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## **Local Government in Brazil and Switzerland: A Comparative Study on Merger and Inter-Municipal Cooperation**

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## **Abstract**

This text is the result of a comparative research on local government in Brazil and Switzerland, with emphasis on the themes of creation and merger of municipalities and inter-municipal cooperation. The first chapter contains a theoretical study on the relationship between local government and federalism, as well as a brief analysis of the constitutional profile of municipalities in various countries. In the second and third chapters are explained profiles of municipalities respectively in Brazil and Switzerland. In the fourth chapter a comparison is made between these profiles, especially in the chosen subjects (merger and inter-municipal cooperation). In the conclusion, taking the precautions needed in any study of comparative law, are exposed some ideas for improvement of local government in both countries.

## **Resumo**

Este texto é resultado de uma pesquisa comparativa sobre o governo local no Brasil e na Suíça, com ênfase nos temas de criação e fusão de municípios e de cooperação intermunicipal. No primeiro capítulo é feito um estudo teórico sobre a relação entre governo local e federalismo, bem como uma breve análise do perfil constitucional das municipalidades em vários países. No segundo e terceiro capítulos são expostos os perfis das municipalidades respectivamente no Brasil e na Suíça. No quarto capítulo é feita uma comparação entre estes perfis, especialmente nos temas indicados (merger e cooperação intermunicipal). Na conclusão, observando as cautelas necessárias em qualquer estudo de direito comparado, são expostas algumas ideias para aperfeiçoamento do governo local em ambos os países.

## **Astratto**

Questo testo è il risultato di una ricerca comparata sui governi locali in Brasile e in Svizzera, con particolare riguardo ai temi della creazione e fusione di comuni e di cooperazione intercomunale. Il primo capitolo contiene uno studio teorico del rapporto tra governo locale e il federalismo, e anche una breve analisi del profilo costituzionale dei comuni in diversi paesi. Nel secondo e terzo capitoli sono illustrati i profili di comuni rispettivamente in Brasile e in Svizzera. Nel quarto capitolo è fatta una comparazione tra questi profili, in particolare nei temi scelti (fusione e cooperazione intercomunale). In conclusione, prendendo le precauzioni necessarie in ogni studio di diritto comparato, sono esposte alcune idee per il miglioramento del governo locale in entrambi i paesi.

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All persons of the Institute, even the ones not mentioned here, contributed to the making of this work, building a pleasant environment for study and cooperation. Fellow researches and PhD candidates from Switzerland, as well as other guest researchers from various parts of the world, have provided very entertaining conversations and learning about cultural diversity which, after all, is one of the most important ingredients in the delicate recipe of federalism. To all, thanks from the author.

## Introduction

The motivation for the topic of this research is originated in the author's years of experience in local government, *on the ground floor*, while studying federalism, *on the top floor*, at the University. Both factors led the author to try to look at the local government with theoretical federalism approach and, in the opposite direction, look to federalism with practical insight from local government. Two different ways of observing two realities (federalism and local government), that had crossed, once upon a time, in some corner of science.

But the interest in the study of local government is not only a personal predilection of the author.

Throughout the evolution of humankind, at some remote time, nomadic groups began to settle in certain territories<sup>1</sup>, building small «hamlets». From them, the life of the community is permanently connected to a local, i.e., takes on a **territorial basis**. The growth of hamlets led to the cities<sup>2</sup> and this time the problem of **local government** emerged.

Despite the antiquity of the city, as anthropological and sociological phenomenon, we cannot forget that, throughout history, most people continued to live in rural and remote areas, in small settlements or hamlets. The reversal of this trend, with the concentration of population in urban centres, is historically recent phenomenon, for about a century, while living precisely in the XXI Century the time when the urban population exceeds the rural, as reported by Günter Dill:

- «- in the early 20th century, the urban population was 150 million, i.e. less than 10% of the world population;
- *in 1970, 35% of the population was urban;*
- *in 2000, 50% of the world population, or approximately 3 billion people lived in cities, while in developing countries in 1997, this proportion has reached to 70% and in Latin America 74%;*
- *forecasts for the period 2010–2020 admit an unprecedented trend: the towns have larger populations than rural areas;*
- *between 1980 and 2000 the urban population of the Third World doubled from one to two billion, over a period of 20 years.»<sup>3</sup>*

Therefore, the study of local government, and its possible improvement, is a task that falls between the demands of the modern world. But this would not be a task for political scientists, economists and administrators?

The author believes that the study of local government cannot be separated to the study of federalism. The municipality is not an isolated reality. Rather, it operates necessarily in the reality of a sov-

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<sup>1</sup> This «time» actually was not homogeneous, so that for thousands of years lived on Earth both the nomadic groups and other ones already established in a locality. Even today there are still remnants of nomadic life of some groups, especially in Africa.

<sup>2</sup> Throughout the work will be explained in which sense it is adopted the word «city» as well as the option for the term 'municipality' to designate the local government.

<sup>3</sup> DILL, Guenter. *O município em tempos de globalização*. In: HOFMEISTER, Wilhelm; CARNEIRO, José Mário Brasiliense. *Federalismo na Alemanha e no Brasil*. São Paulo: Fundação Konrad Adenauer, 2001. p. 218. Translation by Nikolaus Karwinsky (from German to Portuguese) and by the author (from Portuguese to English).

ereign state. Necessarily it must relate to the central power of the sovereign state and, in a federation, also with the «intermediate» power of the states or cantons.

However, as noted by Michael Burgess, from the top of his experience:

*«Another reason why federalism has been so problematic for scholars is that it is multifaceted. By its very nature it is constitutional, political, social, economic, cultural, legal, philosophical and ideological. It spans the whole gamut of human experience. To understand federalism and federation fully and to comprehend its many faces, then, would be impossible.»<sup>4</sup>*

Thus, it seems clear that the theory of the federal state (and therefore the Constitutional Law) is a necessary (but not the only) approach to the study of local government.

Therefore, in the first chapter, we will study the relationship between the **municipality** and **federalism**. Although it may seem at first glance evident, this relationship needs to be justified, since the theory of federalism, which appeared many centuries after the local government, began with the union of **states**. Also in this first chapter, a brief study on the autonomy of local government in many contemporary countries will be presented.

Then, in the second chapter will be examined the Swiss municipality, with special emphasis on the processes of creation and merger, as well as cooperation. The same will be done in a shorter time frame, with the Brazilian municipality, in the third chapter.

The choice of these two themes – creation or merger of municipalities and cooperation – is justified by the fact that they are a current and important debate, both in Brazil and Switzerland, as well as changes still ongoing in both countries. So they are themes that enable the immediate formulation of proposals, in line with the goals of the program in which this work is inserted.

The fourth chapter aims to make a more direct comparison between the two countries maintaining the emphasis on both subjects initially delimited. Finally, in conclusion, the author tries to draw some lessons from the comparative study, in order to formulate proposals that might be useful for the improvement of legal institutions.

In the references, the author held the title of the works in the original language, but in quotes and transcripts translated the texts into English, seeking the highest possible fidelity to the original idea, instead of a literal translation. Nevertheless the author presents apologize for any misunderstanding in this task. As an exception, in the transcript of judgments was kept the original language of publication (always one of the official languages of Switzerland), to avoid the risk of be far from the literal meaning of an official document.

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<sup>4</sup> BURGESS, Michael. *Comparative Federalism: theory and practice*. London: Routledge, 2006, p. 1.

# I. Municipalities in Federal and Unitary States: A Worldwide View

## I.1 Why do study Municipalities under federalism?

According to the perception of Carlo Panara, the study of local government attracts Scholar's attention in Administrative Law and Political Science, without having the same interest from Scholars of Constitutional Law<sup>5</sup>. However, it is undeniable the importance of local government in this matter, as highlighted by the same Professor:

*«The general lack of constitutional law studies on local self-government is particularly notable, of one considers that this tier of government is an essential part of the state machinery and that local authorities perform a crucial role in the daily life of the citizen.»<sup>6</sup>*

The concepts of **federation** and **municipality** did not emerge historically interconnected, neither originated at the same time. They are two phenomena that, for centuries, had develop separately, without a causal relationship, nor were commonly studied in their interactions.

There is a reasonable consensus among scholars that the formation of the United States of America, in 1787, represents the first clear example of federal organization, although the «federalism» as a concept and method of human organization can be identified in other historical periods<sup>7</sup>.

In what could be called the «classical» approach on federalism, the federation (or federal state) is essentially a union of states, so that coexist central power and local power. In this approach, therefore, there are only **two levels** of state power in a federal state. On this same view, is common to refer to «founders» or «constituent units» of federal state, especially when it comes from the creation of a new state by the union of others preexisting («come together federalism»). Likewise, when some nations adopt federalism as a way to remain united, or accommodate differences about nationality, ethnicity, language or religion («hold together federalism»), reference is made to «members» of federation, which in practice is the same idea as the previous concept, although historically comes from a different process. There is a great variety of terms used to designate «founders» or «constituent units» of a federation. George Anderson made the following list of words used for such purposes:

*«The most common names of constituent units are states (**Australia, Brazil, Ethiopia, India, Malaysia, Mexico, Nigeria, and the US**) and provinces (*Argentina, Canada, Pakistan, South Africa*). But other terms are *Länder* (**Austria and Germany**) and cantons (*Switzerland*). There are both regions and communities in **Belgium** and autonomous communities in **Spain**. **Russia** has regions, republics, autonomous areas, territories, and cities of federal significance. Some small federations have islands.»<sup>8</sup>*

However, the study of federalism cannot ignore the sociological and geographic phenomenon **city**. Historically, cities were originated when human race left the nomadic life and started keeping in

<sup>5</sup> PANARA, Carlo, VARNEY, Michael. *Local Government in Europe: the «fourth level» in the EU multilayered system of governance*. London: Routledge, 2013, p. 369.

