characteristics (gender, race, age, physical or mental impairment), or features of cultural and other kinds (origin, language, social status, religious and other beliefs etc.).

The particular kinds of behaviour to which the principle of non-discrimination applies depend on the context: the precise nature of the principle is determined by previous experience which in turn depends on the historical and current development of the particular community[14]. The principle of non-discrimination therefore arises in "response to the historical experience of exclusion, vilification, and stigmatisation of people solely on the basis of their belonging to a particular social group".[15]

The legal structure of the principle is quite complex, and its relation with the right to equal treatment needs to be clarified.

4.1.1 Legal structure of the principle

A distinction between direct and indirect discrimination can be made:

- Direct discrimination occurs when a measure or a regulation provides for explicit discrimination (e.g. if someone is not employed on the basis of their nationality).

- Indirect discrimination occurs when a measure or regulation is not directly coupled with a particular personal characteristic, but has the effect that a member of a particular social group is disadvantaged in practice. If dogs are not permitted in a retirement home, for example, this disadvantages the visually impaired.

Neither form of discrimination is permissible, but indirect discrimination is, in practice, often difficult to prove.

The principle of non-discrimination results in several state obligations[16]:

14 SeeJ.P. MÜLLER/M. SCHEFER, Grundrechte in der Schweiz, Bern 2008, p. 692.

15 MÜLLER/SCHEFER, op. cit., p. 684.

16 http://www.humanrights.ch/de/menschenrechte-themen/diskriminierungsverbot/konzept/staatspflichten/

- **Negative obligations:** The state (and all its institutions) shall not discriminate against anyone in its own dealings.

- **Protective obligations:** The state and its institutions should also ensure that no discrimination is permitted in the public areas of private business (e.g. "equal pay for equal work" in terms of private employment law).

- **Guaranteeing obligations ("Gewährleistungspflichten"):** The state must ensure that specific provisions are in place to facilitate the implementation of non-discrimination e.g. an effective judicial system which makes it possible for people to contest discrimination. This obligation also requires preventive and awareness-raising measures to be put in place.

- Finally, a constitutional duty to take **positive measures** against discrimination can derive from the principle of non-discrimination: the legal principle of non-discrimination alone is not enough to protect "de facto" disadvantaged groups or prevent them from being subject to actual discrimination. The state must adopt specific measures for disadvantaged groups in order to enable them to enjoy the basic and human rights in the same way as everybody. The state is therefore obliged, when making and implementing laws, to treat members of disadvantaged groups as well (i.e. "unequally") as is required in order to prevent them from being subject to de facto discrimination (such measures are known as "affirmative action").

4.1.2 Relationship to the guarantee of equal rights

The principle of non-discrimination is closely related to the guarantee of equal rights.

The guarantee of equal rights gives an individual the right to be treated in the same way as all other individuals by state bodies, in terms of law-making and the application of the law. This equality is an indispensable element of democratic constitutions (Müller et al., P. 653). On the one hand, it contains the requirement of equal treatment: this requires that "according to its equality the same shall be treated equally". On the other hand, it contains a requirement for differentiation: this requires that "according to its inequality the different shall be treated unequally". This means that unequal treatment on the basis of the same conditions (or equal treatment in spite of differences in circumstances) is only permissible if there are specific reasons for doing so.

The *principle of non-discrimination* offers an individual protection against unequal treatment in the sense just described, insofar as this affects a person in a fundamental aspect of his or her personality or even subjects him or her to degrading treatment.

The protection offered by the principle of non-discrimination therefore extends "only" to *specific instances of unequal treatment*. It protects against unequal treatment that results from a particular characteristic e.g. race, age, gender, religion etc.

Unequal treatment on the basis of the characteristics in question - which actually constitutes discrimination - cannot be justified on objective grounds, but needs to be justified on the basis that it must pursue a legitimate goal and that it must be appropriate, necessary, and reasonable to reach that goal.

4.2 Legal Basis in Switzerland

The principle of non-discrimination is enshrined in international law, as well as in the European Human Rights Convention (Art. 14) and Art. 2 and 26 of the United Nations (UN) Convention II (UN International Convention on Civil and Political Rights). There are also specific agreements, such as the UN International Convention on the Elimination of All Forms of Racial Discrimination, which aim to eliminate all forms of discrimination against women and uphold the rights of people with disabilities.

In Switzerland, the principle of non-discrimination - as well as the guarantee of equality before the law - is enshrined in Art. 8 of the Federal Constitution:

Art. 8 Federal Constitution

1. Every person is equal before the law.
2. No person may be discriminated against, in particular on grounds of origin, race, gender, age, language, social position, way of life, religious, ideological, or political convictions, or because of a physical, mental or psychological disability.
3. Men and women have equal rights. The law shall ensure their equality, both in law and in practice, most particularly in the family, in education, and in the workplace. Men and women have the right to equal pay for work of equal value.
4. The law shall provide for the elimination of inequalities that affect persons with disabilities.

It was on this constitutional basis that legislation on gender equality was passed in 1995, and legislation on the elimination of discrimination against people with disabilities was passed in 2002.

These legal provisions are valid without exception on the municipal level too.

4.3 Significance of the Principle of Non-Discrimination at the Municipal Level in General

4.3.1 Preliminary remarks

The principle of non-discrimination is seldom being at stake in judicial proceedings dealing with municipal affairs in Switzerland. This is partly because the specific characteristics of the principles of accountability, transparency, and participation in Switzerland already play a significant role in minimising discrimination, if not completely ruling it out.

A brief look at the significance of the interplay of the various good governance with the principle of non-discrimination in mind:

- In terms of the principle of **Accountability** the comparatively well established rule of law plays an important role in ensuring that the basic principles of the democratic constitutional state - including especially the general principle of equality, as well as the prohibition of arbitrary treatment – can be implemented. Where the rule of law does not function, a carefully designed principle of non-discrimination can achieve little.

- In terms of the principle of **Transparency**, the principle of freedom of information guarantees that administrative dealings are fundamentally accessible to the public. In many cases it is only on this basis that the information necessary to establish the existence of discrimination can be obtained.

- In terms of the principle of **Participation**, the system of concordance ensures that the majority does not rule alone; the minority is also usually represented in the municipal council. Special provisions on the protection of minorities in systems of majority voting also seek to ensure that minorities cannot simply be overridden.

4.3.2 The principle of non-discrimination as a means of assessing the legality of municipal acts

Individual claims can be made against municipal authorities on the basis of the principle of non-discrimination, as explained above.

Anyone who considers that they have been discriminated against or dealt with arbitrarily can make a complaint about the particular actions of the municipality. The court must then decide if the municipality has breached the law, and should that be the case, the decision is annulled and the municipality required to make a new decision free of any discrimination. In practice associations representing the interests of potentially discriminated groups (such as the association for the elimination of discrimination against persons with disabilities) are quite powerful and are often intervening also at the municipal level in order to ensure at an early stage integration of the interests of their group in the political process.

If a municipality refuses to remedy serious discrimination, the *cantonal supervisory authority* can remedy the unlawful conditions on its own and oblige the municipality to take appropriate measures. The cantonal supervisory authority is subsidiary to the appeals procedure, and it only intervenes if there is significant wrong-doing on the part of the municipality and if the municipality refuses to remedy the situation itself.

4.3.3 Measures for the elimination of de facto discrimination ("affirmative action")

In certain areas, the federal government or the canton stipulates that the municipalities must take specific measures to eliminate de facto discrimination. This specific legislation does not concern individual cases, but rather the implementation of measures which have a general effect against discrimination of a specific group. In the foreground here are the equality between men and women (gender) and that of disabled and the able-bodied (for which the relevant legal basis is set out in the constitution, Art. 8, Sections 3 and 4 of the Federal Constitution). If certain measures are not implemented by the municipality, there is also (generally on the basis of Federal equality legislation) an individual legal right for the affected person to make an individual legal claim (usually on the basis of Federal equality law) which can be enforced by the courts (and/or supervisory body). Cantonal building law, for example, states that municipalities must build in line with the requirements of persons with disabilities, so that the municipalities are required to implement minimum standards enshrined in law.

Aside from these "legally prescribed" measures, where it is quite clear who has a legal claim to what "special" treatment, municipalities are more and more confronted with demands coming from specific groups and asking for specific treatment in areas where no special anti-discrimination legislation is in place. It is not easy for the municipalities to position themselves when such demands are being made, because every special treatment results in an "unequal" treatment and might be taken as a precedent case for other groups wanting special treatment. Is there a constitutional duty for a municipality, to provide e.g. special cemeteries for specific groups belonging to a specific religion?

4.3.4 "Voluntary" measures and programmes

Specific "voluntary" measures and programmes to counter discrimination which are mounted "only" on the municipal level are rather rare, such measures and programmes are more likely to be put in place at a higher level.

In urban regions the municipalities tend to be more open-minded and active than those in rural areas. Cities such as Zurich and Bern e.g. have developed action plans in line with the European Charter for Equality of Women and Men in Local Life and established goals and priorities (key themes are equality on the employment market, promoting equal training opportunities for young people, careers and lifestyle, prevention of gender-based violence, ensuring equality within the city administration, proper distribution of urban services and resources, improvement of data as a prerequisite of a targeted equality policy as well as improving the situation of migrants).

Experience shows that a pragmatic approach is crucial to the success of such measures or programs. A wide-ranging and intellectually demanding project is difficult to implement. It is worth avoiding such projects turning into paper tigers just used as good publicity for the municipality. No legitimacy can be won and nothing can succeed if the responsible municipal bodies cannot be convinced. This is why those responsible need to be involved from the beginning in the development and implementation.

4.4 Significance of the Principle of Non-Discrimination at the Municipal Level in Particular Areas

4.4.1 Representation of minorities and specific groups in political decision-making bodies

As presented in Part 3 (voting), Swiss municipalities can themselves decide whether the municipal parliament (if they have one) or the municipal council is elected by majority vote or a system of proportional representation.

Large municipalities have a municipal parliament, which is regularly elected by proportional representation and has a minimum of 30 members as stipulated by cantonal law. Larger cities may have up to 80 members. Where there are 30 members, more that 3% share of the vote is required for a seat, which makes it possible for minorities and small groups to be represented in the parliament.

With a few exceptions, the municipal executive in the larger municipalities are also elected by proportional representation. In the case of an executive with seven members, a share of the vote of 12 - 15% is required for a group to be represented, which means that smaller groupings with smaller shares of the vote are barely represented.

If the municipal executive is elected by majority voting, the canton stipulates minimum minority protections; these do not however go as far as those applying to proportional representation. These protections also apply to the election of committee members, but again do not go far. In the case of a seven member authority, the right to a seat requires a share of the vote of around 20%.

The "minorities" who are "protected" by these processes are often political groupings. In practice, those addressed by the non-discrimination laws hardly ever claim political minority protections as groups, because they - at least until now - have not participated in formal terms in municipal elections. An exception is the case of Catholic minority parties who benefit from these minority protection provisions in reformist (Protestant) areas. Political parties have also begun to draw up gender specific lists; this is not always done in order to protect certain groups, but rather with the intention of winning as many votes as possible.

The introduction of gender quotas is always a matter of discussion ("affirmative action", a directed improvement of disadvantaged groups). To date (with very few exceptions), this has always been rejected on political grounds. Quotas (insofar as their goal is to improve disadvantaged groups) are legally permissible, also in connection with voting rights. In majority voting procedures, the implementation of quotas would be relatively unproblematic; in proportional voting the implementation is also "technically" feasible in spite of the difficulty of dealing with both the demands of political parties and those made on the basis of gender. But so far the introduction of gender quotas at the municipal level failed because of political resistance.

In relation to the presence of women at the head of the municipalities, there has been an interesting development: although most posts continue to be largely filled by men in large municipalities with professional, full-time mayors, in the middle-sized and smaller municipalities there are more often women in this office. This development cannot be attributed to affirmative action programmes, but rather has to do with the fact that it is increasingly difficult to find people in the wider society to join the authorities or act as mayors. Roles which were once associated with honour and respect are now regarded simply as duties with little prospect of social standing and public recognition. It seems that the male members of civil society only put themselves forward for public office when it is associated with generating an income or some other form of reward. For positions which are not financially rewarding, women then spring into the breach.

4.4.2 Representation in the administration

There are no general rules requiring municipalities to have certain groups represented in the administration. Some municipalities ensure that a certain proportion of women are in the municipality (or, for example, in the occupation of administrative boards of outsourced municipal companies), but this is the exception. However, it is also the case (without a corresponding legal obligation) that municipal administrative posts are increasingly occupied by women, especially in the commercial sector, while the technical field (construction and civil engineering) remains a predominantly male domain. Persons with disabilities or foreigners are rarely systematically integrated into the administration. But here, too, there are changes under way: it is increasingly common to see foreigners of the second or third generation in municipal administrations. Certain communities create jobs for people with disabilities, especially in the construction sector. Permanent cost pressures often stand in the way of such plans.

4.4.3 Fulfilment of tasks / Distribution of resources

a Preliminary remarks

The central government adopts guidelines that ensure that access to municipal services is free of discrimination and arbitrary treatment in key policy areas. For example, the standards of the national school or social assistance are largely harmonised, and the provision of care (for example, childcare outside the family) are also subject to cantonal regulations.

In general, the municipalities' *per capita* expenditure for the fulfilment of tasks decreases as financial strength declines, and financial strength tends to be linked to the geographic location of the municipality. As a rule, the more urban the "richer", the more rural, the "poorer" (always with exceptions).

Even if the central state guarantees a certain "minimum level of provision" to the poorer communities with extensive compensation systems (horizontal and vertical financial compensation, distribution of burdens etc.), public service provision in these areas is much more modest than in urban areas.

It is however not the case that particular groups (religious, ethnic minorities etc) live in these municipalities. The population living in rural areas is a minority when compared to the population living in urban areas, but the "rural" population is not in the focus of discussions about discrimination.