<sup>6</sup> PANARA, Carlo, VARNEY, Michael, *op. et loc. cit.*

<sup>7</sup> For Daniel ELAZAR : «There have been three critical federal experiments in the history of humanity to date. The Israelite tribal federation described in the Bible was the first. (...) The second was the Swiss Confederation. (...) The third was the United States of America» (Exploring Federalism. Tuscaloosa: The University of Alabama Press, 1991, p. xii).

<sup>8</sup> ANDERSON, George. *Federalism: an introduction*. Oxford: Oxford University Press, 2008, p. 3.

collective settlements. It should be noted, as reported by Lewis Mumford, that the setting of human groups in a territorially delimited space, since the beginning, contains an unmistakable **cultural component** that differentiates it from other permanent agglomerations of animals:

*«In the development of permanent human settlements, we find an expression of animal needs similar to those in other social species; but even the most primitive urban beginnings reveal more than this. Soon after one picks up man's trail in the earliest campfire or chipped-stone tool one finds evidence of interests and anxieties that have no animal counterpart; in particular, a ceremonious concern for the dead, manifested in their deliberate burial – with growing evidences of pious apprehension and dread»<sup>9</sup>*

Thus, cities, as geographical and sociological phenomenon, come earlier in millennia from federal form of state organization. On the other hand, it is clear that cities have always been part of the **territorial organization** of Humanity. Therefore, they are necessarily related to the idea of **federal state**, which is precisely the **division of powers by territorial criteria**. Hence, it is necessary to bring this «third tier» of state power to federalism studies, even though it is not regarded as a «founder» or «integrant» of federation, as the «second tier» is.

It is noteworthy that the phenomenon of local power (at the level of what is often called «municipality») exists in both federal and unitary states. Local power must interact with central and – in federal states – local power (at the level of what is called «member state» or «province»). Consequently, a federal state can only be understood properly when studying the «third level» of government, in other words, the local municipal level.

To avoid misunderstandings, will be used the word «state-local» to describe what is commonly called «second-level» (states, or «intermediate» level) and «municipality-local» to describe the so-called «third level».

## **I.2 Municipalities in contemporary States**

Regarding the cities, there is an enormous variety of profiles, concerning their legal recognition and regulation by constitutions of federal states. Unlike happens with the «second level» of power (as mentioned above), this variety goes beyond the question of terminology. In some federations, the sharing of powers made with local tier is merely administrative. At the opposite extreme, in other cases, municipality can enjoy great political autonomy, almost the same as the state (second level). Between these two extremes, there are varying degrees of autonomy of municipalities, as well as different forms of relationships with other levels of federation.

Consolidating the conclusions of debates occurring simultaneously in twelve federal states in 2007, under the coordination of the *Forum of Federations*, Nico Steytler summed in this way the degree of diversity on conceptions of local-municipal power:

*«The legal regime of local government is also characterized by a high level of variation from state to state in most countries where local authorities fall directly under the jurisdiction of state governments. In the older federations local authorities are creations of state laws and*

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<sup>9</sup> MUMFORD, Lewis. *The City in History: its origins, its transformations, and its prospects*. London: Secker & Warburg, 1966, p. 6.

*their autonomy is thus defined by such laws. However, the basic elements of local government – in status and role – are increasing being captured in federal constitutions.»<sup>10</sup>*

In the United States, the federation is based, since its inception, on the distinction between the central (federal) and local-state powers, with no concerning about political autonomy at local-municipal level. Thus, the municipality is what the local-state power says (in the state constitution) that it should be. As explained by John Kincaid:

*«In the American federal system, local governments are legal creatures of the states, established in accordance with state constitutions and statutes. All states provide for the establishment of local governments and determine how much authority may be exercised by each type of government.»<sup>11</sup>*

Alan Tarr clarifies some more peculiar aspects of municipal organization in that country, such as the existence of an intermediate body between the state-local and the municipal-local, called «county», which may cover several municipalities. There are also some areas that are not included in any municipality. A second distinguishing feature is the existence of functional units in local government, beyond the municipal level, to provide specific public services, such as school districts, sanitation districts and regional transport councils<sup>12</sup>.

In Germany, the Federal Constitution is quite clear about the competence of *Länder* to establish the legal regime of Municipalities.

*«According to Article 84 I 7 GG, introduced in 2006, federal laws may not entrust municipalities and associations of municipalities with any task – **this is a competence of the Länder with regard to municipalities in their territory.**»<sup>13</sup>*

Notwithstanding, as reported by Andreas Krell, differently to what occurs in the USA, there is a «reserve of local autonomy», granted directly by Federal Constitution, which also provides for the organization of municipalities:

*«However, the administrative character of German municipal institution prevails to date. There, the legal doctrine considers the communes and towns as administrative subdivisions of the respective states; those, however, are endowed with the right to autonomy by Federal Constitution and also have important political functions. Popular representations in German municipalities – Councils (Räte) – are not called legislative as in Brazil with the city councils. They also do not edit true laws, but statutes (Satzungen), to self-regulate the affairs of the local entity.»<sup>14</sup>*

This is also the situation found in Austria, as emphasize Andreas Kiefer and Franz Schausberger:

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<sup>10</sup> STEYTLER, Nico. *Comparative reflections on local government and metropolitan regions in federal countries*. In: BLINDENBACHER, Raoul; PASMA, Chandra (org.). *Dialogues on local government and metropolitan regions in federal countries*. [n.d.]: Forum of Federations, 2007. p. 4.

<sup>11</sup> KINCAID, John. *Overview of Local Governments*. In: KEMP, Roger L. *Forms of Local Government*. Jefferson : McFarland & Company, Inc. Publishers, 1999, p. 5.

<sup>12</sup> TARR, G. Alan. *O Constitucionalismo americano e o governo local*. *Revista de Administração Municipal*. Rio de Janeiro: IBAM, a. 49, n. 247, mai/jun 2004, p. 16.

<sup>13</sup> FRENZEL, Eike Michael. *Local Government in Germany: an indispensable level of UE governance*. In : PANNARA, Carlo, VARNEY, Michael. *Local Government in Europe: the «fourth level» in the EU multilayered system of governance*. London: Routledge, 2013, p. 99.

<sup>14</sup> KRELL, Andreas. *Diferenças do conceito, desenvolvimento e conteúdo da autonomia municipal na Alemanha e no Brasil*. *Revista de Informação Legislativa*. Brasília, a. 32, n. 128, out./dez. 1995, p. 113.

*«For example, the Länder and the federation have, depending on the circumstances, the right to information, the right of repeal of illegal local orders, the right to approve local ordinances, and – hardly ever applied – the right to dissolve the local assembly.»<sup>15</sup>*

In the same direction, Harald Eberhard points out that: *«Unlike the Federation and the Länder, the municipalities do not have any legislative powers and, therefore, are only administrative bodies»<sup>16</sup>*. Following this principle, the same author informs that:

*«In this respect, Land constitutional and ordinary laws usually determine the administrative arrangements of the local authorities, electoral processes at local level, local taxes, the representation of local authorities in the Land legislative process, and municipalities' rights to initiate legislation or specific forms of direct democracy, such as referendums.»<sup>17</sup>*

Although often referred to as examples of three-tiers federations, in India<sup>18</sup> and South Africa<sup>19</sup> there is also a certain degree of subordination of the municipality to the state-local power.

In Canada, the situation is similar, so that the municipal organization is entirely subordinate to provincial law. Loleehn Berdham outlined this situation as so far:

*«The first challenge facing Canadian municipal governments is a general lack of autonomy. In Canada, municipalities are neither constitutionally recognized nor given any specific powers or responsibilities. Instead, «Municipal Institutions in the Province» are assigned as one of a number of provincial responsibilities.»<sup>20</sup>*

In Australia, as reports Graham Sansom, the municipality is further subject to the local-state law. There is also no recognition by the federal Constitution:

*«Its place in the federation is undefined and at risk: local government is not recognized in the Australian constitution and is established wholly under state laws. Democratically elected councils can be dismissed by state governments, boundaries changed without referenda, and all aspects of local administration subjected to detailed state control»<sup>21</sup>*

Some of the more ancient federations in the world, as we perceive, differ only on the degree of subordination of the local-municipal power (municipal entity) to local-state power (state, province, can-

<sup>15</sup> KIEFER, Andreas; SCHAUSBERGER, Franz. *Local government in Austria: sharing responsibilities*. In: BLINDENBACHER, Raoul; PASMA, Chandra (org.). *Dialogues on local government and metropolitan regions in federal countries*. [n.d.]: Forum of Federations, 2007. p. 14.

<sup>16</sup> EBERHARD, Harald. *Municipalities as the «third tier» of Austrian federalism*. In: PANARA, Carlo; VARNEY, Michael. *Local Government in Europe: the «fourth level» in the EU multilayered system of governance*. London: Routledge, 2013, P. 2.

<sup>17</sup> EBERHARD, Harald, *loc. cit.*

<sup>18</sup> HOOJA, Rakesh; MATHEW, George. *Partners in development: local government in India*. In: BLINDENBACHER, Raoul; PASMA, Chandra (org.). *Dialogues on local government and metropolitan regions in federal countries*. [nd]: Forum of Federations, 2007. p. 26.