The following explanations are not intended to be exhaustive but rather illustrative examples. Great efforts to counteract discrimination are made in many areas, but it is difficult to identify a standard municipal approach.

b Infrastructure

There is in principle a legal right for developed areas to be connected to the necessary infrastructure (water, sewerage, electricity). It is not however the case that a municipality can provide the same standards across its whole area. In densely populated areas, this can result in connections to services varying between those on offer in the “town centre” and those available to the scattered settlements in the peripheral parts of the municipality. While the provision of common heating systems or fibre-optic cabling makes sense from a commercial point of view in the town centre, the same level of provision on the periphery would be financially unsustainable. Closing a school house in a peripheral part of the municipality might put children at a disadvantage because they will have to travel further to school. But concentrating schools appears to be justifiable from an economic and a pedagogical point of view, so such "unequal treatment" can be objectively justified. Since it is not related to a particular feature which is specifically prohibited under the principle of non-discrimination, or which actually defines a disadvantaged social group, it is simply the right of equal treatment, rather than the prohibition of discrimination, which is relevant here. Differing levels of provision must always be based on objective criteria and never differentiated on the basis of certain groups of the population.

c Integration

As the bodies closest to the population, the municipalities have prime responsibility for integrating new arrivals, especially those coming from abroad. Here for the municipalities it is always a matter of balancing respect for the religious and cultural outlook of people on the one hand and on the other the integration of the way of life within the municipality. Cantonal law regulated how people should be integrated and which sorts of integrative measures should be offered (introductory courses to local ways of life, language courses, business advice, etc.). Especially in terms of asylum seekers, the municipality plays an increasingly important role in organising accommodation and integration. Here the municipality's focus is increasingly on cooperation with civil society organisations, which often offer professional support in the voluntary sector. The municipalities play a very important role in the integration of labour, because of the close links they usually have with local businesses.

Those at whom integrative measures are aimed often, but not always, belong to socially disadvantaged groups as well. Because such measures are taken on the basis of personal characteristics (origin, language, culture), they come under the principle of non-discrimination. Therefore, such measures, on the one hand - at least insofar as obligations are imposed on the person themselves – always need to be justifiable under the principle of non-discrimination (i.e. the obligation is imposable only if the measure pursues a “legitimate” reason). On the other hand, since the person to be integrated is often belonging to a “de facto”

disadvantaged group, sometimes there may also be a constitutional requirement that integrative measures are to be taken. The goal of integration is considered to be a public interest issue of high priority (Decision of the Federal Court 2C 666/2011 of 7 March 2012). Integrative measures must always comply with the principle of proportionality, that is, they must be appropriate, necessary and reasonable for the individual in relation to the goal of integration. In this sensitive area, municipalities find it very helpful when the canton establishes regulations that apply across the board.

d Travellers

Municipalities find it difficult to deal with the travelling people who make stops within their boundaries before, as is usually the case, moving on within a few weeks. A decision of the Federal Court from 2003[17] states that planning decisions must be made with the principle of non-discrimination in mind, and therefore take the needs of travellers into account. It has since then become clear that the federal government, the cantons, and the municipalities need to work together to ensure that there are enough permanent and temporary places for travelling people. In recent years only a few places have been made available. The implementation of the law has proved to be extremely demanding, although some cantons have developed action plans and are working on them. The cantons struggle with the fact that while they are required to provide places with the necessary infrastructure at the important transit points, this generally meets with local resistance. At the local level the municipalities try to negotiate with the travellers so that everyone's interests are served to some extent, but they are often under pressure from those sections of the population who cannot reconcile themselves with the travellers. Some municipalities also issue regulations concerning the parking of caravans etc., which are not always in the interests of the travellers.

The combined forces of the federal government, the cantons and the municipalities find it hard to cope with the challenges posed by the interrelation of travellers and the principle of non-discrimination.

e Funerals

Although religious conviction is a matter for the church and not the state, municipalities are responsible for the organisation of cemeteries. They also determine the nature and scale of memorials. This is also a sensitive area in terms of the principle of non-discrimination. Provisions made for a particular religion must pursue a legitimate goal and be proportionate, and must not be degrading to its followers. Large municipalities have by now established areas in which Muslims can be buried in line with the specific requirements of Islam. This then raises the question of whether such “special solutions” should be offered for the members of other religions, and whether such claims can be derived from the principle of non-discrimination. In Bern, for example, there is also a Jewish cemetery.

17 BGE 129 II 321 ff.

4.4.4 Public procurement (submissions)

Above a certain level, bids to carry out public works are regulated by the canton. This mitigates against arbitrarily preferential or detrimental treatment of market participants. In this context the challenge is not so much one of avoiding discrimination against certain groups, but rather of avoiding preferential treatment to local providers. The procurement rules also guard against nepotism and corruption.

PART 5

Efficiency

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5.1 Definition of the Principle

In the context of international development cooperation, the concept of "efficiency" should be understood in a wide sense. It broadly concerns the meaningful and appropriate use of scarce resources so as to maximise their effectiveness. The use of public resources must be optimised within the context of politically led struggles around their allocation. The broad notion of "efficiency" can also be defined as the "capacity to act", which can conflict with other important concepts and goals. Political processes which ensure participation and legitimation and foster decentralised structures are often complex, and there is a risk that efficiency and the capacity to act will suffer as a result. Aspects of the efficient local fulfilment of tasks are detailed below, but this in no way means that efficient structures and procedures take priority. On the contrary, efficiency should ultimately always be subordinate to the political, even when this makes certain processes more complex and slow. There is no point, for example, in developing a particular "product" with great efficiency and cost-effectiveness if this means that the political demands to which it is also subject cannot be fulfilled.

"Efficiency" is broken down into the following elements:

- Fulfilment of tasks (5.2)
- Funding of tasks (5.3)
- Financial planning (5.4)
- Systems of accounting and budgeting (5.5)
- In-house or external procurement (make or buy)? (5.6)
- Inter-communal cooperation (5.7)
- Administration (5.8)
- Logistics (5.9)

The authors of this toolkit are well aware that there are many ways in which the notion of efficiency can be broken down. Here the point is to show which aspects of efficiency are relevant to everyday local self-government, and how they relate to the other key concepts of governance. This presentation of the issues therefore makes no claim to be complete or "true", but should rather strengthen the resolve of its users to consider particular aspects of efficiency in concrete terms and then to define what is meant by them. One cannot speak of governance without getting concrete about the meaning of its constituent parts.

5.2 The Fulfilment of Tasks

5.2.1 Which tasks should be carried out?

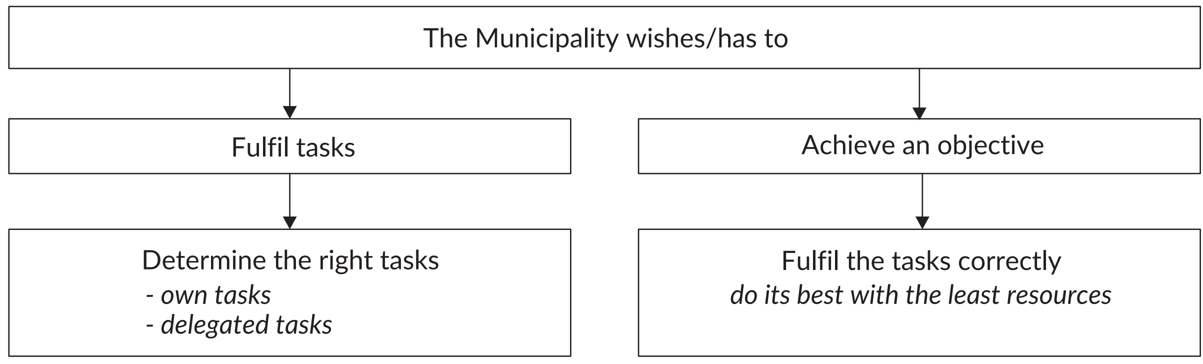
Local governance begins not with the word, but the task. This might seem a trivial point at first glance, but it has proved vital to countless processes of reform. If a local theatre needs to be refurbished, there is no point arguing about such issues as architectural restoration, funding, the organisation of the theatre, or its legal structure if the political actors have not agreed on the role the theatre should play, who should back it, and who should assume responsibility for it.

The following scenarios should be distinguished:

1. The municipality *is required* to undertake a task on the basis of the higher ranking law (see Part 1, section 1.2.3).
2. The municipality *cannot* fulfil a task, because other governmental or private bodies have ultimately been entrusted to do so.
3. The municipality *chooses to* fulfil a task, but *does not have to do so (the municipality's own voluntary tasks*, i.e. those it chooses to carry out, see also Part 1, section 1.2.3).

In the first scenario, there is no room for doubt about "whether" a role should be assumed, but there is room for political and operational manoeuvre about "how" it should be done. In the second case, no further discussion is required, because the municipality has no role to play. In the third case the municipality can realise all aspects of a project, but in most cases will lack the financial discretion to be active on a wider front.

The municipality must therefore decide which tasks it wishes to assume, and then fulfil them as simply and well as possible.



Lessons learned

- The responsible bodies of the municipality must be precise in defining which tasks should be fulfilled (and which not).
- There are differences between the tasks which must be fulfilled according to higher ranking law, and those which are additionally (voluntarily) assumed.

5.2.2 Leadership tools (planning / implementation)

The basic responsibility for the leadership of the municipality lies with the executive municipal body, which therefore needs instruments which are based on the one hand on good planning and on the other on good organisation. Planning sets out the procedures and resources necessary for objectives to be reached, and indicates when which decisions should be made. Organisation is a matter of ensuring that the responsible parties make the necessary decisions at the right time, take the necessary measures, and implement the decisions that have been made.

A simple diagram of planning and implementation looks like this:

Planning - Implementation

Guidelines
Basic strategic direction of the municipality
Long-term perspectives

↓

Objectives of the legislature
Concrete objectives to be achieved within the lifetime of the legislature - in accordance with the guidelines

↓

Measures
Agreement on measures necessary to achieve objectives

↓

Concrete decisions
by relevant bodies (acts, credit guarantees, costing)

On the basis of relatively abstract guidelines, a municipality can set the following legislative goals:

	Expectations:
Population objectives: The good population structure of the municipality is maintained	The age spread remains constant The number of inhabitants remains constant at least The distribution of income is maintained
Financial objectives: The books are balanced	*middle-term:* At the end of the legislative year, the municipality's capital is around 30% of the tax rate. Degree of self-financing: > 80% Proportion of self-financing: 8 – 12% The overall tax burden corresponds in the middle-term to the average of neighbouring municipalities
Planning / environmental goals: The municipality ensures the requirements for high standards of living and working. It protects the natural environment and cultural diversity.	The inhabitants / jobs ratio remains constant The rented property/home ownership ratio changes in favour of home ownership The number of societies and events remains at least constant
Staffing / technical resources objectives: The municipality is a fair and competitive employer. Staff are performance-driven, flexible, and innovative.	The yearly fluctuation rate is on average less than 10% The proportion of women in leading positions is raised Competitive salaries are paid comparable to other municipalities

Once the legislative objectives have been decided, concrete measures can be put in place. For a particular area, this could mean the following:

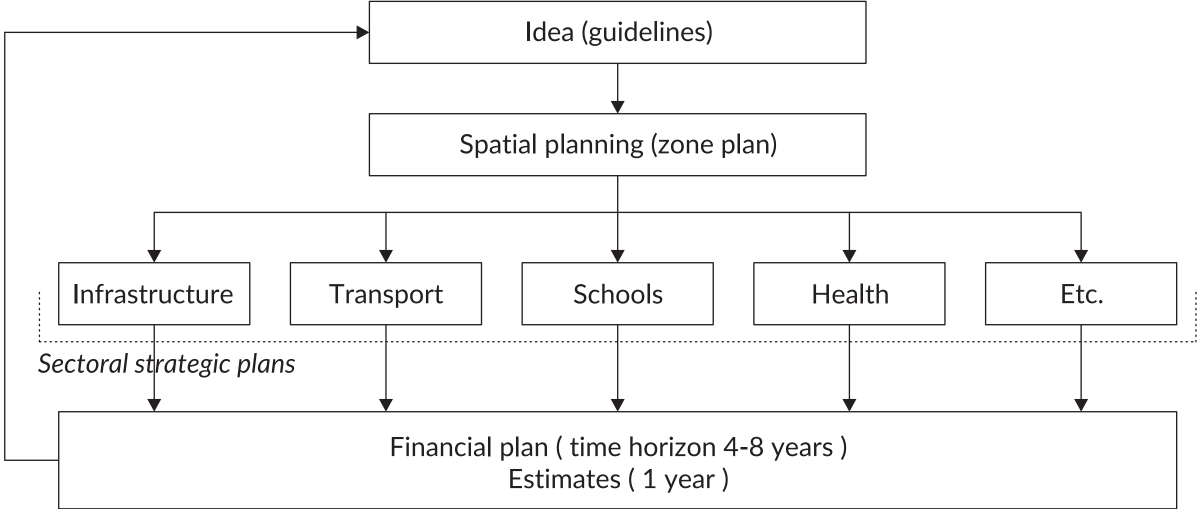
Implementation plan

Ref.	Nr.	Measure	Target
B	BK02	The secondary school model is to be co-ordinated with neighbouring municipalities and implementation scheduled.	End June 2010

B	BK04	The image of the municipality is to be improved • local history to be developed in an appropriate form • the municipality's publicity is to be redesigned	Local history project to be completed by the end of 2010. Net costs for the municipality <CHF 100,000. Brochure completed April / May 2010.
B	GB01	Public transport is to be made more attractive	1. Maintain frequency of use 2. Reconstruct one bus stop per year 3. Create Park + Ride opportunities for private cars and bikes at major interchanges 4. Gradual introduction of lighting at bus stops

Municipalities often risk having many very different planning instruments at their disposal which do not however come together in a comprehensive and consistent planning policy. The political and operational leadership of the municipality is sustainable only if the various planning tools can be co-ordinated. This means above all that the guidelines must be in accordance with the various areas of spatial planning policy (action plan) as well as with the financial resources (financial plan).

Policy planning (interactions of planning instruments)



Lessons learned

- Planning tools must not be too complicated.
- All the essential elements must be co-ordinated and inter-linked.
- Planning must lead to concrete measures.
- The whole planning process should be subject to continual review.

5.2.3 Steering tasks

The municipality must decide which functions ("products") it should fulfil, in what numbers, to what standards, and to what ends. There are two different management models:

- Resource management

  The management of financial and staffing resources is widely used and well proven. Resource management is often criticised for the fact that it produces too few "battles" over aims and outcomes, and too many about money and staffing. If the political decision about the local library was taken only on the basis of resource management, the management basis would look like this:

Management using costings - Library

	Expenses	Earnings
Charges for committee participation	3,000	/
Revenues	15,000	/
Social security	1,500	/
Accident insurance	100	/
Office supplies	2,000	/
Books and media	30,000	/
Furniture	2,400	/
Maintenance	1,000	/
Administrative costs	1,500	/
Membership contributions	1,200	/
Off-setting	1,300	/
Services	/	15,000
Net expenses	/	44,000
Total	59,000	59,000

- **Outcome-oriented steering**

Outcome-oriented steering is concerned with defining the needs of target groups (those one wishes to affect) and providing services in relation to the necessary resources. A graphic representation of such management of the local library looks like this:

Order		Outcome
Requirement	Heightened attractiveness Encouraging reading Improved cultural offering	Effect
Services planned	Number of books New books Replacing books Opening times	Services performed
Resources	Francs (CHF)	Use of resources

In terms of the political process, commissioning the specific project of the library can be described thus:

Definition of outcomes – library (mediatheque)

Outcome aims	Indicators (key figures)	Standard (target values)
User-friendly	Opening times	10 hours a week
Subject-area competence	Competent staff	At least one specialist
Wide-ranging resources available	Two books per inhabitant; max 1/3 other media	9,000 books available for each age range
Current stock	Updating	5% new acquisitions per year
Lending library visitors	Number of visitors	at least 8,000 visitors
	Numbers of loans	at least 22,000 loans

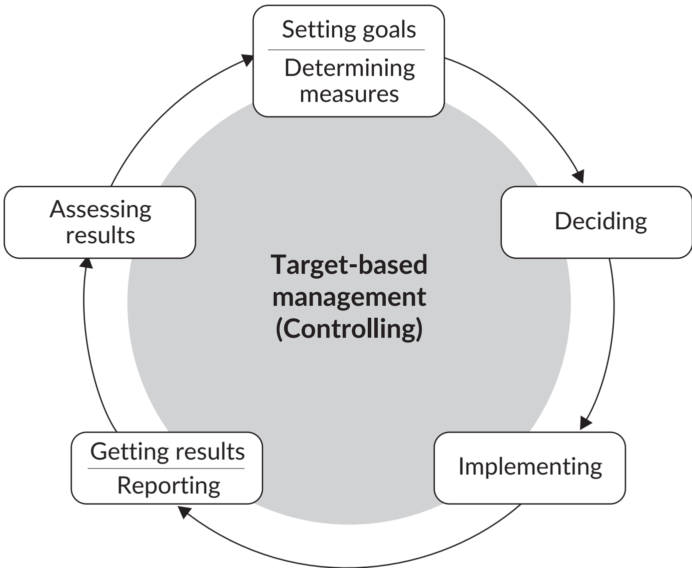
Finances (based on 2004)	
Expenses	CHF 59,000
Income from charges	CHF 15,000
Contingency fund	25%
Net expenses of product category (taxes)	CHF 44,000

Lessons learned

- "Traditional" resource management is relatively meaningless in terms of the quality and quantity of tasks to be fulfilled.
- Outcome-oriented administration is more informative and allows for more differentiated political and operational management, but is also far more demanding.
- Outcome-oriented administration is more appropriate for larger municipalities.

5.2.4 The cycle of control

The successful "development" of communal functions requires continuous control. Put simply, "control" is a matter of continually steering the way in which public tasks are drawn up in political and operational terms, and this requires periodic target-performance comparisons. The process of control can be imagined like this:



Targets are formulated in such a way that it is possible to measure whether they have been reached or not in the end. Planning is a matter of setting out the steps that should be taken in order for the targets to be met.

While the project is underway, information about the steps and the achievement of the goals is continually collected and compared with the desired outcomes. As long as the actual situation is in line with the desired outcome, there is no need to intervene. If they begin to diverge, this puts the achievement of the goals in question. The relevant bodies are then required to deal with the anomaly and adopt whatever measures may be necessary to ensure that the goal can be achieved in the light of the changed conditions.

The reporting system serves to inform the relevant bodies about how matters are developing.

Lessons learned

- Monitoring only works when it is kept as simple as possible (management by exception).
- On the one hand, it must ensure that the political bodies know exactly what is happening and can actually take responsibility for the implementation of the "political orders" they have given.
- On the other hand, monitoring must ensure that operations are efficient and effective.
- Permanent target-performance comparison facilitates the consistent implementation and adaptation of the (political) requirements.

5.3 The Funding of Tasks

The fulfilment of municipal tasks requires resources for which the necessary funding must be made available. The municipality can cover its costs in several ways:

- Levying own duties (taxes, public charges). Note: in Switzerland around a third of government spending is made on the municipal level. Around 70% of the resources necessary for this are generated by the municipalities through their own levies.
- Contributions from central government, earmarked or uncommitted.
- Resources from financial equalisation (if available)
- Contributions from third parties, earmarked or uncommitted (e.g. donors)
- Investment income (rental income, interest on investments, etc.)

While *taxes* are unconditional (everyone pays tax, whether or not they have children in school) and are as a rule collected on the basis of economic performance, special charges are made for specific municipal

services without, as a rule, taking the financial situation of those who are charged into consideration. Special charges can also be described in terms of the principle of "costs-by-cause", such as:

- Charges for municipal services (obtaining planning permission)
- Charges for water supply, sewerage and waste disposal

Insofar as municipalities are given some discretion by the higher ranking law, they must use legislation (laws/regulations) to decide who is liable for duties, on what they should be levied, and how they are to be calculated (the water charges for a single house might, for example, be calculated on the basis of the number of taps and the amount of water used, e.g. 50% for each).

To the extent that third parties seek to make a profit or at least incur no losses from their activities, the funding of public tasks through third parties (for example in the framework of a private-public partnership, or through credit from banks or donors) does not come under the category "funding of tasks". Such cases are less about the funding of a task itself than the pre-financing of municipal tasks, partly by taking risks for the third parties which are doing the pre-financing. It should be noted that a private investor who operates a waste incineration plant will ultimately want to write off the investment and gain interest from the capital. These expenses fall to the municipality: this is how it fulfils its tasks or arranges their fulfilment. A bank or another commercial source of capital generally reckons on the loan being repaid with interest after some time. These are resources which must therefore be generated by the municipality.

Larger investments usually require *loans* (borrowed capital) to be taken out, for which the municipality has sufficient liquidity to service. This borrowed capital must be amortised, and interest must be paid, resulting in annual expenses on the statement of income which must be borne by the municipal budget.

5.4. Financial Planning

The funding of municipal tasks must be planned for the medium and long-term. Short-term planning usually concerns a year and is defined as an estimate or budget. Medium-term planning applies to five to eight year periods and is known as a financial plan.

The fulfilment and funding of tasks are Siamese twins. It is always important to consider both elements together. Reforms which are the subject of only one or the other element tend as a rule to fail. It is worth noting at this point that to the extent that it cannot secure its own sources of finance, the municipality tends as a rule to be largely dependent on the allocation of resources from central government. Insofar as the municipality raises its own taxes, it does so as a rule within the framework of central government law.

Lessons learned

- The fulfilment and funding of tasks are like Siamese twins and cannot be considered separately.
- Tasks can only be fulfilled if the requisite funding is secured.
- Taxes take account of people's ability to pay the financial circumstances of those liable into account; as a rule, special charges do not, which can make high special charges problematic from a socio-political point of view.
- Only a municipality's own resources can be used to fund activities. While loans and guarantees etc. guarantee liquidity, they do not constitute funds.
- Municipalities should at the least have the financial and political room for manoeuvre that allows their tasks to be effectively fulfilled. If possible, the municipalities should be granted uncommitted funds which they can decide how to use at their own discretion and on the basis of the needs of the population.
- On both political and financial grounds, it is unacceptable - and also de-motivating - for central government to delegate tasks to local authorities without at the same time putting the necessary financial resources at their disposal.

5.5 Accounting / Financial Budgets

5.5.1 General

Municipalities must fulfil their various tasks in such a way as to make the best possible use of financial and other resources for the population. This requirement can only be fulfilled if authorities and staff have at their disposal the management tools that allow the best decisions to be made. One such instrument is accounting. Accounting is not merely a matter of keeping the books which show, at the end of the financial year, that the finances have been dealt with properly: it should also be regarded as a comprehensive system to which it is possible to turn at any time to get information about past as well as future financial performance.

As in the private sector, financial data is increasingly turning public accounting into a controlling tool based on financial data; an instrument of administrative and managerial supervision.

5.5.2 Principles of financial management

The following principles and objectives are the main guidelines for budgetary management. They are to be considered before any decision that has financial implications is made. The decision to take on new expenditure can only be made in accordance with these principles.

- The principle of **legality** requires that the authorities entrusted with financial management comply with the relevant legislation (e.g. laws and regulations). Spending in particular should be only given the go-ahead by bodies with the relevant financial responsibility.

- The **balanced budget** principle strives for a balanced current account in the medium term. This means that expenditure is covered by revenue in the medium term, and deficits are written off within this time-frame. Medium term refers to a period of between five and eight years.

- The principle of **economy** means that every expenditure is to be assessed in terms of how necessary it is and whether it can be borne. Expenditures should be prioritised on the basis of their urgency.

- The principle of **efficiency** aims at the optimal and cost-effective deployment of staff and practical resources for the fulfilment of the task. This goal is closely connected to economy. But look out: economy is not always efficient, and efficiency is not economical. It is important that the relevant bodies set the necessary priorities in each case, so that both economy and efficiency are optimised.

- The principle of **costs-by-cause** means that as a rule the beneficiaries of special services bear the reasonable costs of the fulfilment of the task. This principle requires the authorities to check funding questions with beneficiaries when deciding on public services, and to collect reasonable charges or contributions.

- The principle of **benefit compensation** means that third parties should compensate for economic benefits derived from public facilities and arrangements.

5.5.3 Transparency

Communal accounting should ensure that all incidents relevant to the financial accounts are recorded in the books. There should be no unsupported entries. In addition, all entries should be itemised separately: the entry of net sums is unacceptable.

Some tasks are not fulfilled by the municipality on its own, but jointly through associations of municipalities or private bodies (societies, foundations, businesses, co-operatives). Because financial duties, legal liabilities, and later funding obligations can arise from such joint ventures, the municipality must publish a list of these risks under the following categories:

- Taking part in inter-communal bodies constituted according to public law (associations of municipalities, institutions etc.),
- Participations in legal entities under civil law,
- Contractual relationships, entered into in order to fulfil municipal tasks,
- Memberships of societies, associations, and co-operatives.

5.5.4 Accounting tools

The following **accounting tools** are available to the financial administration:

	Financial Plan	Estimate	Annual accounts
Aim	Medium-term financial management Setting priorities Co-ordination	Short-term management; Funding assigned to concrete tasks	Ongoing monitoring of finances; Target-performance comparison
Period	Four to eight years in advance	Next calendar year	Current/past calendar year
Effect	Non-binding instrument	Binding; can legitimize spending	Binding; proof of budgetary management

5.5.5 Principles of accounting

Principles about the organisation, design, and use of accounting methods must be established in order to achieve the budget's overriding goals. Meaningful and continuous information can be produced only by sticking to these principles and hence decisions can be made and the financial budget properly managed on the basis of said information.

- **Clarity** implies the understandable and clear presentation of financial plans, estimates, and bills in line with the official accounting system.

- The principle of **completeness** requires all anticipated revenue and expenditure to be set out in the financial estimate and plan. Each case of income and expenditure must be recorded in the accounts.

- The principle of **accuracy** requires that actual facts agree with the picture expressed by the accounts.

- The **gross principle** states that expenses and income cannot be offset. Expenditure and income must be shown in full in separate accounts; this applies to investments as well as costings and annual accounts in the current accounts. This principle also applies as far as possible to the financial plan.

- The **debit principle** requires that financial transactions are recorded at the time of invoicing, or when a debt is made, and at the latest when books are made up. Accounts can only be interpreted when the particular accounting period is clearly delineated.

- The **principle of specificity** ascertains that outgoings and incomings from a particular account - or for which an account had to be opened - are recorded correctly. An account labelled "unforeseeables" has no place in a schedule of accounts.

- **Qualitative constraints** specify that costings or credit guarantees provided for the achievement of a particular end can only be used for that purpose.

- **Quantitative constraints** mean that expenditure cannot be higher than that stated in the estimate or agreed through a credit guarantee.

- **Time constraints** require that expenditure can only be made within the estimated period. Unused credit expires at the end of the financial year.

- **Annual accounting** means that both estimates and municipal accounts are drawn up over the period of a year. The accounts are made up on 31 December. Distinctions are to be made in the relevant accounts (debtors, creditors, prepaid expenses and deferred income, risks).

- **In advance** means that costings must be decided upon before the start of the financial year.

5.5.6 An accounting model scenario

An accounting model has the following elements:

- The balance sheet
- Investment statement
- Profit and loss account
- Cash flow statement
- The appendix

The system of accounting and financial reporting must ensure that financial information is correct, complete, and truthful. Accounting can only be a successful management tool on these terms.

- **The balance sheet:** The balance sheet shows on the one hand the value of an institution's assets (active side), and on the other how these assets are financed (the passive side). Assets in indirect operational use (e.g. liquid assets) are presented separately from those in direct use (e.g. streets, school buildings). Directly operational assets cannot be disposed of without having an effect on the fulfilment of tasks; these are assets which will (and must) allow tasks to be carried out in the coming year. In terms of financial reporting, it is important that the balance sheet is considered “correct” (true and fair view). Only accurate assessments make a truthful balance possible and allow statements about the actual financial situation to be made. Assets are financed by *outside funding* or *internal capita*l. External capital shows to whom an institution owes money (creditors, banks etc.). Internal capital is made up from profit and represents the “debt” of the institution to its owners or, in terms of the municipality, the inhabitants. The municipality's capital also serves to finance future tasks, without the need to levy further charges.

- **Statement of investments:** The statement of investments details the financial impact of investments made in operational assets during a year. The level of detail is set according to a binding schedule of accounts, which is organised according to tasks (functions e.g. training, security) and specific types (e.g. construction of a school, procurement of fire engines). Net investments are carried over annually in the balance sheet as capital required to meet the running costs. The annual depreciation of investments must be written down as an expense in the profit and loss account.

- **Profit and loss account:** The profit and loss account includes the expenses necessary to the management, operation and maintenance of assets, and the revenue earned from conducting tasks. The profit and loss account therefore shows the costs of all the tasks which have been fulfilled, and the revenues (such as taxes, fees) that have been used to cover this expenditure. The profit and loss account is structured like a statement of investments in terms of tasks and types, so that it is always easy to see which expenses apply to which specific tasks. The profit and loss account also shows the costs arising

from operational assets (depreciation, maintenance, etc.). The profit and loss account totals show surpluses and shortfalls of expenditure for tasks: a revenue surplus suggests that charges were set too high and becomes available as capital for tasks in future years; a surplus of expenditure indicates that charges were set too low to cover expenses and diminishes the municipality's capital. If there is no capital, the surplus expenditure has to be accounted for as an accumulated deficit - this constitutes a form of credit held by the institution against future "tax payers", who have to cover a loss without being able to benefit from any services.

- **Cash flow statement:** The cash flow statement takes information from the balance sheet, the statement of investments, and the profit and loss account, and distinguishes between cash transactions (e.g. the payment of a craftsman's bill) and non-cash transactions (e.g. depreciations). The totals on the cash-flow statement shows changes to the levels of cash in hand, and how investments have been funded.