<sup>19</sup> VISSER, Jaap de. *South Africa: local development in an uncertain partnership*. In: BLINDENBACHER, Raoul; PASMA, Chandra (org.). *Dialogues on local government and metropolitan regions in federal countries*. [nd]: Forum of Federations, 2007. p. 34.

<sup>20</sup> BERDAHL, Loleen. *Municipalities in Canadian Federalism: challenges and innovations*. Presentation on *International Forum on Federalism in Mexico*. November, 15–17, 2001, Veracruz, México. Available at <[www.forumfed.org](http://www.forumfed.org)>.

<sup>21</sup> SANSOM, Graham. *Australia: the third sphere steps up*. In: BLINDENBACHER, Raoul; PASMA, Chandra (org.). *Dialogues on local government and metropolitan regions in federal countries*. [n.d.]: Forum of Federations, 2007. p. 9.

ton). There are also different degrees on preordination of municipalities on federal constitution. It can be said, however, that in essence all are characterized by *non-recognition of a political autonomy of the municipality*. Therefore, municipality is not considered as one of the «members» of the federation.

In Belgium, the Municipalities are recognized as political and administrative entities, with a high degree of autonomy. Nonetheless, they are still subordinated to the Regions (the second level of power), as highlighted:

*«The discretion left to local entities can be very limited. Regional parliaments can «upgrade» a power from local to regional level by enacting legislation on the specific topic. Local entities can only execute such competences within the boundaries set by regulations which are enacted at the national or regional level.»<sup>22</sup>*

In Argentina, although the organization and powers of municipalities are part of the «Provincial Constitutions»<sup>23</sup>, since 1994 an amendment (on Federal Constitution) guaranteed some level of municipal autonomy, as reported by Roberto Dromi:

*«The article 123, incorporated into the Constitution during 1994' Reform, explained the nature of the city, ensuring their «autonomy» and regulating its scope and content in the institutional, political, administrative, economic and financial. In that sense, it's up to each Provincial Constitution to restructure the extent of such reform in relation to the demands of their own reality, such as the territorial dimension, population, economic and financial resources, etcetera.»<sup>24</sup>*

Also according Dromi, several provinces, using this power, bestowed their municipalities the autonomy of self-organization<sup>25</sup>.

Therefore, for all federations thus far mentioned, it is possible to summarize the legal regime of municipalities in the following propositions:

- *the legal framework of municipalities is defined by state-local power, usually in the Constitution of each «second level» entity (state, province, canton);*
- *the federal constitution may contain some rules about municipalities, mainly about their organization (absolutely absent in the United States and Australia);*
- *the federal constitution can guarantee, to some extent, a «intangible core» of municipal autonomy, to be respected by local-state («intermediate level») power.*

In last decades, reforms enacted in several European countries have changed the profile of «local autonomy» also in unitary states.

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<sup>22</sup> DE BECKER, Alexander. *Local Government in Belgium: a «catch 22» between autonomy and hierarchy*. In: PANARA, Carlo, VARNEY, Michael. *Local Government in Europe : the «fourth level» in the EU multilayered system of governance*. London: Routledge, 2013, p. 33.

<sup>23</sup> DROMI, Roberto. *Ciudad y Municipio*. Buenos Aires: Ciudad Argentina, 2007, p. 329.

<sup>24</sup> *Ibidem*.

<sup>25</sup> Catamarca, Córdoba, Chaco, Chubut, Jujuy, La Pampa, La Rioja, Misiones, Neuquén, Salta, San Luis, San Juan, Santa Cruz, Santiago del Estero, Rio Negro e Tierra del Fuego (*ibidem*, p. 329).

In Spain, although local-municipal autonomy has long historical tradition and constitutional guarantee, there is also subordination to the «second level» of government (the Region), or directly to the «state»<sup>26</sup>:

*«The municipalities and provinces, then, do not have any power of political self-organisation. It is the State, through the LBRL, which has the power to regulate the organization (and operation) of the decision-making bodies of municipalities and provinces while the Self-governing Communities have the power to regulate the complementary organisation of those bodies.»<sup>27</sup>*

The United Kingdom shows a clear example of subordinate character of local-municipal government<sup>28</sup>. On the contrary, the Constitution of Sweden gives significant autonomy to Municipalities, which are directly subordinate to the central government, thus constituting directly the «second level» of power, without an «intermediate» level. As explained by Vilhelm Persson:

*«Sweden is a unitary state. Despite this, municipalities enjoy considerable independence. Their importance is marked by the constitution safeguarding local self-government. To a large extent, municipalities are free to decide on organisation and finance.*

(...)

*There is, however, a trend towards national regulation of more activities, thereby transferring them from municipalities' powers to special statutory powers.»*

Some Eastern European countries such as the Czech Republic<sup>29</sup> and Hungary have substantially modified their systems of local government in recent years, so that it is not even possible to have a clear idea about the degree of political autonomy of municipalities. In the latter, according Zoltán Szente, there is an ongoing process of centralization:

*«However, since 2011 important changes have been introduced by other laws reducing significantly both the scope of responsibilities and the finance of local authorities. Some core local government functions, like the maintenance of public schools and basic health services were taken over by central government in 2012 and are to be taken over 2013.»<sup>30</sup>*

In Poland, the Municipalities enjoy considerable autonomy. Nevertheless, changes are very recent, so it is not possible to say clearly the degree of effectiveness of this autonomy. That is the opinion of Bogustaw Bamaszak:

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<sup>26</sup> As Spanish people call the «central» government or first level, according George Anderson (Federalism: an introduction. Oxford: Oxford University Press, 2008, p. 2).

<sup>27</sup> PUIG, Gonzalo Villalta. *Ungovernable Spain: Regional subsidiarity and the crisis of local governance*. In: PANARA, Carlo, VARNEY, Michael. *Local Government in Europe: the «fourth level» in the EU multilayered system of governance*. London: Routledge, 2013, p. 284.

<sup>28</sup> VARNEY, Michael. *Local Government in England: localism delivered?* In: PANARA, Carlo, VARNEY, Michael. *Local Government in Europe: the «fourth level» in the EU multilayered system of governance*. London: Routledge, 2013, p. 330.

<sup>29</sup> POMAHÁČ, Richard. *Local government in the Czech Republic: History, current position, prospective evolution*. In: PANARA, Carlo, VARNEY, Michael. *Local Government in Europe: the «fourth level» in the EU multilayered system of governance*. London: Routledge, 2013, p. 71.

<sup>30</sup> SZENTE, Zoltán. *Local Government in Hungary: a creeping centralisation?* In: PANARA, Carlo, VARNEY, Michael. *Local Government in Europe: the «fourth level» in the EU multilayered system of governance*. London: Routledge, 2013, p. 153.

*«All those changes did not lead to the significant decentralisation of power and the central government was still responsible for two-thirds of all administrative tasks. Although the communes were assigned the remaining third, their actual capabilities were limited by a low level of funding, which in the mid-1990s, amounted to 15 per cent of total public spending.»<sup>31</sup>*

### **I.3 The «three-tier» federation: political or administrative concept?**

As we could see below, from the analysis of municipality position in several countries, especially in the federal ones, we find a huge variety in their degree of autonomy. The following questions may indicate a greater or lesser autonomy of municipalities in a specific country:

- *Who can decide about creation or dissolution of municipalities?*
- *Which legal standard defines the functions of municipalities? The federal constitution, the constitution of each state or simple statutes?*
- *Can states overrule or modify decisions of municipal government?*
- *Can municipalities edit their own laws?*
- *Do municipalities levy directly their own taxes?*
- *Is the municipal autonomy a principle of the federal constitution?*

Each of these criteria would produce, in each country, a different result in the analysis of the degree of municipality's autonomy. Hence, the affirmations of municipality as a «third-tier» entity end up having a high degree of subjectivity, depending on the criteria most valued by the observer.

In this context, two assumptions might be important to give greater clarity to the analysis and allow us to continue on the research theme. Firstly, the question about municipal autonomy doesn't claim for «all-or-nothing» answer, one cannot simply say «yes» or «no». It is a matter of **degree**: between the fully autonomous municipality and the fully subordinated municipality exist an infinite numbers of degrees of autonomy.

Secondly, one of possible distinctions that seems to assume great importance is between political autonomy and administrative autonomy. As seen above, like in the case of Sweden, municipalities may have great administrative autonomy but no political autonomy. It is what can also occur in the United States, depending on the regime established by a particular state.