- **The appendix:** The appendix provides the information required to interpret the financial results and the budgetary situation. Provisions for future obligations, such as leases and contingent liabilities, belong here, as does a schedule of shareholdings, which shows the other bodies in which an institution is involved (and the associated risks this may entail).

5.5.7 Financial controlling

In the case of a profit and loss account, financial controlling can be presented as follows:

- **Setting targets, planning, specifying measures and making decisions:** The executive body determines certain legislative goals, e.g. during the next four years there will be no changes to the tax rate, and decides on the measures necessary to fulfil this objective. The financial plan shows the financial effects. It is anticipated that expenditure will need to be reduced in certain areas in order for the legislative targets to be met. Estimates allow concrete decisions to be taken about what expenses should be charged to the profit and loss account in the coming year. A decision about the estimate is made by the relevant body.

- **Running/monitoring/governing:** Authorities and administrations fulfil tasks as required. Expenses are incurred and charged to the current account. The books are updated on a daily basis to show the difference between budgeted (targeted) and actual (performance) values. As long as the actual performance is within the realm of the target, no action is required. Should they diverge, for any reason, the relevant bodies instruct managers to take corrective measures so that the objectives can be met.

- **Reporting back:** Financial administrators make regular reports about the status of "their" budget accounts. The mayor will normally be informed about the status of the finances each quarter or term. The comparison between objectives and outcomes is submitted to the parliament with the annual accounts.

Lessons learned

- A meaningful accounting system is indispensable for political and operational management.
- Transparency in financial matters strengthens trust in the authorities and the administration and counteracts political disenchantment.
- A well organised accounting system secures development over a particular period and allows comparisons with other municipalities.
- The central government must guarantee with binding provisions that comparisons with other municipalities are at all possible.

5.6 In-House or External Procurement (Make or Buy)?

5.6.1 Overview

Four possible and overlapping models are distinguished here. The scheme is not without its ambiguities, but does contribute to an understanding of the relevant issues.

- In-house (MAKE) – a municipality uses its own resources to set up a service (staffing, material).
- External procurement (BUY) - a municipality puts services out to tender from private bodies or other municipalities.
- Outsourcing (MAKE & BUY) – a new legal entity is established (municipal association, public company, society etc.). Such entities belong to the municipality, which sets up services with these third parties (MAKE) and then buys them in (BUY).
- Cutting services (DON´T MAKE, DON´T BUY) – cuts can lead to the disappearance of a service. This might, however, prompt the private sector to offer the service.

5.6.2 In-house provision

A variety of political, legal, and economic factors determine whether a municipal task is best fulfilled internally or when procured from a third party. Some restraint should be exercised when "buying in" policing services, for example, because policing concerns the monopoly of the legitimate use of physical force. In this case it is clear that in-house provision should be prioritised; any external procurement should be confined to the provision of policing or security services by another municipality. Reaching the "right" decision requires the precise determination of the qualitative and quantitative nature of tasks in advance: which resources the municipality wishes to provide, and at what cost the task can be fulfilled. The problem is often that the municipality does not know the exact costs of fulfilling a particular task, and cannot therefore identify the advantages and disadvantages of performing it in-house.

The following factors favour in-house production:

- Constant availability of resources
- The needs of the municipality take precedence
- The municipality's staff can be better utilised
- Staff expertise can be put to the best use
- Public tasks can be fulfilled with greater awareness.

Against in-house production are the following:

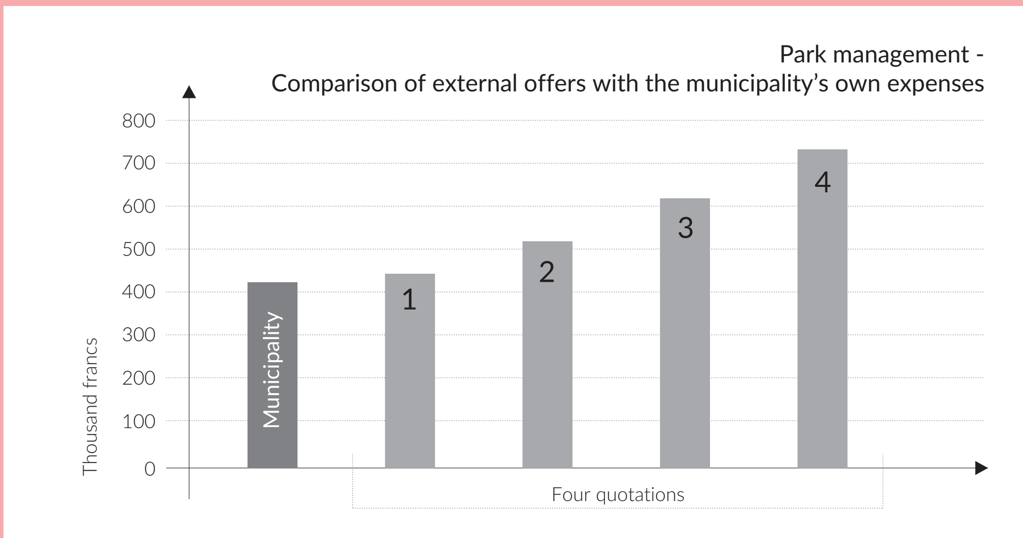
- Services are not organised in market terms
- Costs are higher than in the case of external procurement
- Municipal staff are not always used to the fullest
- Services which are not expressly required may be provided

There is no perfect formula for deciding on the best way to carry out a task. It is important to weigh up exactly which model has the most advantages in each individual case. Cost is certainly an important argument, but by no means the only one.

Example

The municipality is in dispute about whether municipal resources or a private company should be used to run its parks. In the political debate, two very basic positions are opposed: one side is convinced that in-house production is flawed because it lacks a market basis, while the other

finds the idea that a private company should take care of the municipality's own parks abhorrent. As a result, a project is launched to bring some transparency and objectivity to the debate: the services hitherto provided and those anticipated for the future are ascertained, as well as the "true" costs of the previous in-house management (including overheads and internal billing). The following results are published:



As a consequence the council makes a unanimous decision to retain in-house operation. The municipality's ability to run the parks well and economically itself is largely due to the commercial sense and social skills of its leaders.

5.6.3 External procurement

Services are purchased on market terms from a private body or another municipality. This entails entering into public-private or public-public partnerships, the characteristics and examples of which are presented below.

External procurement is characterised by the following broad features:

- **(Contractual) Purchasing of services from third parties** (private or other municipalities): a municipality buys services from a third party - a private body or another municipality. In Switzerland municipalities can also tender as private bodies, operating services which are then offered to other municipalities. In

this case municipalities compete with private bodies. This practice is increasingly common; whether it actually happens under normal market conditions is a good question.

- **Market pricing** (insofar as there are competing suppliers): market pricing usually applies in areas where there are several suppliers expressing interest in the provision of services. But it doesn't always work!

- Rather than simply cutting a service, the municipality assumes financial responsibility by determining which services can be provided by a third party but **funded** by the **municipality**.

- **Default liability generally falls to the municipality**. For example, the municipality can be held liable by someone whose dog is run over by a private haulage company. The municipality can however use contract law to recoup the costs from the third party. It is always be borne in mind that enormous costs for damages can be incurred. The higher ranking law always applies, of course.

- There is **no municipal control over the operation of services**. This is the crucial difference between external procurement and the establishment of a spin-off body. The municipality plays no role in the management of the private haulage company and has no interest in the operating costs of the private company; its interests are confined to the cost, the quality, and level of the provision. In exceptional cases, additional conditions can be imposed to ensure that the municipality only works with those private suppliers who, for example, apply certain minimum standards of employment law.

- **No participation with third parties:** the municipality assumes no proprietorial role and there is therefore no confusion about ownership.

- **Third parties generally deal directly with those commissioning the service** (the customers). This system is relatively uncontroversial and well-proven in Switzerland, where a sixth of expenditure on municipal services is made to third parties.

- The model is **output oriented** (products, global budgets, etc., as in New Public Management). Services and costs are foregrounded.

- The buying in of services is not done arbitrarily, but in the framework of a transparent **procurement process**, which determines the criteria on which the contract will be awarded in advance. Price is an important criterion, but by no means the only one.

Examples (external procurement)

External procurement can refer to a service which is directly provided to the customer (*Contracting out*) or one which is "internally commissioned" (*Outsourcing*).

Contracting out:

- **Security - private security companies.** It can make sense for street patrols to be undertaken by a private security company whose presence can foster a sense of security. It should however be noted that the jurisdiction of private security staff cannot exceed that of ordinary citizens. The police must continue to hold the monopoly of the legitimate use of force. Where the state wishes to go further, it is the police who must represent the legitimate use of force. Whether a municipality actually instructs a private security firm is in the end a political decision.
- **Waste disposal – private garbage collectors** (transport companies).
- **Building inspectors (building permits) – private architectural or engineering firms:** in small municipalities, a private architect or engineer can assume responsibility for tasks related to building (checking building applications, preparing decisions, etc.). The formal planning process is however the business and responsibility of the municipality.
- **Structural and operational street maintenance** - construction companies or (in small municipalities) farmers often maintain roadways with great economy.

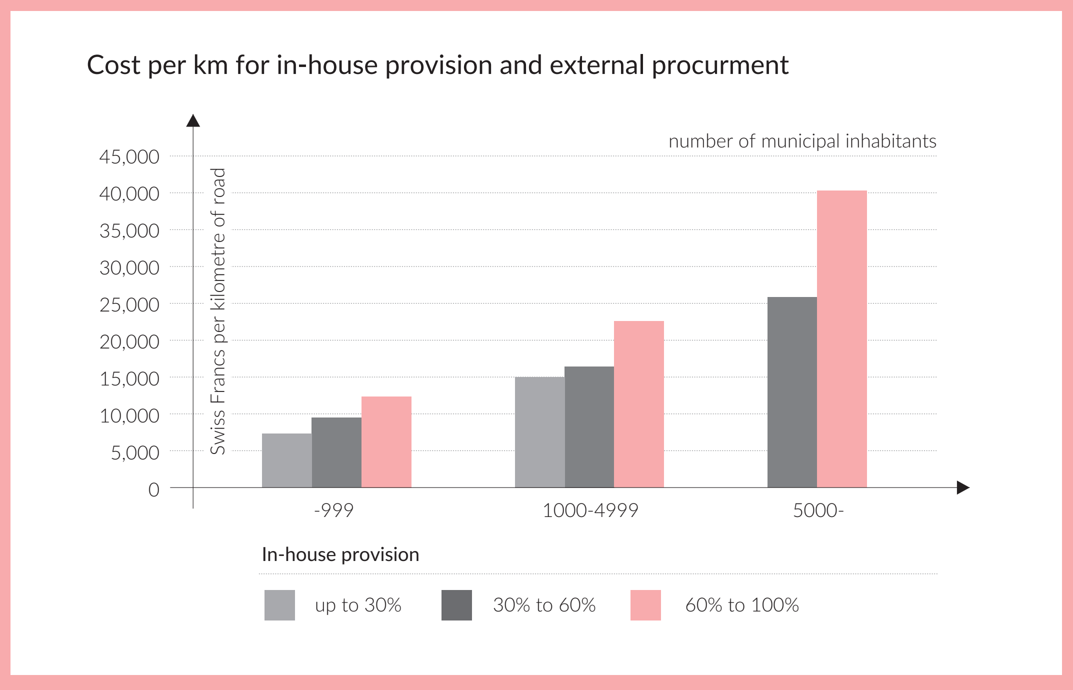
Outsourcing:

- Because of its complexity, the process of **auditing** can be handed to specialised auditors.
- **Municipal administration:** many administrative activities can temporarily or permanently be delegated to specialised third parties.
- Municipalities without their own **legal services** can get advice from specialised lawyers on a case by case basis.
- **Information technology:** it can make sense for a municipality to buy in certain information services (even extending to an IT centre) rather than setting them up itself.
- **Insurance management (brokers).**

Example for taking a decision how to fulfil a concrete task (make or buy)

Three sizes of municipality are compared in order to ascertain the costs for road maintenance conducted in-house and those arising from its external procurement.

As the diagram below makes clear, the **costs for road maintenance are higher per km when conducted in-house than when the services are bought in**. This may be because certain services are performed in-house (e.g. the occasional cleaning of private forecourts), or because the salaries of municipal construction or maintenance depot personnel are significantly higher than those of the private providers. There is certainly more pressure on costs in the case of external procurement than with the in-house provision of services, which simply uses the resources at its disposal.



Lessons learned

- It is not easy to say which model (in-house or external procurement) best serves municipalities.
- External procurement is generally better and more economical in the case of peak demand, exceptional requirements, and unusual needs, while permanent conditions tend to favour the use of municipal resources.

- The degree of commercial sense with which a particular unit is run on a day to day basis is often decisive. Its presence favours in-house production, but if it is lacking, external procurement should be given priority.
- External procurement can only succeed if there is a market and an active one at that. Buying in services from suppliers with monopolies is not a recipe for success.
- Only clear procurement rules agreed in advance can ensure sufficient competition.

5.6.4 Spin-off bodies

It is increasingly common for a proportion of municipal expenditure on the provision of services to be made in part through legally independent municipal spin-off companies (in organisational and usually in legal terms *independent of the municipality*). The municipality *holds up to 100% of the shares of this third party*, with which it *shares operational control*: this means that municipal representatives are usually appointed to the board of this legal entity (taking seats). There is normally *no market pricing*, but the same procedures apply as to in-house operations i.e. in accordance with available resources (*classical input orientation*). Losses incurred by these third parties are covered by the municipality, which tends to be a disincentive to commercial behaviour.

Spin-offs are created on two main grounds:

- The first, and important reason is inter-communal cooperation: small municipalities which cannot operate certain services themselves have to come together with other municipalities. Here the establishment of a new service provider (often in the form of an association of municipalities under public law) is an obvious solution.
- The second reason for setting up a spin-off is the necessity to act on the New Public Management (NPM) principle that political and operational control should be distinct. When a task is outsourced to a separate legal entity, the separation between strategic planning and operational implementation is more assured. If the municipality does not want to collaborate with the private sector or with other municipalities so that it can maintain its independence and freedom to act, the establishment of a new legal entity is a way forward.

Spin-offs can take many different forms:

- *Contractual inter-communal cooperation* (e.g. a common cemetery). In this case, several municipalities run just one cemetery between them. The formation of a new legal entity is not recommended here. A simple, unbureaucratic contractual solution can be found.

- B*odies with legal and organisational independence* – these are comparable to foundations (e.g. transport services).

- *Municipal associations* (e.g. hospital management, sewage disposal, schools).

- *Shareholder companies* (as for example with a municipal association) - here private parties can also participate under certain conditions. Such participation is however very rare today. It would be an option for the supply and distribution of power, but this has not yet been tried out.

Spinning off municipal tasks often proves particularly challenging on the following grounds:

- If the *strategy* is (regrettably) handed over as well as the *operation*, the municipality is left with only limited opportunities to influence a process which it nevertheless still owns.

- *Neither market nor democratic controls* apply when tasks are fulfilled by spin-off bodies. Although there is also little market influence on operations conducted in-house, democratic and technical supervision remains very effective.

- *The municipality's regulatory and supervisory powers* are very *slight*.

- There is *a tendency for spin-off bodies to gain their own momentum and focus too narrowly*: local politicians usually have seats on the bodies of the municipal spin-off company. Because they are then dealing only with a particular sector, rather than in their capacity as members of the municipal executive council, they tend to lose sight of the whole picture. Since all members of the board of a municipal spin-off tend to agree on the (increasing) use of resources, there are few of the usual discussions about the municipal distribution of public resources, and spin-off bodies can acquire a momentum of their own which serves to prioritise their particular sector.

- *The spin-off company's strategy can be put before the municipality's own interests:* the point of restructuring is to minimise political influence and give the company as much freedom as possible. From a political

point of view there should be a clear notion of ownership. Within these parameters, the company must be as free as possible. In fact there is often no clear notion of ownership on the part of the municipality: the company behaves "as it pleases" and the municipal representatives are increasingly in hock to its interests. To counter this, municipal representatives on the board of the spin-off company should be people with commercial experience or social partners who can act on their own discretion. On the other hand, responsibility for the pursuit of the municipality's proprietorial interests and the development of the company's development remains with the politicians.

All these challenges can be met if the right organisational and legal arrangements are in place: Even when the municipality does not perform a task itself, but instructs a company it has formed for this purpose, it remains politically and, as a rule, legally responsible for the correct and economical fulfilment of the task. Figuratively speaking, the municipality remains the "owner" of the task, even though it is fulfilled by a legally independent entity. In this respect, the question becomes one of how the municipality can and should properly exercise its sense of ownership. Most of the time the influence of the municipality over one of its own companies is confined to the delegation of a municipal representative to the board. Experience suggests that this is inadequate, and often leads to mismanagement. What tends to happen is that over time, the person who should be representing the interests of the municipality starts to put their passion and commitment into the company itself and turns into a lobbyist on its behalf in the municipality. Therefore, delegating municipal representatives to a board only really makes sense when they are committed to *a clear strategy of ownership formulated by the municipality(ownership strategy)*. This guarantees that the municipality can express and enforce its influence as the owner of the company.

The municipal ownership strategy should deal with the following questions:

- Why is the municipality founding a company / why is it participating in a company? (e.g. to be able to behave in a business-like manner, to hold back the influence of everyday politics, to facilitate cooperation with third parties (e.g. private bodies etc.).

- What should the company do / not do (definition of objectives and tasks)?

- What falls to the municipality, and what should be left to the market?

- Who represents the municipality as the proprietor on the board?

- What conflicts of interest may arise (for example the company seeks profit, while the municipality wants on the contrary to get the most economical service)?

- How autonomous should the company be (e.g. with regard to staffing policies, finances, organisation)?
- What political guidelines does the municipality want to set (e.g. minimum standards about gender, environmental guidelines)?
- In what kinds of collaboration and participation can the company engage?
- Can third parties participate in companies?
- How and when should the company report to the municipality?

Lessons learned

- Regardless of the legal form assumed by the spin-off company, it has to be remembered that it continues to deal with municipal tasks for which the municipality is ultimately responsible.
- The advantages and disadvantages of a spin-off should be accurately presented and assessed.
- The municipality can only guarantee the autonomy of the spin-off company in the context of a clear and meaningful ownership strategy.
- Without operational autonomy the company cannot function as a business.
- Although private legal forms (e.g. shareholder companies) have been tried and tested on the market, there is no guarantee that they will behave commercially: the only incentive for commercial behaviour is effective competition.
- Spinning-off a municipal task to a private legal entity is not real privatisation.

5.6.5 Cutting services

If a municipality no longer fulfils a task, this is real privatisation.

Examples of cutbacks

Housing construction – many municipalities provide housing. This raises the following questions:
- Is house building a job for the municipality?
- Is it a financial investment?
- Does it achieve certain social objectives?

The provision of electricity, gas, and telecommunications (TV, radio): all these areas have the potential to be transferred to other suppliers: this is currently a theme in terms of the liberalisation of the electricity market. It is only responsible to hand over such areas if the market can guarantee that a third party can provide a service well and economically. If a third party has a monopoly or a quasi-monopoly, there is a danger that profit becomes the goal and the service is poor and/or more expensive.

Whether or not to provide a service in-house is often a matter of municipal discretion. If the finances are tight, areas such as tourist infrastructure, swimming pools, theatres etc. tend to be at risk of falling victim to fights about the distribution of resources. Because these are areas where it is very difficult to raise funds commercially or make a profit, such cutbacks are rarely compensated by private suppliers or the market.

Lessons learned

- A municipality can cut particular services if they can also be provided by competing private suppliers.
- If there is no functional market for these services, there is a danger that a single private supplier may misuse the market position and try to gain a monopoly.

5.7 Inter-Communal Collaboration

It can often make sense for municipalities to fulfil tasks in cooperation with other municipalities rather than by themselves. Reaching the "right" decisions here requires an understanding of the opportunities and risks of inter-communal collaboration, so that the necessary organisational measures can be taken.

5.7.1 The opportunities

- *Enhancing professionalism:* working practices can be more professional at different scales. In this sense it doesn't matter whether the person responsible for managing a task is answerable to one or several municipalities.

- *Synergies / economies of scale:* larger "production perimeters" can sometimes mean that resources can be better used, and this can lead to synergies, economies of scale, and therefore lower costs.

- The right kind of collaboration between municipalities can mean that the *area* within which a task should be fulfilled can be "tailor-made". While sewage treatment can be measured primarily in topographical terms, the joint operation of a waste disposal plant may bring other factors into play.

- Finally, meaningful inter-communal collaboration can improve the *quality of the output* of municipal services.

5.7.2 The risks

- *Danger of gaining own momentum*: there is always a risk that an inter-communal body which has its own legal person will escape the influence of the municipality and begin to gain a momentum which serves its own - and possibly divergent - commercial interests.

- *Technocratic perspectives*: inter-communal collaboration can result in municipal activities, conducted close to the population, being handed over to a technocratic "agency". This can mean that everyday reference to the "end-users" is lost, and a rather technocratic perspective prevails.

- *Loss of the bigger picture*: when a municipality performs a task itself, it is always aware that the costs are incurred in competition with other claims. The municipality has an eye on the whole picture and always has to make compromises, set priorities, and ensure that cutbacks are evenly made when resources are

scarce. Inter-communal bodies tend to fulfil one or a few tasks in a particular sector, and this can lead them to overvalue their tasks and lose sight of the bigger picture.

- *Higher professional standards - higher costs*: inter-communal collaboration often increases professionalism, but this is often associated with higher costs.

- *Loss of accountability*: municipal boards must give regular accounts of their conduct and particularly their use of resources to the municipal executive bodies or the electorate. In the case of spin-offs or inter-communal collaboration, this responsibility is "mediated", and mismanagement rarely results in sanctions. Inter-communal collaborations can make it difficult both to determine who is responsible for what and to hold them to account.

5.7.3 The organisation of inter-communal collaboration

Two “basic types” of inter-communal collaboration can be considered:

- Lead municipality model
- Bodies with their own legal personality

With the *lead municipality model*, the collaborating municipalities delegate a particular task to the lead municipality (which normally has the necessary infrastructure) to whom they pay a fee. The contractually bound municipalities can be granted participation rights (membership of a committee responsible for the management of a service, veto rights in terms of large-scale investments in which the connected municipalities are obliged to participate). The lead municipality model is simple and well proven, because tasks are fulfilled at a level close to the municipality and its citizens, and there is no risk of the process gaining its own momentum and running away with itself. All the advantages of setting up a new legal entity can also, as a rule, be effected contractually. The collaborating municipalities' internal politics often mitigate against the lead municipality model, because there is basic mistrust of the leading municipality and little willingness to see a service farmed out. Where a collaboration is contractual, there is provision for unilateral termination, in compliance with a notice period which, in the case of major investments, should be rather long, so that the lead municipality can work together with the other contracting municipalities to write its investments off.

In the case of a *body which has its own legal person*, the collaborating municipalities establish a joint company in the form of a legal entity. As opposed to the lead municipality model, this form of joint responsibility for

tasks has the basic advantage that all municipalities have equal rights, and specifically that ownership is not assumed by a single municipality but rather by the body set up for this purpose.

The statutes of an inter-communal body must deal specifically with the following points:

- How can the statutes be adapted (changing targets for example only with the agreement of the participating municipalities, changing the organisations with a simple majority etc.)?
- How are important decisions (e.g. investments) to be made by the inter-communal body?
- How are the municipalities represented in the body?
- How are the costs distributed amongst the participating municipalities?
- On what grounds and in accordance with which notice periods can a municipality pull out of the body?

The disadvantage of inter-communal bodies with their own legal persons is that, in order to be functional, participating municipalities must have only limited influence over them, which can again lead to the risk that they can gain their own momentum as described above. There is a tension between commercial freedom on the one hand and the legal framework provided by the participating municipalities on the other. The spin-off model (see 5.6.4) is one way of dealing with this problem: inter-communal collaboration in the form of legally independent entities is simply a special kind of spin-off.

Examples

- A municipality draws drinking water for a part of its territory from another municipality with which it has a contract. The task of providing and distributing drinking water is given to "lead municipality", which then operates in the other municipalities who pay the lead municipality for this service at an agreed rate.

- Five municipalities decide to set up a joint body for regional development which has specialised "know how" at its disposal. The staff of the body are employed by the lead municipality (which also has the office infrastructure). The collaborating municipalities compensate the lead municipality in proportion to the numbers of their inhabitants. A committee, on which all the collaborating municipalities are represented, is in charge of the management and supervision of the unit. Decisions about the "fair" costs are made in conjunction with the budget of the lead municipality.

- Ten municipalities decide to set up and run a waste disposal depot jointly. To this end they create a municipal association under public law. Costs are apportioned 50 % according to the inhabitants and 50% according to the amount of waste. Any extension of the association's tasks requires the agreement of all the municipalities. Decisions about the day-to-day running of the business can be made by a joint committee in which all municipalities are represented with appropriately weighted voting rights. Municipalities can give two years' notice to leave the association, but must however proportionally write down administrative investments which have not yet been written off, so that the remaining municipalities do not have to take over the "legacy debts" of other municipalities.

Lessons learned

- Inter-communal collaboration is well-established and with the right organisation can lead to professional performance at reasonable costs.
- Familiarity with the associated opportunities and risks of this approach is advisable. Appropriate organisational processes can minimise the risks.
- The lead municipality model ensures that operations are commercial and uncomplicated, but municipalities may reject it on the grounds that certain tasks are taken out of their hands.
- The formation of legally independent inter-communal bodies is recommended on the basis that it protects the equal rights of all the municipalities, but there is a risk that such bodies can gather their own momentum and become removed from the municipality and the population.
- Municipalities participating in an inter-communal body must have a guarantee that they can participate in the most important and far-reaching decisions (possibly with veto rights). At the same time the functionality of the organisation means that majority decisions about day-to-day affairs must be able to be made within a useful period of time.

5.8 The Administration

5.8.1 Human resources

Every successful company depends on capable and motivated staff. Municipalities are therefore obligated to compete with the private sector in terms of the conditions of employment they offer in order to fulfil their tasks well and in a business-like manner.

A municipality's *employment law* must ensure that the rights and obligations of its employees are unambiguously established from the start, and that all employees are subject to the same procedures and conditions. It is vital for a good collegiate atmosphere that employment conditions and salaries are legal and non-arbitrary. Clear and transparent criteria should establish which functions belong to which salary classes. Promotions in the course of a municipal career must be possible on objective grounds and cannot depend on managerial good will.

Sufficient attention should be paid to *staff training and development*. Only trained personnel with the capacity to react quickly to changing conditions can deal with the kinds of complex issue that arise. Basic training and education can be conducted internally, while more complex training programmes must be purchased from specialised third parties. It makes sense for more demanding training and education to be jointly organised and conducted by several municipalities or by an association of municipalities.

It is vital that vacancies are *publicly advertised* so that all qualified candidates are able to apply. A transparent evaluation process must ensure that posts are filled according to objective criteria and without arbitrariness by the person with the best aptitude.

5.8.2 Organisation

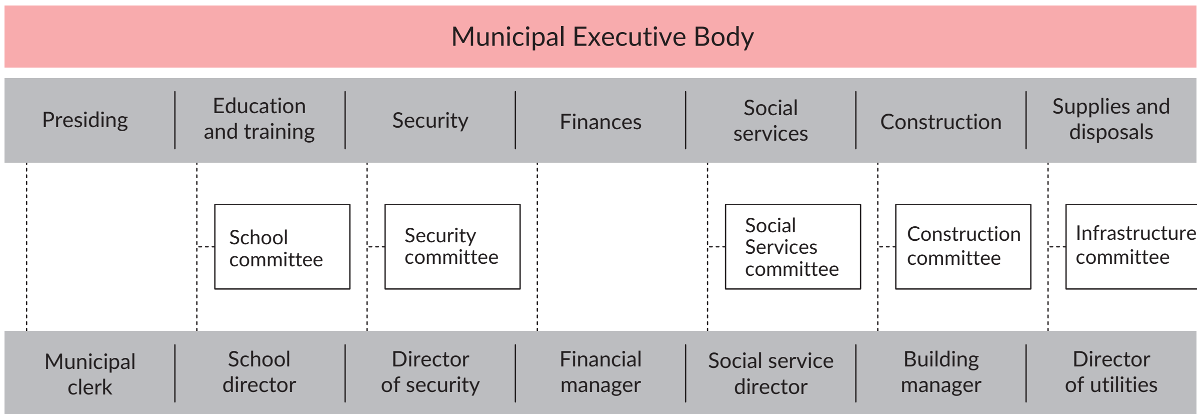
The municipality must organise its *structures and procedures* to suit its needs.

- The *organisational plan* groups the tasks to be performed and assigns them to individual roles. Relations between the various roles must then be defined (in terms of hierarchies, responsibilities).

- The *functional plan* shows the individual steps which need to be taken in particular working procedures, and the ways in which the various roles interact.