To identify the political autonomy of the municipality in some country, it is necessary to know if the following features are present:

- municipal autonomy as a principle guaranteed in the Federal Constitution;
- creation or dissolution of municipalities by decision (or at least consultation with) to the populations concerned;
- legislative functions exercised directly by the municipality;
- prohibition to the state (intermediate level) to modify or exercise the powers defined as municipal;

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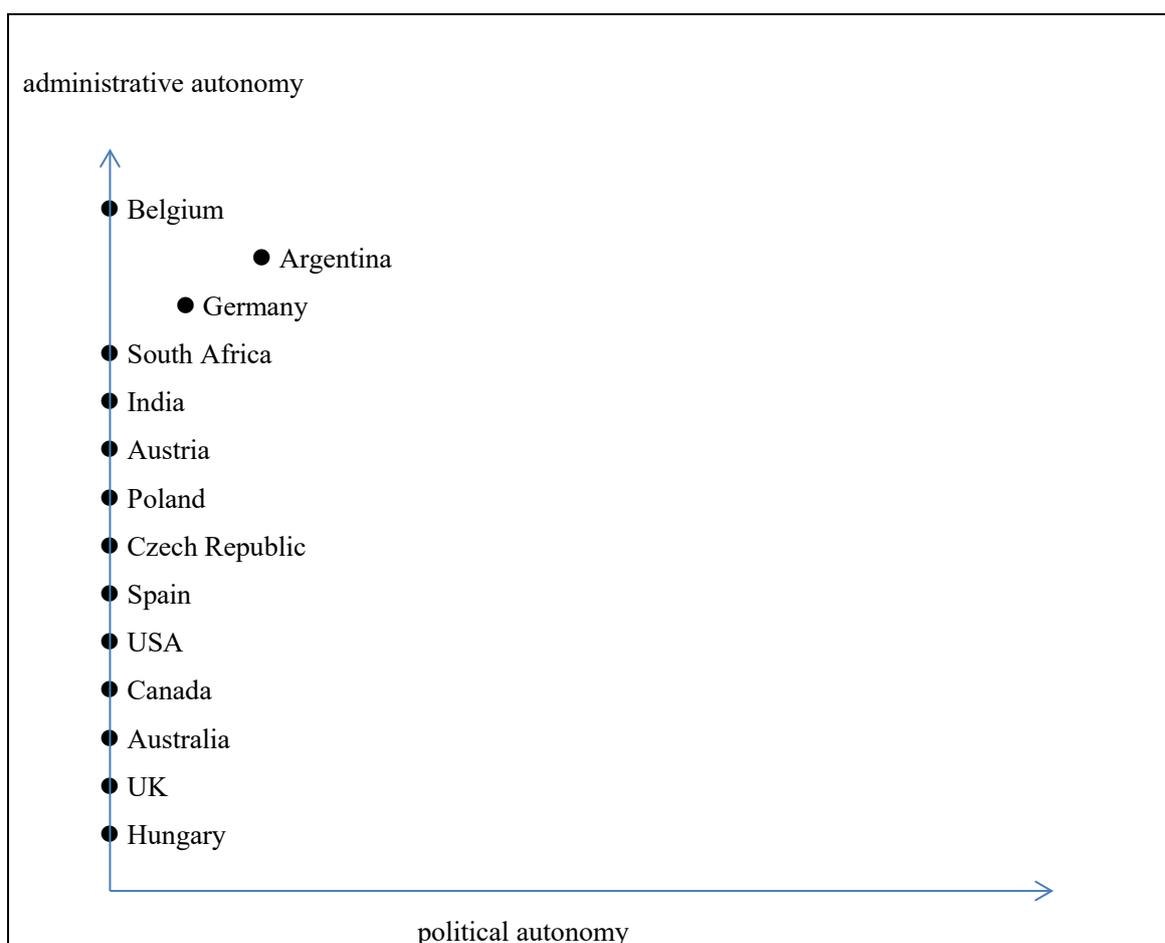
<sup>31</sup> BANASZAK, Bogustaw. Local Government in Poland: towards consolidation? In: PANARA, Carlo, VARNEY, Michael. *Local Government in Europe: the «fourth level» in the EU multilayered system of governance*. London: Routledge, 2013, p. 256.

- guarantee of own revenue to the municipality.

This identification is also a matter of degree, i.e., all features may be present, or only some of them.

From these features, one can distinguish countries where municipalities have political autonomy of those that they have merely administrative autonomy.

Looking to all examples mentioned in previous section, we note that in all countries there is some degree of administrative autonomy of municipalities, even in unitary states. However, political autonomy is present only in few countries (all federations), although there is also a variation of intensity. Graphically, without mathematical rigor, this could be illustrated as follows:



Graph 1 – Municipalities' Autonomy

The cases of Brazil and Switzerland will be analysed in next chapters.

Given these considerations, it is clear that it is not easy to say when a federal state is a «three-tier federation». Considering only the autonomy of the municipality, in any degree, almost all federations may be considered as «three-tier». Therefore, to be clear, this work will consider «three-tier federation» only one in which the municipalities bear reasonable political autonomy.

## II Municipalities in Swiss Federalism

### II.1 The Swiss Federation and municipalities: a historical briefing

Switzerland is often cited as one of the oldest federations in the world. The name «Confederation», still used today, demonstrates the historical process of union of existing cantons. This process began in XIII Century, with only three cantons. For over 500 years, other cantons were aggregating into the confederation. In 1848, the Cantons which formed the Confederation adopted the first Federal Constitution, which can be considered, therefore, the starting point of the Swiss federation, as it exists today.

Nonetheless, the history of Swiss *city*<sup>32</sup> (*Gemeinde* in German, *commune*, in French or *comune* in Italian) is as old as the Confederation. The formation of municipality, as geographic and social phenomenon, has also been a long and gradual process, as pointed out by Peter Steiner:

*«To face the challenges of the time, from the end of Middle Ages were formed assemblies of persons not limited to the family or the clan. From these early embryonic forms, based on human needs of help and protection, the municipality had developed in a long process characterized by increasing skills and self-normative powers, becoming autonomous on the political and legal system.»*<sup>33</sup>

Like in many other European countries, Swiss municipalities do not have emerged exclusively as government or public entities. The origin of the municipal institutions «*is to be found in the Parish (Parrochia), often in the Brotherhoods (Confraternite)*»<sup>34</sup>. As a result, nowadays it is already necessary to distinguish between different types of local government, especially between political municipality and bourgeois municipality, as will be explained in the next item.

Therefore, it is natural that municipalities, despite have arisen at the same time – or even before – the Confederation, have not been issue of constitutional regulation at federal level. In the Constitution of 1848, the reference to the municipalities was merely indirect, concerning about the household for citizenship purposes, as was seen in article 41, item 4:

*«The resident enjoys all the rights of citizens of the Canton in which he lives, except the right to vote in municipal affairs and participation in the assets of municipalities and corporations. In particular, it is guaranteed to them the free exercise of industry and the right of purchase and sale of stable goods, according to the laws, in which can be awarded a grant to the cantons and municipalities for the costs of assistance incurred by them for these people.»*

In the Revision of 1874, the theme was included in article 43, with clearer reference to «citizenship in the municipality», as shown:

*«The Swiss national resident enjoys, at the place of his residence, all the rights of the citizens of Canton and also together with all the rights of citizens of the Municipality. However, it re-*

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<sup>32</sup> The word «city» is used here in the meaning of «human settlement», urban or rural. It expresses a social and geographical idea, without a political or legal content.

<sup>33</sup> STEINER, Peter. *Comune*. In: *Dizionario Storico della Svizzera*. <http://hls-dhs-dss.ch/textes/i/110261.php>.

<sup>34</sup> STEINER, Peter. *Autorità Comunali / Medioevo e prima età moderna*. In: *Dizionario Storico della Svizzera*. <http://hls-dhs-dss.ch/textes/i/126447.php>.

*mains the exception of sharing the goods of patricians (patriziato, Bürgergüter)<sup>35</sup> and brotherhoods, as well as the right to vote in business purely patrician, unless the cantonal legislation did not state otherwise.*

*In cantonal and municipal affairs, he acquires the right to vote after a residence of three months.*

*The cantonal laws about the domicile and the residents' right to vote in municipal affairs are subject to the sanction of the Federal Council.»*

So that in the modern (since the XIX Century) concept of municipality, the relation between individuals and cities is essentially linked to the idea of «belonging». That is, the individual (citizen) **belongs** to the city, but at the same time, the city is **formed** by *citizens* (and not only by a *territory*). However, since the Reform of 1874, the notion of «citizenship» became to mean more clearly the «domicile» as Andreas Ladner highlights:

*«The Federal Constitution of 1848 established the freedom of domicile for all Swiss citizens<sup>36</sup>, but the right to vote on municipal questions remained a privilege of natives. Only the 1874 Constitution guaranteed, to all Swiss domiciled in a municipality, both cantonal and communal political rights, except on matters specifically reserved for patrician ones; for the same residents, however, was denied the sharing of patrician goods.»<sup>37</sup>*

Another reason for the silence of the Constitution of 1848 (before and after the Reform of 1874) about municipalities is the idea that it is essentially a matter to cantons. In other words, the autonomy of the cantons (seen against the Confederation) includes the freedom to decide about recognizing and organizing the municipalities.

As will be seen below, this idea (municipalities as a cantonal concerning) is still the main thrust about the position of municipalities in Switzerland, even after the recognition of municipalities by the 1999 Constitution.

## II.2 The municipality in the present Swiss law

### II.2.1 Local government entities in Swiss law

Before analysing the **municipality** in the current law, it is necessary to address the diversity of types of **local government** in Switzerland.

As seen above, Swiss municipalities emerged with some *private feature*, consisting of associations of people with a common origin in a given city. More specifically, it was a matter of political self-identification, connecting an individual with certain families who historically inhabit a territory, and not the fact, itself, that having been born in that territory. Furthermore, there wasn't a clear distinction between such «general» associations and others with specific purposes, usually religious (*Par-*

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<sup>35</sup> These both words, in Italian and German, are in the original version (RAPPARD, William E. *La Costituzione Federale della Svizzera*. Locarno: Arti Grafiche Carminati, 1949, p. 492–493).

<sup>36</sup> The word «citizens» («*cittadini*») was used in the original text of Andreas Ladner. However, the same author, in another text of the same Dictionary («*Autorità comunali*»), explains that this guarantee was exclusive to Christians. In practice, it meant the exclusion of Jewish people, a reasonable minority at this time.

<sup>37</sup> LADNER, Andreas. *Comune / XIX e XX secolo*. In: *Dizionario Storico della Svizzera*. <http://hls-dhs-dss.ch/textes/i/110261.php>.

*rochia*) or professional (*Confraternite*). These associations also have ancient origins, being entrenched politically and historically in the Swiss society.

Slowly and gradually, the municipalities with a public law profile (*political municipalities*) became predominant. However, the previous model still exists, reaching the XXI Century<sup>38</sup>. Therefore, nowadays in Swiss law there are two types of «municipality», that could be, in some situations, territorial overlapping. Moreover, in some situations there is a «homogenization», which results in more difficult, in practice, to distinguish the both types. That is what says Pierre Moor:

*«There is homogenization of municipal «corps»: the same political rights belong to all those that have their centre of interests, so not only the citizens, but everyone (except foreigners) who are established or simply stay: the political home. So there is for all the same relationship to the institution, as defined by political affiliation.»<sup>39</sup>*

In the theoretical approach, the distinction is clearly explained by Fleiner, Misic and Töpperwien, as following:

*«The political municipality can be distinguished from the ancient burghers or bourgeois municipality, which only includes persons with citizenship of the municipality, or descendants of one of the old families of the municipality.»<sup>40</sup>*

Another remnant of old institutions is the **ecclesiastical municipality**. It is a status conferred by some cantons to religious entities, whose territory does not necessarily coincide with political municipality<sup>41</sup>.

The Swiss law also presents a kind of local government, usually called **specialized municipality**, which is characterized by having a specific purpose such as public policy. It generally covers the territory of more than one municipality but its boundaries may not coincide with those of municipalities. These entities are essentially creations of the cantonal power. The main important and known one is the **school municipality**<sup>42</sup>.

Therefore, the **specialized municipality** shows great resemblance to the **special district** of U.S. law, which are «authorized by state law to provide only one or a limited number of designated functions and with sufficient administrative and fiscal autonomy to qualify as separate governments».<sup>43</sup>

On the other hand, despite the similar naming, the **district**<sup>44</sup> existing in Swiss law does not match the district of U.S. Law. Here, the district is also a cantonal creation without any autonomy or political feature. It is solely a division of Canton for administrative purposes. What differentiates it to the

<sup>38</sup> LADNER, Andreas. *Autorità Comunali / XIX e XX secolo*. In: *Dizionario Storico della Svizzera*. <http://hls-dhs-dss.ch/textes/i/126447.php>.

<sup>39</sup> MOOR, Pierre. *L'institution communale: hier, aujourd'hui et demain*. In: TANQUEREL, Thierry, BELLANGER, François. *L'avenir juridique des communes*. Genève: Schulthess, 2007, p. 11.

<sup>40</sup> FLEINER, Thomas, MISIC, Alexander, TÖPPERWIEN, Nicole. *Constitutional Law in Switzerland*. Alphen aan den Rijn: Kluwer Law, 2012, p. 178.

<sup>41</sup> FLEINER, Thomas, MISIC, Alexander, TÖPPERWIEN, Nicole, *op. cit.*, p. 179.

<sup>42</sup> FLEINER, Thomas, MISIC, Alexander, TÖPPERWIEN, Nicole, *op. et loc.cit.*

<sup>43</sup> KINCAID, John. *Overview of Local Governments*. In: KEMP, Roger L. *Forms of Local Government: a handbook on city, county and regional options*. Jefferson: McFarland & Company Publishers, 1999, p. 7.

<sup>44</sup> In German, for historical reasons, different words can be used to the «district»: *Bezirk, Amt, Amtsbezirk, Amtei*, and others, with some tinny differences of meaning, due to the canton. (DUBLER, Anne-Marie. *Distretto*. In: *Dizionario Storico della Svizzera*. <http://hls-dhs-dss.ch/textes/i/1100358.php>).

specialized municipality is the plural nature of its functions, not specific to a particular public policy. In some cantons, districts may be further subdivided into **circles**<sup>45</sup>.

Finally, it is necessary to mention the **agglomeration**. The agglomeration does not match with the specialized municipality or with the district, both parts of *cantonal power*. Its tasks are limited (often in transit and planning) and the area covers more than one municipality. But the agglomeration is an expression of *municipal power*, although subject to the supervision and to the rules of the Canton.

The agglomeration is better understood as a way of association of municipalities, so it will be study in the item II.5, above.

## II.2.2 Municipalities in the 1999 Constitution

In Swiss 1999 Constitution, there is a single article about municipalities, with the following content:

*Art. 50.*

<sup>1</sup> *Communal autonomy is guaranteed in accordance with cantonal law.*

<sup>2</sup> *In its activities, the federation shall take in account the possible consequences for the communes.*

<sup>3</sup> *In so doing, it shall consider the special situation of cities, agglomerations and mountainous areas.*

According Walter Haller, municipal autonomy was already guaranteed by Supreme Court decisions, well before the advent of art. 50 of Federal Constitution:

*«Communal autonomy had already been protected by the Federal Supreme Court as a constitutional right of the communes long before it was written into the federal constitution.»*<sup>46</sup>

On the contrary, Fleiner, Misic and Töpperwien say that municipal autonomy was granted *«for the first time»* at federal level. In their opinion, however, this statement is *«empty»*, with a value more symbolic than real, since in practice municipalities remain fully subject to cantonal law:

*«The new Constitution of 1999 for the first time grants municipalities autonomy. However unlike in the German Constitution, this guarantee of autonomy is formal. Its content is empty with regard to its substance. It is still up to cantonal legislature to decide the scope of autonomy granted to municipalities»*<sup>47</sup>

The synthesis of Nicolas Schmitt shows clearly the role of Constitution and Constitutional Court decisions at each time:

*«This is because most authors of the Constitution judged that, as the status of the municipalities falls under cantonal law, cantons should remain the main interlocutors. Until 1999 municipal autonomy was not guaranteed by the Constitution but through the jurisprudence of the Federal Tribunal»*<sup>48</sup>

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<sup>45</sup> DUBLER, Anne-Marie, *op. e loc. cit.*

<sup>46</sup> HALLER, Walter. *The Swiss Constitution in a Comparative Context*. Zurich: Dike, 2009, p. 48.

<sup>47</sup> FLEINER, Thomas, MISIC, Alexander, TÖPPERWIEN, Nicole. *Constitutional Law in Switzerland*. Alphen aan den Rijn: Kluwer Law, 2012, p. 177.

<sup>48</sup> SCHMITT, Nicolas. *Swiss Confederation*. In: KINCAID, John, TARR, G. Alan. *Constitutional Origins, Structure and Change in Federal Countries*. Montreal: McGill-Queen's University Press, 2005, p. 365.

Furthermore, specifically addressing the current Constitution, 1999:

*«A section of the Constitution now deals with municipalities, although it consists of only one article (Art. 50), of which the first paragraph states that municipal autonomy is guaranteed within the limits fixed by cantonal law. This implies that the status of the municipalities varies from canton to canton.»<sup>49</sup>*

There is no doubt that municipal autonomy is entirely subject to the canton, which can, at least in theory, decide even about the existence of a municipality. On the other hand, it cannot also be said that article 50 of Federal Constitution is useless. Municipal autonomy is protected, including by Courts, in case of arbitrary or unreasonable decisions of the cantons that withdraw the citizens the right to make the decisions that affect them locally.

It is interesting to note that even this limited statement of municipal autonomy, in the Federal Constitution, faced the resistance of Cantons during the drafting of the 1999 Constitution. As recorded in the Message of the Federal Council of 20 November 1996:

*«During the consultation process, it was criticized by the Cantons the fact that Article 33, paragraph 2 AP 95 does rise the municipal autonomy to the rank of federal institution. In D 96 was considered this criticism. Indeed, Article 41 D 96 expresses even more clearly with respect to the AP 95 that the municipal autonomy is an institute of the cantonal law and protected by the federal government pursuant to Article 177 D 96.»<sup>50</sup>*

This text also offers a very good definition of the *status* of municipal autonomy: *«an institute of the cantonal law and protected by the federal government»*.

But to *which entity* of local government (among those analysed in the previous item) is addressed the protection of the Federal Constitution?

In a literal-minded understanding, it is clear that the Constitution uses the words *Gemeinden* in German, *communes* in French and *comuni* in Italian, always in the plural. Thus, first of all, agglomerations, specialized municipalities, districts and circles can be excluded from constitutional protection.

Apparently the article 50 of the Constitution also protects *bourgeois* municipalities and ecclesiastical municipalities. This protection should be understood as encompassing the degree of autonomy that, historically, these entities have always enjoyed, i.e., in the terms established in the respective cantonal constitution.

Concerning the **political municipalities**, there is no doubt about the answer. Its autonomy is protected by the Constitution, with all limitations already mentioned above.

Despite the dominant role of the Cantons, in some rare situations, article 50 of the Federal Constitution allows being apart cantonal laws or acts that threaten the municipal autonomy (in the way that it is stated in cantonal constitution), as can be seen in recent decisions of the Constitutional Court of Switzerland:

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<sup>49</sup> SCHMITT, Nicolas. *op. et loc. cit.*

<sup>50</sup> Text available at: <http://www.ejpd.admin.ch/>. Translated by the author from the Italian version (p. 203).