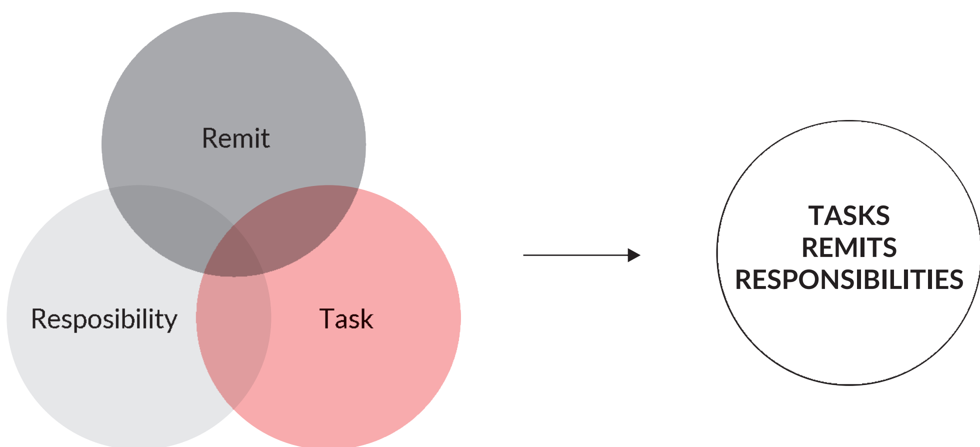
- An internal control system should be in place.

The *organisational plan* is often enacted as a diagram that shows the structure of the organisation and the hierarchical arrangement of its particular levels, it might look like the following example:



Each role must have a clear and exclusive remit corresponding to particular tasks and their associated responsibilities.

Allocation of tasks, remits and responsibilities to posts



The *functional plan* is often enacted in the form of a functions diagram. This diagram allocates responsibilities to the individual posts or authorities who can be approached for decisions, proposals, execution, consultation, or information. The diagram ensures that all responsibilities are seamlessly assigned and that no decision-making responsibilities are duplicated. It might look like the following example:

Tasks	Municipal Assembly	Municipal Executive	Departemental Head	Committee	Section Head	Clerk
Budget Guidelines		D		P	E	
Budget Preparation			I		E	C
Budget Estimates				D		
Decision on Budget	D	P			E	
Budget Execution (credits up to CHF 10,000)					D	P/C
Budget Execution (credits over CHF 10,000)				D	P/C	C

D - Decision
P - Proposal
E - Execution
C - Consultation
I - Information

Finally, the *Internal Control System (ICS)* is the organisational tool that ensures the protection of assets, a reliable accounting system, and regulatory compliance. This ultimately concerns the making and implementation of all necessary decisions. The ICS ensures that this chain of events is not interrupted. An important aspect of this is control, which cannot avert mistakes completely, but can certainly minimise them. Particularly where the use of public funds is concerned, it is important that all income and expenditure is clearly documented (evidence), that this evidence is always reviewed and initialled by a senior person, and, in the case of financial liabilities, that this person also issues the order to make the payment. In all important cases, the *four-eye principle* applies (double signatures, initialling by the relevant official, payments instructed by senior personnel, etc.).

5.8.3 Administrative techniques

Various procedures and processes must be established and followed if a municipality is to work well. A middle path should always be found, so that the necessary measures are taken on the one hand, without building too great a bureaucracy and thereby hindering the efficient and effective day to day administration too much on the other. A few notes on some important administrative procedures:

- The *dossier* ensures that all municipal activities are registered and can be identified at any time.

- Documents must be stored in meaningful and systematic archives, one of which is immediately accessible, in the case of current matters, and one which is protected against the natural disasters and external encroachments in the case of concluded matters. The archive plan ensures that stored documents remain accessible even after a long period of time.

- The *preparation* of important decisions often involves a network of activities of various posts. In this case a central position must ensure that the basis is seamlessly connected and understandably developed and documented. It is recommended that all important businesses are developed in a common format in order to improve understandability and comparability.

- The *documentation* of events, specifically official meetings and discussions, is extremely important. Minutes state the facts as they happened. The minute-taker signs the document, which is usually confirmed or signed off by a participant of the meeting.

- The establishment and keeping of *registers* is a vital means of running and managing the municipality. The use of modern software facilitates the keeping of registers. A register that is not regularly updated soon becomes useless. It should be noted that not every single task requires a register of its own in which information is partially duplicated, but all master data should be managed centrally in order to minimise errors and expenses. Central government and local registers should be harmonised as much as possible.

  The municipality must always - within the terms of confidentiality - be able to counter allegations that it is not transparent and completely trustworthy. The *principle of transparency*, which asserts that administrative processes are fundamentally accessible to all, as far as data protection and personal information allows, has proved itself invaluable. One consequence of this principle is for example that people have the right to see particular dossiers. It is also important that the municipality publishes a *proactive information technology policy* on a well designed website, and that problems and solutions are always publicly shared.

- In order to safeguard the personal data of third parties and the legitimately confidential interests of the municipality, comprehensive data protection must also be guaranteed. There must therefore be transparent and comprehensive rules about who can access which files (registers) and who has the right to get confidential information.

5.8.4 Supervision of the administration

Government business - and this is also true for all municipal affairs - is often bound up with the exercise of power, because the state has the ultimate unilateral and sovereign capacity to enact the laws that guarantee its workings. In view of this power it is hardly surprising when more or less significant and legitimate concerns about potential misuses of power and improper or inefficient uses of state resources are raised. This makes it absolutely essential that the administration - like the political authorities - has an effective system of supervision (see for general comparison the discussion in Part 1, section 1.5.2). With regard to political supervision of the administration (primarily at the executive level), the following issues should be considered:

- A seamless *allocation of areas of responsibility* and particular responsibilities is an important prerequisite for effective supervision of the administration. Only if roles and duties are clearly defined can people be held responsible by way of supervision. Senior personnel are required to constantly check whether those responsible are fulfilling their tasks in a proper and timely manner.

- Supervision is only possible in practice if *the administration has a clear political remit* to assess the implementation of tasks. There can be no effective supervision if there is no remit, or if it is unclear: administrative tasks cannot be assessed without a clear mandate.

- The *recording of working times* allows for checks to be made on whether municipal employees are actually present during working time. As we all know, simple presence is not enough to ensure the good fulfilment of tasks. That's why employees - in broad terms - should *report* on their activities to show how much time has been spent on which work. Work reports are a very important and efficient management and supervision tool. The administration must ultimately do what the political leadership specifies, and not, for example, what it simply likes to do, or thinks it can do particularly well.

- In addition to direct administrative supervision by the assigned political authorities (usually the executive municipal body), it is vital that the administration is also indirectly supervised by a political authority, such as a committee composed of members of the legislative body. In order not to blur the distinction between the principle of checks and balances on the one hand, and this kind of supervision on the other, the latter is limited with good reason to questions of *legality* (has the administration complied with the existing rules of the municipality and the higher ranking law) and compliance with *deadlines*. The effectiveness of administrative activities cannot really be subject to this kind of supervision because this would involve political supervision in matters that are beyond the remit of such a committee. This kind of

supervision tends to occur more randomly or when there is some specific case of something not being done properly (for comparison, and on supervision through central government and legal protection through the courts, see Part 1, section 1.5.2).

- Supervision of accounting procedures (auditing) is particularly significant, and as a rule should be underwritten by both the political executive and a legislative body. It is often appropriate to get a specialised company with the required knowledge of public accounting to come in. Before the responsible body presents the accounts of the previous financial year, an independent auditor must confirm that everything has been done correctly and in compliance with the regulations. In terms of accounting, it must also be possible for the central government to act if a municipality fails an audit or on other special grounds, and to take over the supervision of the accounts in part or in full. At the same time the municipality must be assured that it can seek redress in an independent court if central government auditing measures impinge on the legally protected position of the municipality.

Lessons learned

- Motivated, trained, and appropriately paid staff are the key to a well-run municipality.
- National or regional management networks facilitate the exchange of information, the meaningful joint training and education of staff, and the strong presence of combined municipal knowledge.
- Simple instruments (organisational diagrams, functions diagrams) can be used to make responsibilities transparent and comprehensible.
- Administrative supervision is only possible if remits and responsibilities are comprehensively and clearly assigned. Clear political mandates are vital here, so that checks about whether the administration is doing its job correctly and in accordance with the regulations can be made.
- The supervision of administrative activities is primarily the task of the municipality. Only when it is not willing or able to perform, this role is performed by the central government, which is normally confined to checking legality, need to take over these functions.

5.9 Logistics

5.9.1 Physical infrastructure

The fulfilment of public tasks would hardly be possible without the necessary physical infrastructure. The following facilities are amongst those that should be considered:

- Central administration (administrative buildings)
- School buildings
- Hospitals, health centres
- Sports facilities
- Leisure facilities (swimming pools, public toilets)
- Streets, paths, and public squares
- Water supplies (plants, piping)
- Sewage disposal (piping) / purification
- Waste disposal sites (depots, incinerators)

Planning the physical infrastructure requires *networking* across sectors. Water supplies should accord with housing developments, school planning with anticipated growth in certain areas of the community, etc. When planning for expected expenses, investment costs are only part of the story: *running* the infrastructure (structural and operational maintenance), together with the necessary writing down to account for depreciations and allowing for replacements result in considerable expenses which should always be declared and taken into account when deciding on investments. The sustainable management of municipal infrastructure must be foregrounded from the start in order to avoid the risk of poor investments.

An alternative to investing one's own resources is to *rent* infrastructure from outside. This option can come to the fore if the municipality has a short term need for some administrative infrastructure. The commercial viability of renting, leasing, and similar practices is always to be assessed with due care and consideration of all the possible scenarios. Assessments should basically be made on the same basis as those conducted by private companies when they use such services, so the municipality's tax considerations, for example, should not be taken into account.

5.9.2 Moveable goods

The administration requires appropriate furnishings. As a rule, office materials and equipment are centrally purchased and maintained because this allows them to be bought on reasonable terms. In relation to municipal vehicles, investments assume several years of use which makes it possible to write-down depreciation over the useful life. In this case it should be decided if each administrative department (according to sectors) is to run and maintain its own vehicles, or whether this should be done centrally. It is often cheaper for maintenance work not to be done in-house, but bought in from private third parties. This is generally the case with the purchase of municipal vehicles (e.g. road maintenance vehicles, garbage trucks): always decisive here is whether the services are provided in-house or bought in. This decision has far reaching consequences for the purchase of equipment. The municipality must maintain a register of all equipment (except for consumable materials) which can be subject to administrative oversight.

5.9.3 Information technology

Information technology is also equipment, but belongs to a special and extremely important "category" to which the following remarks apply:

- The procurement of information technology resources (hardware and software) must be made in the context of an effective concept applicable to the whole municipal administration.
- Communication between individual work stations must be ensured.
- Access rights to the necessary information must be precisely regulated.
- Sufficient attention should be given to training and support. The use of information technology only makes sense if all users have the necessary know how, and its technical and operational use is guaranteed.
- As a rule, information should be centrally stored: individual data storage at the work station makes no sense.
- Many municipalities outsource their central computing services and use the services of private bodies or other municipalities.
- Data security should be given the highest priority.
- It is important to decide whether and to what extent employees can make private use of the information technology at their disposal (email, Facebook etc).

Lessons learned

- In terms of investment decisions, follow-up costs (depreciation, maintenance) are always to be declared.
- Beware of third-party financial investments: always consider the question whether maintenance and operation can be sustained with in-house resources (never look a gift horse in the mouth!).
- Alternatives (rental, leasing) only come into consideration if they are commercially cheaper in the medium to long-term.
- Information technology has central importance. An information technology concept over the whole municipality ensures the effective use of these resources.

ANNEX 1
Case Studies

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Case Studies: Accountability

1) Accountability: Assignment of responsibilities

On the assumption that the jurisdictional order is arranged as shown in the toolkit (Part 1, section 1.3): Who is competent to take a decision in the following situations:

1. The municipality wants to reorganise its structures, i.e. to reduce the size of the municipal executive to five members (instead of seven).

2. The IT-Hardware of the municipal administration is outdated and needs to be replaced for the amount of CHF350.000.

3. The city museum applies for a recurring municipal grant (CHF80.000 per year). The municipal executive plans to conclude a service agreement with the museum for the next five years. The head of the finance department proposes to include that amount in the budget.

   Let's assume that the municipality has set the following jurisdictional order:, in addition to the regulation as shown in the toolkit, has adopted the following rule: The competencies for deciding on new recurring expenditure are ten times less than for deciding on new one-off expenditure. Who is competent to decide about the expenditure? Is it correct to include it in the budget?

4. A court decision orders the municipality to pay, within 30 days, CHF350.000 because of a wrongful termination of a contract with the municipal clerk. Who decides on this expenditure?

5. The municipality wishes to give an interest-free loan of CHF5.5 million for the establishment of a mountain railway on its territory.

6. The municipality wants to buy shares in the amount of CHF 2.2 million of a waste-disposal plant (stock company with different municipalities as shareholders).

7. The municipality buys a piece of land for CHF 1 million (and later wishes to sell it as building land).

8. The local decision (i.e. ordinance of the municipal executive) on the organisation of the administration allocates responsibility for invoicing fees to the head of the department for

communal services. The audit body finds out that for the last ten years many invoices the communal services department was issuing were not paid to the municipality in the end. Nobody realised this and therefore nobody felt responsible to send reminders nor to enforce payment. No regulation assigning responsibility for reminding and enforcing local fees exists at the local level. Who is responsible for the loss of money?

2) Accountability: Conflict of interest / Duty to withdraw from the decision-making process

Case Study No. 1

Miss X is member of the municipal council (in Switzerland: the executive body of the municipality) and married to Mister Y who is a farmer.

The municipality owns some land which it is going to lease to some private person. There are many private persons interested in leasing the land. One of those persons is Mister Y.
The municipal executive is the competent body to conclude the contract on behalf of the municipality. When starting the discussion on the issue, Ms. X declares that Mr. Y is her husband and that she is in a situation of conflict of interest.
The municipal executive decides that Ms. X cannot vote on the issue but that she can be present during the discussion, i.e. that she does not have to leave the room. The executive decides (with three votes for and three votes against, the president exercising the "final ballot") that Mr. Y will get the contract.

Mr. A who also wanted to lease the land thinks that this is not correct. He argues that Ms. X has influenced the decision because she was present during the discussion and the other members of the municipal executive could not feel free when taking their decision. Is he right? What could he undertake? Will he be successful?

Art. 47 of the Law on Municipalities says that:
Any person acting for the Municipality and having a direct personal interest when dealing with an issue from the sphere of the Municipality has to withdraw from the decision-making process. In addition, the following persons have to withdraw from the decision-making process:
- Relatives (cognates and all persons related by marriage in direct line, siblings and spouses)
- Legal, statutory, or contractual representatives of persons that have a direct and personal interest in the issue.

The duty to withdraw from the decision-making process does not apply for:

- decisions to be taken by ballot
- decisions to be taken by the municipal assembly
- decision to be taken by the municipal parliament

Case Study No. 2

Ms. X is a member of the parliament of the Municipality A and at the same time president of the administrative board of the “Y inc.”, a big pharmaceutical firm based on the territory of the Municipality A. Is this a problem?

Is it a problem if Ms. X is not anyhow related to the ”Y inc.” but receives CHF 10,000 for financing her electoral campaign?

Case Study No. 3

In Municipality A an initiative was launched, aiming at lowering the salary of the president of the municipality. Mr. X, President of the Initiative Committee, is at the same time member of the municipal executive. The municipal executive (its head is the president) has to discuss the initiative proposal in order to give its comment/statement to the municipal assembly to set up a vote on the issue.

Who has to withdraw from the decision-making process?

Case Study No. 4

The municipality is going to renovate its school building. It has issued an invitation to tender for the paintwork. The municipal executive decides who gets the contract. One of corporations bidding for the contract is owned and directed by Mr. Y who is the brother of Mr. Z. Mr. Z is a member of the municipal executive. Is Mr. Z obliged to withdraw from the decision-making process?

Case Study No. 5

The Municipality A is owner of a public enterprise which produces and delivers energy. The legal structure of the enterprise is a stock corporation, all stocks are owned by the municipality.

According to the internal regulations of the Municipality A, the member of the municipal executive who is head of the department of public utility services is automatically the president of the administrative board of the corporation. His name is Mr. Y.

The municipality now intends to sell a small part of the stocks to a third person. The municipal executive has to prepare the issue and to make a proposal to the municipal parliament.

Is Mr. Y obliged to withdraw from the decision-making process when the municipal executive is discussing the issue and formulating the proposal to the assembly?

Case Study No. 6

Are the following constellations legally admitted?

a) A is member of the municipal executive, his cousin B is a member of the auditing commission.
b) Miss X is member of the municipal executive, her husband, Mr. X, is a member of the municipal school committee.
c) Municipal clerk is working 50% for the municipality, at the same time he is member of the municipal executive.
d) Miss Y is President of the Municipality, her husband is employed in the department of communal utility services, he is subordinate to the head of the department of communal utility services.

Lit a), b) and d) are relating to the ineligibility of family members (different persons that are part of the same family are holding different offices), lit c) is relating to incompatibility (one person holding two offices at once).

3) Accountability: Sanctions

Facts (escalating)	Legal Sanction?	Political Sanction?
X, President of the Municipality is acting more and more in an authoritarian manner although he would, in principle, be just a „primus inter pares“. He receives a fixed sum compensation from the municipality, also apart from this he has his own architectural office. In addition to the presidential affairs he is also responsible for the planning and building department of the municipality and in this function is competent to decide on contracts up to CHF 100,000		

Facts (escalating)	Legal Sanction?	Political Sanction?
Escalation level 1 X's wife also has an architectural office (one-man business) and submits a bid for the renovation of the school building for CHF 200,000. The municipal executive body decides to give the mandate to X's wife although there were other bids at lower prices. The decision is taken with a 4:3 majority vote, the president participating in the vote as well.		
Escalation level 2 The president of the municipality awards a contract for CHF80,000 to his own architectural office (one-man business)		
Escalation level 3 The president of the municipality prepares construction of a new building for road maintenance. The necessary preparational architecture work is done by his wife's architectural office (this time let us assume that it has the legal form of a stock company) for CHF40,000. In the following he is preparing the proposal to the municipal Parliament to decide, based on the proposal elaborated by his wife, on a project credit for CHF250,000. (in order to elaborate the detailed planning documentation, again, by his wife).		
Escalation level 4 The president is frustrated and neglects the affairs of the department of security. The municipality loses a lot of money because fees are not timely invoiced and reminded. In addition many statutory requirements for road traffic are not enforced which results in a loss of security standards in the municipality.		
Escalation level 5 There are rumours that the president, in different incidents in the area of security police, turned a blind eye and received abundant financial compensation for this from the persons concerned.		

Case Studies: Transparency

Case Study No. 1: Vertical assignment of tasks: how much of central state is bearable?

Facts

Childcare outside of the family house (day care centres) is regulated by the canton in a law and an ordinance. The canton contributes with 50% of the costs.

Questions

1. What should the canton regulate?

    a. Educational requirements of the staff in the day care centres?
    b. Maximum number of children in care?
    c. The fees the day centres (municipalities) are entitled to charge to the parents?
    d. The opening hours?
    e. The space per child (how much m^2)?
    f. Provisions regarding nutrition (organic cooking, how much vegetables and fruits, no chocolates, only a little meat)?

2. Should the canton leave it open for the municipalities to decide whether they want to provide day care centres within the framework stipulated at all?

3. Can neighbouring municipalities sent children from their territory to a day care centre in another municipality? If yes, what should be the preconditions?

Case Study No. 2: Horizontal interactions: a blessing or a curse?

Facts

A smaller municipality is cooperating in many policy areas with third parties:

- Administration: The municipal administration is handled by another municipality, on a contractual basis.
- Schools: The children of the municipality are visiting the school in the neighbouring municipality.
- Social care: The municipality is member of an organisation responsible for fulfilling the tasks in the area of social service for several municipalities.
- Maintenance of roads: Here, the municipality has concluded contracts with building companies and with farmers, the municipality does not dispose of an own operation centre.

- Supply and disposal (water, sewage, waste): The municipality is a member of a big inter-municipal public corporation.

Questions

1. Is this municipality clever because she it can buy services tailored to her needs?
2. What is your feeling with regard to possibilities for steering and transparency of producing these public services?
3. Are there any alternatives?

Case Study No. 3: Consultative vote as an ambush

Facts

A bigger municipality still has the ordinary organisation model (municipal assembly, no parliament). The political decision-makers don't want to introduce a parliament. Some smaller political parties since some time request for the introduction of a municipal parliament. Without the issue being put on the agenda of the municipal assembly, the president of the assembly proposes, just before closing the assembly, to have a consultative vote on this issue. The assembly – in the consultative vote is against the introduction of a parliament - with 35 votes against and 25 for. Therefore, the municipal council does not undertake any steps towards starting a project dealing with pros and cons of the introduction of a municipal parliament.

Questions

1. Where do you see a problem?
2. Why is the decision of the assembly to be handled with caution?
3. Do the citizens dispose of any remedy against the proceedings of the president of the municipal assembly?
4. What political instruments are in place for the citizens?

Case Study No. 4: Full transparency of the municipal council

Facts

A municipal initiative claims the meetings of the municipal council to be public for the future.

Questions

1. What arguments are in favour of these meetings being public?
2. What arguments are against these meetings being public?
3. Which instruments ensure that even with confidentiality of these meetings things are improving?

Case Study No. 5: Sports for all!

Facts

Excerpt from the Council's message to the citizens with a view to the vote on the construction of an Ice Sports Complex:

> *Proposal*
> *The expenditure of CHF 18 million for the construction of the long-desired Ice Sports Complex (artificial ice rink with curling) as well as the construction of an attractive tennis court shall be accepted.*
>
> *Justification*
> *From a tourist perspective it is desirable for the municipality and for the whole region to build an ice sports complex. The ice sports complex will be built on municipal land. First the construction of the tennis court was planned on the same property but then we realised that there is not enough space for both. This is why the tennis court shall be built on an estate owned by a private Company. Also the tennis court will promote the attractiveness of the municipality. Moreover the local tennis club would finally dispose of enough training space.*
>
> *The costs for both projects will amount to approx. CHF 25 million. The municipal council is convinced that once the complex and the tennis court are built private investors will be found for contributions amounting to approx. CHF 7 million. The municipal council will outsource both infrastructures into private stock companies and sell stocks to private investors as far as necessary.*
>
> *The plans for both projects can be found in the annex.*
>
> *Your municipal council.*

Questions

1. What problems are related to this message?
2. What remedies exist?

Case Study No. 6: The curious journalist

Facts

A journalist from Newspaper Y wants to know from the municipality how much the municipal president earns. He also wants to know how much four of the municipality's cadre staff earn exactly.

Questions

1. Can/must the municipality inform about the salary of the president?
2. Can/must the municipality inform about the salaries of the cadres?
3. If the municipality denies access to this information: what remedy for the journalist?

Case Study No. 7: What's going on in the school?

Facts

Municipality X disposes of a school committee which is responsible to take most of the decisions regarding internal school affairs (except for the matters assigned to the director of the school, who is employed by the municipality). The municipal council decides that all minutes of the meetings of the school committee be proactively forwarded to the members of the municipal council within ten days.

Questions

1. Is such a regulation useful?
2. Is such a regulation legal?
3. Does the school committee dispose of a remedy against this regulation?
4. What regulation would make sense in order to ensure the information flow between school committee and the municipal council?

Case Study No. 8: Awarding a public works contract - anything went wrong?

Facts

The municipal council has awarded a big public works contract (construction of the kindergarten) to a local building contractor without public tender. A member of the municipal parliament is not happy with this decision. The municipal council is unwilling to give reasons for its decision or to allow access to the project documentation.

Questions

1. What can the member of parliament do about?
2. What are the possibilities of the parliamentary control committee?
3. Is access to the documents unlimited for members of a parliamentary control committee?
4. Is there a need for the canton to intervene in order to get the information necessary to decide whether anything went wrong here?

Case Studies: Participation

Case Study No. 1: Participation and legitimacy

Facts

The municipality wants to build and operate a multi-purpose-building (culture, sports, leisure). It wants to sound out the needs of the population and conducts a survey on Facebook. Most of the feedbacks (80 out of 100) argue for a focus on culture only, because there are enough other offerings in the areas of sports and leisure. Based on the result of the survey the municipal council (executive body) decides to pursue the project with a narrowed down focus on culture.

Questions

1. What questions arise with regard to the result of the survey?
2. Do you see any risks related to the assessment of the municipal council?
3. Will the project dispose of enough legitimacy?

Case Study No. 2: Voting rights for foreigners: what does it mean?

Facts

The (cantonal) lawmaker provides that municipalities can confer the right to vote (in elections and in votings) to foreigners who have their residence in the municipality.

Questions

1. What is your view on this option?
2. How would you (as a municipality) regulate the right to vote for foreigners?
   - Who exactly will be entitled to vote?
   - Only right to vote or also right to be elected?

Case Study No. 3: Chances and risks of popular votes

Facts

A bigger city is preparing a new tram line. The City Parliament is competent to decide on the new tram line. The City Parliament is, according to the legal framework of the municipality, allowed (but doesnot have to)

to call for a referendum on the issue. The tram line is very controversial in the City Parliament. There are two political camps. One political camp takes the opinion that the Parliament should make use of its competences, the other camp is of the opinion that because of the great importance of the tram line, the citizens should be enabled to decide.

Questions

1. What are the pros and cons of a popular vote?
2. Should the citizens as „highest“ body of the municipality be enabled to decide on all matters?
3. Should the assignment of competences to municipal bodies be rigid or rather flexible?
4. In general: What does the principle of separation of powers mean in this context? What's its importance all about?

Case Study No. 4: Elections: the “true” will of the electorate

Facts

Municipality X elects the president of the municipal council in majority election procedure, the legal framework provides for one round of elections, the person who gets the majority of votes is elected. Two political parties participate in the election. One political party proposes one candidate, the other party proposes three candidates. The election produces the following result:

- Candidate No 1 (Party A): 40 votes
- Candidate No 2 (Party B): 30 votes
- Candidate No 3 (Party B): 20 votes
- Candidate No 4 (Party B): 10 votes

Candidate No 1 (Party A) is elected for President.

Questions

1. Do you have any worries about this election?
2. What should an election procedure guarantee?
3. Do you have any legal remedies against this election?
4. How would a court decide?

Case Study No. 5: Proportional elections - the effects of combined lists

The following examples are based on rough assumptions of shares of vote. The municipal executive body (municipal council) has seven members, six of whom are elected in proportional election procedure. The

president is elected in majority election procedure, his party affiliation is not taken account of when attributing seats to the rest of the municipal council. So, for obtaining one seat, a political party needs to have a share of the vote of approx.17% (100: 6 = 16.666%).

Example *without* combined lists:

Party:	A	B	C	D	Total
Share of vote:	34%	24%	22%	20%	100%
Number of seats:	2	2	1	1	6 seats

Party B obtains a second seat because it has a bigger vote share when compared to C and D (B = + 7%, C = + 5%, D = + 3%). Parties C and D obtain one seat.

Example *with* combined lists (Parties C and D):

Party:	A	B	C	D	Total
Share of vote:	34%	24%	22%	20%	100%
Combined list:	34%	24%	42% (C+D)		100%
Number of seats:	2	2	2 (C+D)		6 seats

Parties C and D will (together) obtain three seats, because together they have a bigger vote share than B (B = + 7%, C and D = + 8% [two seats = 34%, Difference to 42% = 8%]).

The three seats of the combined list will be attributed to the parties C and D according to the list votes obtained.

Case Study No. 6: A strong majority or a group of minorities

Facts

A bigger municipality elects its executive body in proportional election procedure. The biggest political party has launched a motion in parliament asking for a change towards majority election procedure for election of the municipal executive body.

Questions

1. Describe in few words the main elements of both selection procedures. What are possible consequences of a change from proportional to majority election procedure?
2. Which procedure does take better account for minorities?
3. What are the risks implied when changing towards majority election procedure?
4. What happens when a member elected in majority elections withdraws during his/her term of office?

Case Study No. 7: Comprehensive competencies for the citizens?

Facts

Assume traffic is in the remit of the municipal council (executive body). The council decides to introduce “tempo 30” (speed limit for vehicles of 30kph) for all populated areas. The political party “freedom for cars” launches an initiative providing for a speed limit of 50kph for the whole territory of the municipality.

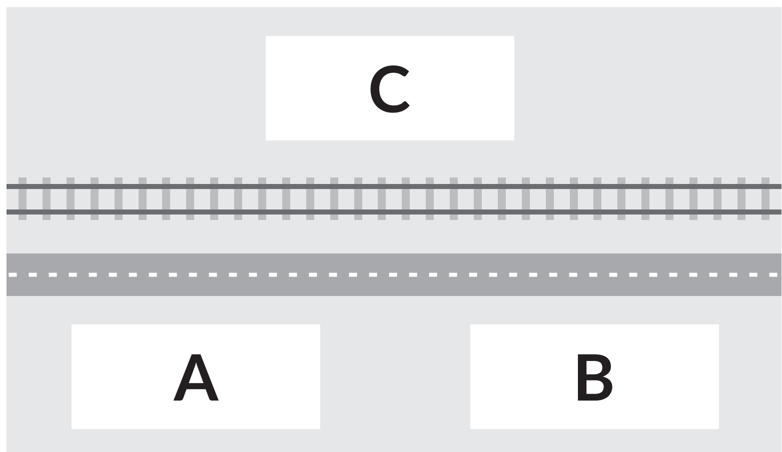
Questions

1. Is this initiative valid?
2. What procedure has to be followed in the municipality?
3. If the municipal council decides not to have a vote on the initiative: is there a possibility for those who have signed the initiative?
4. What possibilities would be in place for the party „freedom for cars“, in order to reach their objective?