«Art. 29 cpv. 2 e art. 50 Cost., art. 85 Cost./ZH, art. 82 lett. b e art. 89 LTF, art. 4 e 9 seg. LPT; rimedio giuridico contro il piano direttore cantonale, partecipazione del Comune alla procedura di adozione del piano direttore.

*Impugnazione del piano direttore cantonale da parte del Comune interessato mediante ricorso contro gli atti normativi cantonali (consid. 1).*

*Autonomia dei Comuni zurighesi nel diritto della pianificazione del territorio ed edilizio (consid. 2).*

**Diritto dei Comuni di essere sentiti e di partecipare alla procedura di adozione del piano direttore (consid. 3.2). Il parlamento cantonale ha violato il diritto di partecipazione del Comune omettendo di esaminare la sua obiezione** secondo cui il collegamento ferroviario necessario non era assicurato durante l'intero periodo di esercizio della cava di ghiaia (consid. 3.3).» (IC\_11/2010 vom 27. August 2010).

Another case originated in the Canton of Zurich concerns to local decision-making:

«Art. 50 cpv. 1 Cost., art. 83 lett. f, art. 89 cpv. 1 e art. 90 LTF, art. 6 LAPub e legge cantonale zurighese sugli acquisti pubblici, art. 85 Cost./ZH; legittimazione ricorsuale di un Comune, autonomia comunale, ammissibilità del criterio del «public voting».

(...)

**Un'autorità cantonale di ricorso che giudica di principio inammissibile il criterio di aggiudicazione del «public voting» disattende l'autonomia comunale.**» (2C\_770/2011 vom 25. Januar 2012)

The issue in case was summarized by the Court in this way:

«Adjudication des travaux d'étude architecturale d'un future bâtiment communal, fondée notamment sur le résultat d'une consultation préalable de la population; décision annulée par le Tribunal administrative zurichois; recours de la commune admis par le TF.»<sup>51</sup>

This part of the decision is especially clear about the protection of municipal autonomy:

«L'autorité cantonale de recours viole l'autonomie communale si elle substitute sa propre appréciation à celle de la commune, dans un domaine où celle-ci jouit d'une liberté de décision relativement importante et exerce donc un pouvoir d'appréciation.»<sup>52</sup>

However, as said, constitutional protection of municipal autonomy only has any meaning when understood in the context of cantonal constitutions. The cantons are the holders of legitimacy to define the content of municipal autonomy. Even in this last case, the Court had regarded what says the Cantonal Constitution:

«L'art 50 al. 1er Cst. garantit l'autonomie communale dans les limites fixes par le droit cantonal, lequel, en l'espèce, leur confère expressément l'autonomie (cf. art. 85 de la Constitution du canton de Zurich du 27 février 2005). Une commune est autonome dans les domaines que le canton ne réglemente pas exhaustivement et dont il lui délègue entièrement ou partiellement la réglementation, pour autant qu'il lui accorde une liberté de décision relativement importante.»<sup>53</sup>

<sup>51</sup> Journal des Tribunaux, 1–2012, Partie I. Lausanne, Presses Centrales SA, p. 144.

<sup>52</sup> *op. cit.*, p. 149.

<sup>53</sup> *op. cit.*, p. 148–149.

Therefore, the next step will be an overview of municipalities in Cantonal Constitutions.

## II.3 The municipalities in the Cantonal Constitutions

### II.3.1 Introduction

The Constitutions of the Cantons, for obvious reasons, are older than Confederation itself. However, over the centuries, the texts have been several changes. Thus, among the 26 Swiss Cantons, are in place constitutional texts from different periods:

*«The present cantonal constitutions date back to three periods: one in Geneva, despite having undergone several partial revisions, has been in existence since the time of Regeneration; some, inspired by the ideals of the democratic movement, were launched in the second half of the Nineteenth Century, and a third group includes texts that, from the years 1960–70, have been totally revised. At the beginning of 2007, the Cantons Schwyz and Lucerne were developing new texts for their Constitutions.»<sup>54</sup>*

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<sup>54</sup> KÖLZ, Alfred. *Costituzione Cantonali*. In: *Dizionario Storico della Svizzera*. <http://hls-dhs-dss.ch/textes/i/110234.php>.

The table<sup>55</sup> below shows the year of adoption of the Constitution currently in force in each Canton:

SZ	2010
LU	2007
ZH	2005
BS	2005
FR	2004
GR	2003
VD	2003
SH	2002
SG	2001
NE	2000
TI	1997
AR	1995
BE	1993
GL	1988
TG	1987
SO	1986
UR	1984
BL	1984
AG	1980
JU	1977
OW	1968
NW	1965
VS	1907
ZG	1894
AI	1872
GE	1847

As can be seen, in the 26 Cantons, 10 updated their Constitutions after 1999 (the year of the Federal Constitution), one (Geneva) has formally the same Constitution of 1847 (prior to the Federal Constitution of 1848) and others 15 are governed by constitutions adopted between 1848 and 1997.

Therefore in 16 Cantons, formal recognition of local autonomy, by article 50 of the Federal Constitution, coexists with previous Cantonal Constitutions. Thus, it is natural that some of these constitutions have few rules about municipalities. For example, the Constitution of the Canton of Appenzell-Innerhoden (1872) rules on the «*subdivision of Canton*» (art. 15) just about the **districts**, specifying also the «district authorities» (Articles 33 to 37). However, there are several references to the municipalities (*Gemeinde*), as in the articles 1, 4 e 10. Notwithstanding, it seems clear that the «district» play the role of «municipality» as defined in this work, and the «municipality» is not the same entity referred by art. 50 of Federal Constitution.

Nonetheless, Cantonal Constitutions have, more commonly, several rules about municipalities, even those ones that are prior to 1999.

Since it is impossible to explore in detail all Cantonal Constitutions within this research, we chose to select three documents that may represent the geographical, linguistic and temporal (in the sense of the year and Century of adoption of the Constitutions) diversity of Cantons.

Table 1 – Cantonal Constitutions

So will be examined briefly in this Chapter the Constitutions of the Cantons Zug (German-speaking, middle-east, 1894<sup>56</sup>), Ticino (Italian-speaking, southern, 1997) and Freiburg (German and French-Speaking, western, 2004).

<sup>55</sup> Prepared by the author from the data contained in [www.admin.ch](http://www.admin.ch). All constitutional texts transcribed in this Chapter have been translated by the author from the Italian version available on the same site.

In the following items will be discussed some important issues about legal *status* and organization of municipalities in the selected Cantons.

### II.3.2 Legal Recognition of Municipalities

The main clauses that demonstrate the recognition, by the Cantons, of the existence and legal significance of the municipalities are:

ZG	§ 24	The Canton of Zug is composed of the eleven political municipalities of Zug, Oberägeri, Unterägeri, Menzingen, Baar, Cham, Hünenberg, Steinhausen, Risch, and Walchwil Neuheim.
TI	Art. 16	The Municipality is an entity of public law. Its existence is granted.
FR	Art. 129	The Municipalities are entities of public law with their own legal personality.

The municipalities are recognized in their political dimension, as public law entities, by the cantonal constitutions now analysed. In Zug, the § 24 was included in 1980 (so before the Federal Constitution of 1999). Other older clauses (§§ 11, 15 and 19, among others) made reference to the municipalities, though not expressly declare their political existence.

The Constitutions of Ticino and Freiburg are more recent and expressly declare the existence of the municipality as a political or public law entity. The first contains also expressed guarantee of the existence of the municipality and the last of his legal status.

Therefore, it is undeniable the recognition of municipalities by cantonal constitutions, as political entities with legal personality.

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<sup>56</sup> A great part of clauses about municipalities has been modified or added between 1980 and 1982.

### II.3.3 Categories of municipalities

The analysed Constitutions have the following clauses about categories of municipalities:

ZG	§ 70	The political municipality includes all people resident in the Municipality.
	§ 71	The patricial municipality includes all people originated in a given municipality.
	§ 72	The Parrochia includes all people of the same faith that live in its territory.
	§ 73	Participants in a corporate asset constitute a corporate Municipality.
TI	Art. 22	<p>The Patrician is a public law entity, owner of assets in common use. It is autonomous within the limits set by law.</p> <p>The State encourages collaboration between Patrician, municipalities and other entities for the rational use of goods in the public interest.</p>
FR		<i>(any specific provision about this issue – see above art. 129)</i>

As can be seen, there is a great diversity of categories of municipalities between cantons. The Zug Constitution clearly defines four types of municipality, similar to the theoretical classification seen above (item II.2.1). In Ticino, the entire Chapter of the Constitution which deals with municipalities (articles 16–23) is concerned to political municipalities. There is a single reference (art. 22) to the «Patrician» (patrician municipality) that, while recognizing its autonomy, transfers to ordinary law the definition of limits of that autonomy<sup>57</sup>.

In Freiburg, the Cantonal Constitution does not define the types of municipality. It seems possible to conclude that article 129 recognizes the existence and autonomy of both main types (political municipality and *bourgeois* municipality or patrician). As clarified by Fleiner, Misic and Töpperwien:

*«In the dualistic system, the citizens and the bourgeois municipalities have their own institutions (Fribourg, Glarus, Schwyz, Zurich), whereas in the so-called mixed system, they are represented by the institutions of the political municipality.»<sup>58</sup>*

In summary, it is possible to say that Swiss Cantonal constitutions recognize the historical reality of different forms of local government, with the legal consequences inherent to autonomy of these entities.