Case Study No. 8: Voting: the “true” will of the voters

Facts

The citizens' meeting (assume: 100 citizens, all of them participating in the vote, no abstentions) has to decide on the location of a new kindergarten. Location A is in the South of the older part of the municipality, location B is also in the southern area, about one km away from location A, but still South of the main road and of the railway track. Location C is in the northern part, on the other side of the main road and the railway track.



The chair of the meeting asks who is in favour of which location with the following result:

- Location A: 40 votes
- Location B: 25 votes
- Location C: 35 votes

The chair declares location A as the „winner". Some citizens complain and propose that a second vote has to take place, this time between location A and C (because B has got the least votes).

Questions

1. Is the complaint of the citizens justifiable?
2. Is the proposed procedure expedient?
3. What procedure should be chosen in order to achieve a legally correct result of the vote?
4. What remedies do the citizens dispose of in case the procedure went wrong?
5. If a court finds that there were some procedural irregularities does this automatically lead the court to declare the vote invalid?

Case Studies: Non-Discrimination

Case Study No. 1: Age limits

Facts

Five municipalities establish a stock company and entrust it with the task „water supply“. The municipality adopts an owner's strategy which is binding for the stock company (through the conclusion of a performance contract). For the rest, the company shall dispose of entrepreneurial scope of action.

The board of the company adopts a regulation providing that a member of the board, once he or she has reached the age of 65 years, shall leave his/her office.

Questions

1. Where do you see a potential discrimination?
2. Is it possible to find legitimate reasons to justify?
3. What can the municipality undertake it she is not happy with the age limit?
4. Would it be a different situation if a municipality adopted the same age limit for the office of the members of the municipal council?

Case Study No. 2: Access to information held by the municipality

Facts

The municipalities are obliged to publish their official information (invitations to municipal assemblies and parliamentary meetings, construction permits, etc.) in a regional „official“ gazette. The „official“ gazette is delivered free of charge in printed form to all households. Since it gets more and more difficult for the „gazette“ to generate its income through advertising, they are working at substantial loss and the municipalities must finance them with the income from taxes.

For some time already the information regarding public procurement is published only on the internet. Now the municipalities decide to do the same in the area of all official information: Everything will be published on the homepage of the municipality and of the region, official gazette will not be printed anymore.

Questions

1. What do you think of this decision of the municipality?
2. Do you see a danger of discriminations, if yes, who could be discriminated?
3. What kind of accompanying measures could the municipality take?

Case Study No. 3: Construction projects

Facts

The main place of a bigger municipality is situated on the hillside. For persons with disabilities it is hardly accessible. A national Act on Equalization of Persons with Disabilities provides that pavements need to be lowered so that they do not possess a barrier for disabled. The municipality decides not to change the existing pavements because persons with disabilities anyway do not appear in this part of municipality. The historical centre is located in the valley (flat terrain), but the roads are paved with paving blocks. According to the already mentioned Act on Equalization of Persons with Disabilities, all public places need to be accessible and barrier-free for disabled. The municipality does not want to change the paving blocks.

Questions

1. Is it possible for the municipality not to make the adaptations, required by the higher law (Act for Equalization of Persons with Disabilities)?
2. What arguments could the municipality produce?
3. What could a person with disability undertake if the municipality remains inactive?

Case Study No. 4: Burial services

Facts

The municipality is responsible for burial services. While the acts of worship (cult acts) in the context of a funerals are done by the religious communities, the municipality is responsible for organising the interment (graves). The municipality therefore regulates the arrangement of the cemeteries, and besides other aspects makes provisions regarding decoration of the graves. A specific religious community asks for the allocation of specific grave areas with the possibility for adopting their own (different) provisions for the orientation and decoration of graves.

Questions

1. Does this religious community have a legal claim to have their own provisions regarding the graves?
2. Is the response to question 1 dependent on the size of the respective community?
3. Can the municipality request the community to carry the costs related to any specific arrangements made for them?

Case Study No. 5: Racial profiling

Facts

The newspaper reports that the police regularly controls representatives of specific population groups, rather than performing control based on reasonable suspicion. In other words: that he suspicion is based solely on the fact of their belonging to that specific section of population and not on a specific action of the controlled person.

Questions

1. If this allegation is founded, what can the municipality undertake in order to change the situation?
2. What could be potential solution?
3. Who decides about such measures?

Case Study No. 6: Service provision

Facts

Municipal water supply system of the municipality is seriously neglected. The municipality decides to renew the pipes in the centre of the municipality, because the water need is the highest there, and also because the inhabitants of the centre regularly pay their water fees. The peripherally positioned parts of the municipality are inhabited by an ethnic minority and social welfare recipients.

Questions

1. What is your opinion on the decision of the municipality?
2. Are there legitimate reasons for justifying the decision of the municipality?
3. Where are the limits of the claims that can be made on the basis of the right to equal treatment/non-discrimination?

Case Study No. 7: Gender equality

Facts

In the municipal administration the representation of women is not the same in the different areas of responsibilities. While there are many women working as “administrators”, only about 20% of the cadre posts are held by women.

Questions

1. Is this situation to be contested from a legal point of view?
2. Do women dispose of legal means to change this situation?
3. What measures can the municipality undertake in order to change the situation?

Case Studies: Efficiency

Case Study No. 1: Steering municipal tasks

Facts

The municipality wants to improve the connections between its smaller communities and central town, and plans to introduce a local bus service. A private company is prepared to take this on.

Questions

1. Does the higher ranking law allow the municipality itself to operate a bus network? Answer the following questions even if the answer is no.
2. Does the bus service remain a municipal task when it is operated by a third (private) party rather than by the municipality itself?
3. How does the municipality steer these tasks (resources, performance, effects), and what do these "parameters" mean in terms of operating a bus network?
4. What benchmarks need to be set by the municipality? Outline the main indicators (key figures) and standards (target values)
5. Are there legal questions about external procurement?
6. The private company which wants to operate the bus lines is run by the brother of the president of the municipality: is this a problem?
7. If the municipality wants to award the bus service for three years, what financial decisions have to be made?

Case Study No. 2: Financing municipal tasks

Facts

Operating the bus timetable as laid out by the municipality costs xxx. A donor is assuming 50% of the costs, and the municipality will finance the rest.

Questions

1. Does the higher ranking law allow the municipality to levy charges for bus tickets? Answer the following questions even if the answer is no.
2. Can the municipality allow the bus operator to set the price of bus tickets?
3. The municipality wants to use general funds (taxes, central government grants) to finance 25% of the costs, and income from the charges for tickets to finance another 25% of the costs. Who decides these charges?
4. What should be considered when calculating the charges?

Case Study No. 3: Accounting

Facts

The municipality keeps accounts in which all items of expenditure and income are recorded. The end of year balance sheet will show the municipality's assets and liabilities.

Questions

1. Why are the communal accounts important from a political and legal point of view?
2. Briefly outline the difference between financial planning, budget estimates and annual accounts.
3. Briefly outline the difference between investment accounts and annual accounts.
4. Do the financial accounts yield information about all operationally relevant questions? Can they say how much the community sports centre costs to run?
5. What is internal billing? Outline three simple examples.
6. What is checked by external financial oversight (auditor), and whom is he reporting to?
7. Does it make sense for the external financial auditors to check the commercial viability and adequacy of the fulfilment of tasks?

Case Study No. 4: Make or buy?

Facts

The municipality uses its own resources (staff, equipment, etc.) to maintain green spaces (parks, green areas, outdoor sports facilities, etc.). Now it is considering whether to hand this work to a private company.

Questions

1. What (political) questions arise in this context?
2. What are the reasons for and against such outsourcing?
3. How does such outsourcing proceed?

4. How can the contents of the contract be presented, in outline?
5. What should be the length of an appropriate contract?
6. How will the fulfilment of the tasks by this private company be overseen?
7. What happens when the contract comes to an end?

Case Study No. 5: Spinning off the communal swimming pools

Facts

The municipality runs its own outdoor and indoor swimming pool as a regional centre. It wishes to spin-off this facility by turning it into an independent body (company).

Questions

1. What does the municipality hope to gain from the spin-off process?
2. What are the opportunities, and where do the risks lie?
3. Why can there be a tension between the municipality as owner and the spin-off service as a company?
4. How can a strategy of ownership be outlined, and what points need to be considered?
5. What is the chronological procedure, and what are the possible options?

Case Study No. 6: Inter-communal cooperation in relation to municipal development

Facts

Three municipalities each have their own management structures to deal with the municipal development. The municipalities agree that it might make sense to maintain a common management body to deal with the development of the whole region (the three municipalities).

Questions

1. What are the opportunities and the risks of such cooperation?
2. How can such a cooperation be organised (e.g. by founding a company, making a contract with one municipality to assume the task)?
3. How will participation / management be regulated in each model of cooperation?
4. Which legal documents would each model require?
5. What benchmarks would have to be established?

Case Study No. 7: "Optimising" municipal administration

Facts

The municipal administration does its job quite well, but could improve its performance. The municipality is working on a concept to optimise its administrative activities.

Questions

1. What can the municipality do to make the positions more attractive?
2. What should be observed in terms of the regulation of salaries?
3. What are opportunities and risks of taking performance into account?
4. How can the training and further education of personnel be done systematically?
5. Could this training and further education be done inter-communally?
6. What might be a meaningful way to organise the administration (organigram)?
7. How can responsibilities be represented (functions diagram)?
8. Which standardised instruments does the administration need?
9. What do these standardised instruments have to do with governance?
10. What is the focus of administrative supervision, and who is responsible?

Case Study No. 8: "Optimised" municipal logistics and infrastructure

Facts

The municipality has a wide range of logistical facilities and infrastructure (streets, administrative buildings, school buildings, information technology etc.). The question of how this infrastructure should be used requires a political decision.

Questions

1. Do you see a connection between the development of the municipality and the communal infrastructure?
2. If a donor finances a particular infrastructure (e.g. investing in a waste disposal site), is the municipality relieved of all financial responsibilities for the next 20 years?
3. List the advantages and disadvantages of purchasing information technology facilities rather than leasing them
4. The communal infrastructure is subject to ongoing maintenance (e.g. of the buildings and running of the school). Who in the municipality is responsible for appointing and leading the staff to deal with this?

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Toolkit

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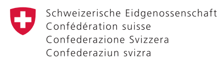

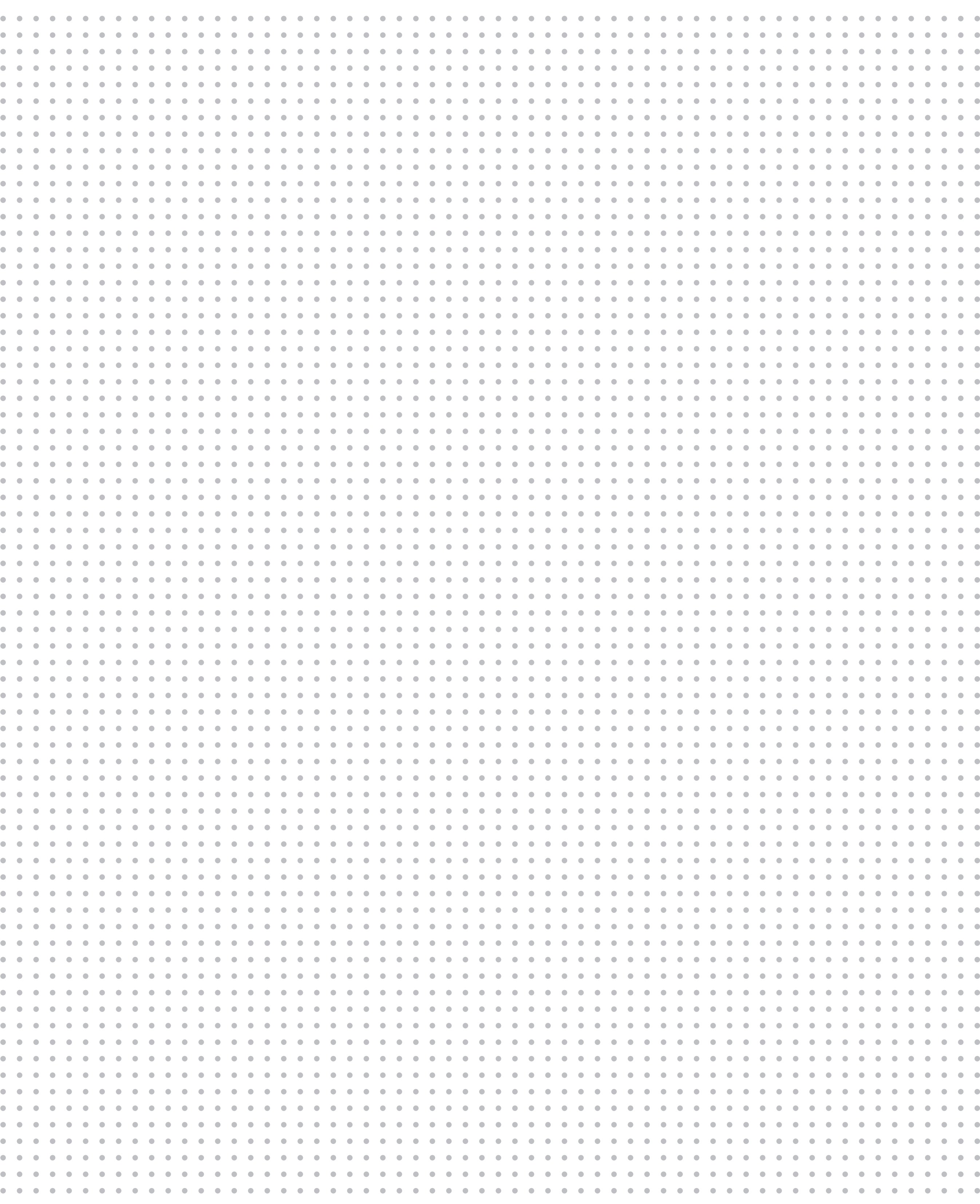

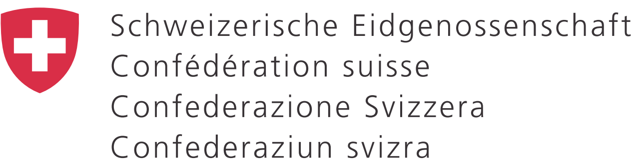

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