<sup>57</sup> This option, however, does not mean that the Patrician has less importance. It is an institution with deep historical roots in that Canton, as demonstrated by Giovanna SCOLARI (*Il Patriziato Ticinese: identità, pratiche sociali, interventi pubblici*. Bellinzona: Dadò Armando Editore, 2003, p. 38–46).

<sup>58</sup> FLEINER, Thomas, MISIC, Alexander, TÖPPERWIEN, Nicole. *Constitutional Law in Switzerland*. Alphen aan den Rijn: Kluwer Law, 2012, p. 178.

### II.3.4 Autonomy and functions

The table below shows the main guidelines of the cantonal constitutions on the autonomy and functions of municipalities:

ZG	§ 76	The details about the organization and responsibilities of municipalities are defined by law.
TI	Art. 16	It is autonomous within the limits of the Constitution and the laws.  At the local level it performs the general public tasks that the law grants neither to the Confederation nor to the Canton.
FR	Art. 129 Art. 130	The municipal autonomy is guaranteed within the limits fixed by cantonal law.  The municipalities fulfill the tasks entrusted to them by the Constitution and by law.  They shall aim to the welfare of the population, providing quality of life and local services.

The three analysed Constitutions say essentially the same: the municipalities are autonomous and exercise residual powers, i.e. assigned neither to the Canton nor to Confederation. Furthermore, all of them leave to the ordinary law the detailed definition of municipal powers. These laws obviously are the Canton's own ones, not federal or local laws.

Despite the similar content, the way that each Constitution is written reflects, to some extent, the times it was adopted. In Zug, there is not express declaration of municipal autonomy, nor definition of functions. These tasks are sent to ordinary law. The Constitution of Ticino, almost contemporary to the Federal Constitution, clearly defines the extent of municipal autonomy. It states also clearly the residual character of municipal functions. Finally, the Constitution of Freiburg, being in tune with the article 50 of the Federal Constitution, puts the emphasis on **ensuring** autonomy, and not exactly on **declaring** it, since it was just made at the federal level. The importance given to the welfare of the population through the provision of local public services, with reference to the «proximity» (*proximité* in French) seems to indicate some influence of the principle of subsidiarity.

Therefore, the cantonal constitutions also guarantee the autonomy of municipalities, with the caveat that the content of this autonomy will always be limited by cantonal laws. About the functions of municipalities, it may vary significantly from one canton to another, according to each one law.

### II.3.5 Organisation of local government

The analysed Constitutions have the following relevant clauses about the political organisation of municipalities:

ZG	§ 76	The details about the organisation and responsibilities of municipalities are defined by law.
TI	Art. 17	The Municipality has the Municipal Assembly and the <i>Municipio</i> , may establish city Council in accordance with the provisions of the law.  The Municipal Assembly is constituted by those entitled to vote in municipal matters.  The <i>Municipio</i> is the body that administers and represents the municipality.  The right of initiative and referendum is guaranteed where there is the City Council.
	Art. 18	Members of <i>Municipio</i> and City Council are elected by proportional representation for a four-year period.  The <i>Municipio</i> is composed of at least three members, including the mayor, as chairman.
FR	Art. 131	May be members of the municipal authorities people who have active citizenship in the municipality.  Every municipality shall have an Assembly or a Municipal Council, as well as a <i>Municipio</i> .

These rules in cantonal constitutions exemplify the classification exposed by Fleiner, Misic and Töpperwien on organizational forms bipartite or tripartite<sup>59</sup>. The most important organ of the municipality is the municipal assembly, formed by all those who have active citizenship in the municipality.

The existence of a City Council is directly related to the size of each municipality. For obvious reasons, the meeting of all citizens, in larger cities, may be unfeasible. Thus, the City Council shall act on more commonplace issues, but always reserving the popular consultation for most relevant ones, according to the Swiss tradition of direct democracy. The Constitution of Ticino, in the last sentence of article 17, expressly contains this guarantee.

The executive power in municipalities is exercised by the municipal government. It has a collective profile, reflecting the federal and cantonal models. Here too the Constitution of Ticino is the most

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<sup>59</sup> FLEINER, Thomas, MISIC, Alexander, TÖPPERWIEN, Nicole, *op. cit.*, p. 186–187.

detailed, specifying that this Council should have a minimum of three members, including the Mayor. He will be, as occurs at the federal level, a *prior inter pares*.

As can be seen, the political structure of Swiss municipalities is simple, allowing the existence of municipalities with small number of inhabitants and facilitating the exercise of direct democracy at the local level.

## II.4 Creation and merging of municipalities

### II.4.1 Origin and fundamentals

The **city** (i.e., the **human settlement**, urban or rural) is a geographical and social phenomenon that predates the political and legal concept of **municipality**. Thus, at the beginning of a federal organization, constitutions generally do not **create** or **determine** the existence of cities. The Constitutions – federal or state – **recognize** the existence of cities, and from such recognition also **recognize**, or **create**, municipality, understood as political and legal entity.

In Switzerland, as in almost all countries over the world, cities (geographical phenomenon) are older than Confederation itself. Therefore, it is natural that the political and legal division, at local level, be reverent to that earlier reality, attributing to existing cities the legal *status* of municipalities.

However, since the human settlements are not static phenomena but dynamic ones, these geographical situations may change over time, requiring a new arrangement of legal organization of the territory.

Within the Cantons, is widely studied the case of the Canton of Jura, created in 1978, as a result of a long and careful process of recognition of a social and political reality at odds with the territorial division.

Similarly, concerning municipalities, it is necessary that the law follows the dynamics of population change. Therefore, the legal framework of a federal state must provide solutions to these changes, through procedures for the creation, dissolution and merger of municipalities.

### II.4.2 Legal Framework

The Federal Constitution of Switzerland does not address this issue. As seen above, in the single clause about municipalities (art. 50), there is only the recognition of their autonomy, leaving other matters over the cantons.

According to Peter Steiner:

*«A real and genuine merger assumes the existence of a municipal law structured in legal terms, which was introduced for the first time in the Helvetic Republic with the law on municipalities.»<sup>60</sup>*

The **creation** of new municipalities can only occur through the division of another pre-existing, or the merger of others that will, consequently, no longer exist. There is a logical explanation for this fact: when the Federation was founded in 1848, the entire Swiss territory was already divided into

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<sup>60</sup> STEINER, Peter. *Comune, fusione di*. In: *Dizionario Storico della Svizzera*. <http://.hls-dhs-dss.ch/textes/i/17971.php>.

municipalities, which had their legal recognition by the cantons and, in 1999, by the Federal Constitution itself. So there is no point in Swiss territory not subject to local power of a municipality<sup>61</sup>.

The **merger** of municipalities can occur in two different ways: the first one is by the incorporation of one or more municipalities, on the other «main» one, which retains its name and identity. The second possibility is the fusion of two or more municipalities, so that all cease to exist to create a new one.

Peter Steiner also reports the phenomenon of «typological» merger. By this one, different types of municipality (item II.2.1 above) are consolidated into a single entity, usually of a political profile. The most significant example is the change occurred in the Canton of Thurgau, as follows:

*«The largest such operation took place in the canton of Thurgau, whose historic municipal dualism was abolished in favor of a single political entity. Since 2000, instead of 35 Einheitsgemeinde and 38 Munizipalgemeinde, which included 144 Ortsgemeinde, there are only 80 municipalities, each of which constitutes cultural, geographic and economic unit whom are demanded all the tasks.»<sup>62</sup>*

In theory, a merger may be **voluntary** or **mandatory**. Despite the recognition of local autonomy under Article 50 of the Federal Constitution, the mandatory merger has been held constitutional. About this issue, is predominant the idea that municipalities are primarily a cantonal matter. According Vincent Martenet: *«The compulsory merger is imposed by the canton to one or more municipalities that oppose it. Article 50 of the Federal Constitution does not prohibit this form of merger.»<sup>63</sup>*

The analysis of some Cantonal Constitutions allows better understanding of the question, as follows.

Among the four Constitutions examined below, in Ticino and Freiburg is stated the possibility of **compulsory** merger. However, the most common, found in all four, is the **encouragement** to mergers, by the Canton, always subject to prior favourable opinion of municipalities. We can conclude that the compulsory merger, where permitted, will always be an exceptional measure, to be applied in extreme situations.

In Zurich, the Article 84 provides the possibility of merger, since there is a manifestation of the majority voter in each of the municipalities involved. The last two items of this article well demonstrate the trend toward to **reducing** the number of municipalities, and not by its **increase**:

*The creation of new municipalities that lead to an increase in the number of municipalities must be done by law.*

*The municipalities that intend to merger are, in their efforts, supported by the Canton.*

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<sup>61</sup> Vincent MARTENET writes about the possibility of absorption of municipalities by a canton, with the creation of an exclusively cantonal territory. Such a possibility, however, would be «only academic». (La fusion de communes entre elles ou avec le canton. In: TANQUEREL, Thierry, BELLANGER, François. *L'avenir juridique des communes*. Genève: Schulthess, 2007, p. 190). Even the canton of Basel-City comprises three distinct municipalities (*op. et loc. cit.*).

<sup>62</sup> STEINER, Peter, *op. et loc. cit.*

<sup>63</sup> MARTENET, Vincent. *op. cit.*, p. 185.

In Zug, the § 24 (already transcribed in item III.3 above) specifies which are the municipalities that form the Canton, suggesting a perennial feature of territorial division. Surely, the merger of municipalities is possible but would depend on prior modification of this clause, or its suppression.

The Article 20 of Constitution of Ticino expressly provides the guidelines to encourage voluntary mergers, while providing the possibility of compulsory merger by decision of the Great Council (cantonal authority).

Finally, the Constitution of Freiburg has the following provisions on the merger of municipalities:

*The Canton promotes and encourages merger of municipalities.*

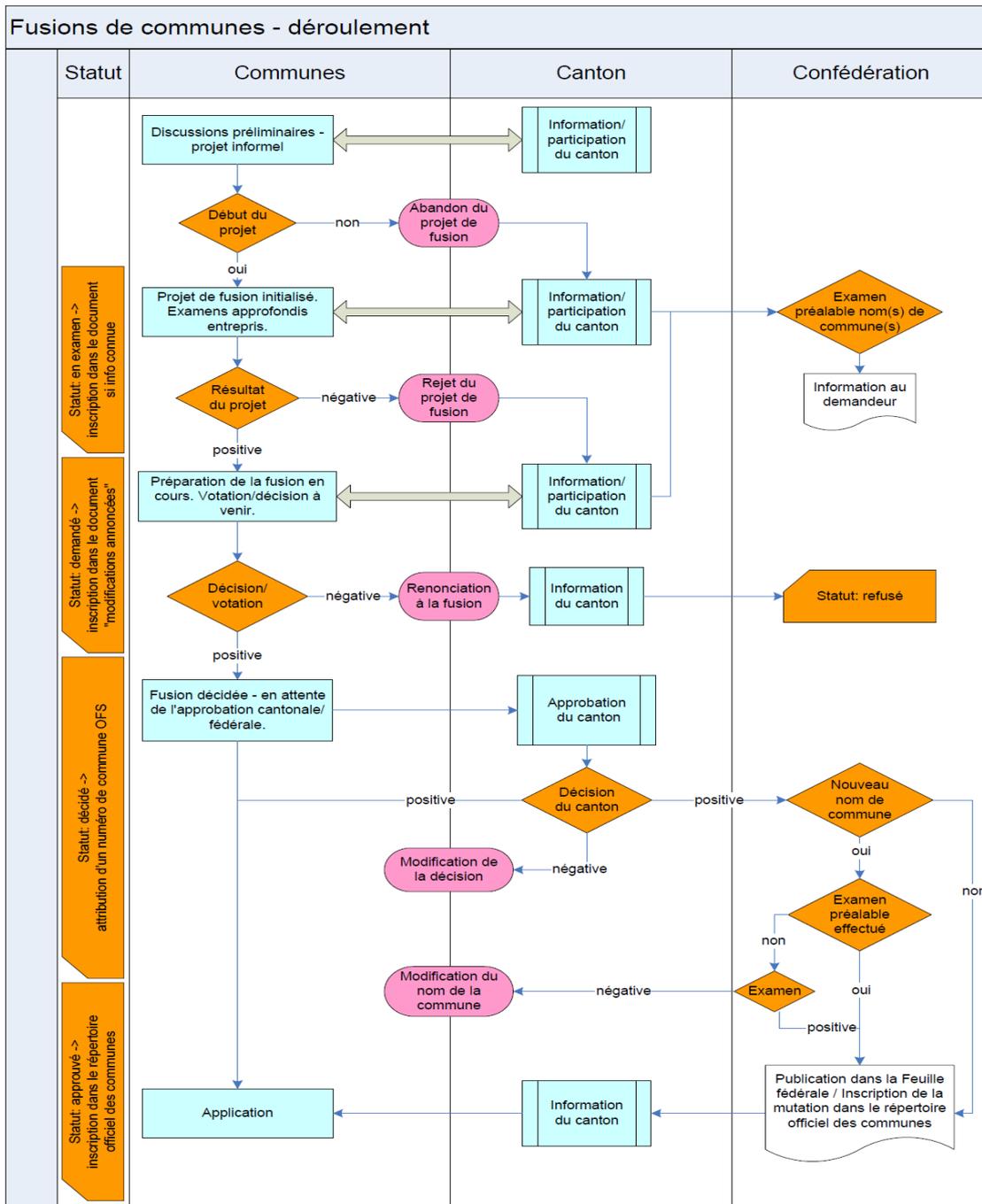
*A merger may be proposed by the municipal authorities, by a popular initiative or by the Canton.*

*The holders of voting rights in the municipalities involved pronounce about the merger. Remains valid the paragraph 4.*

*Where municipal, regional or cantonal interests so require, the Canton may order a merger. The municipalities involved must be heard.*

Also here there are clear guidelines in favour of the merger, encouraging a reduction in the number of municipalities. The initiative of the merger can be either by the Canton as by the municipality itself, or – in line with the Swiss tradition – by the people directly.

The merger procedure is complex, unfolding at various stages. The following flow chart, prepared by the Federal Statistics Office (OFS), allows to clearly visualize the steps:



Flowchart 1 – Procedure of merger

### II.4.3 Factual and Interdisciplinary Aspects

The merger of municipalities has been much more frequent than their division, so that their total number has decreased over time. According the information of Andreas Ladner:

*«Since 1848, year of foundation of the Federal State, the number of municipalities has not undergone substantial changes: from 3,205 then it's down to 2,840 in the end of 2003. Main cause of the decline, however small when compared to the rest of Europe, was the merger of municipalities.»*

In fact, it means a decrease of 365 municipalities (11%) in 155 years. However, this process seems to be accelerated in recent years. According to report published by the SFO on 04/14/2013, Switzerland has 2,396 municipalities. So, there was a decrease of 444 municipalities (16%), only in the last 10 years. Another report of the same Office informs that this number was reached on the same date (04/14/2013), when started to take effect three mergers occurred in the canton of Ticino, where 15 municipalities became 3.

The same document also contains other relevant numbers: there are 56 on-going mergers in many cantons, when, if completed, 253 municipalities will become 57. Consequently, the total number of Swiss municipalities can reach in the next years to 2,200.

What are the reasons for this trend to merging municipalities?

This is a discussion that goes beyond the legal scope. However, it is necessary to reflect on this point, to be able to analyse the legal systems that are the purpose of the present study (Brazil and Switzerland).

It is often necessary remembering that different policies and services have different economies of scale. In such approach – much more administrative than political – the issue becomes the determination of what the ideal size of the basic unit of the federation, for better management of public policies. In other words, as summarized by Fleiner, Misic and Töpperwien:

*«Most discussion on merger of municipalities is essentially a debate on the optimal size of local government. The merger of two municipalities can guarantee a more efficient and effective government by cutting costs and establishing joint administrations.»<sup>64</sup>*

This approach of the problem may give to the unsuspecting reader the impression that a mathematical formula – to be plotted on the map of a country – is enough to determine the better territorial division, whether at the local-state level (state or canton), either at the local-city level (municipality).

The territorial division, however, is not simply a «rational» process or economic planning. As seen above, at the time of the creation of the Confederation, municipalities already existed, with its historical and social roots. Furthermore, the definition of the municipality is essentially tied to the idea of **local citizenship**, or self-identification of the individual with his city. In a nutshell: it is a political problem, before economic or administrative one.

Therefore, it is inevitable the tension between the historical and political origins of the municipalities and the reasons of economic and administrative nature, which recommend their merger. The issue

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<sup>64</sup> FLEINER, Thomas, MISIC, Alexander, TÖPPERWIEN, Nicole. *Constitutional Law in Switzerland*. Alphen aan den Rijn: Kluwer Law, 2012, p. 185.

becomes more serious in Switzerland due to the existence of many cities with extremely low number of inhabitants (sometimes less than 100) and the geographical profile of many rural and mountainous regions.

That is why, once again using the synthesis of Fleiner, Misic and Töpperwien:

*«The merger of municipalities, however, does not necessarily guarantee the needed flexibility and can provoke a legitimacy crisis, particularly where identity arguments are involved.»<sup>65</sup>*

Even considering only the economic approach, the question is not simple and the debate is intense. In a very recent book about this specific issue, edited in USA by Santiago Lago-Peñas and Jorge Martinez-Vazquez, can be find different opinions about this point. The editors express their own opinion as follows:

*«Size matters in the efficient delivery of local public services. Many countries around the world have vertical government structures that are perceived as inefficient because of their high level of jurisdictional fragmentation. A common response has been the implementation of jurisdictional consolidation programs, both forced and voluntary. On the critics' side, it has been argued that policy strategies involving forced amalgamation can result in lost representation and accountability and that, therefore, other strategies need to be followed to address the issues raised by local government fragmentation.»<sup>66</sup>*

However, as shown by the numbers, in Switzerland the pendulum is leaning in favour of increased size of municipalities and, consequently, their merger.

Finally, it is important to emphasize that the merger is not the only way to improve the efficiency of municipalities and achieve economies of scale in public policies. An important alternative is the association of municipalities, which will be examined in the following item.

## **II.5 Association and cooperation between municipalities**

Since its inception, the tasks of municipalities are growing in number and complexity. As expected consequence of this process, municipalities tend to associate to provision of common services in order to achieve greater efficiency and economies of scale. In some situations, very small municipalities are totally unable to perform some tasks. In the historical perspective of Andreas Ladner:

*«In Modern and Contemporary Ages, the extension of the tasks entrusted to the municipalities has encouraged the development of inter-municipal cooperation, which turned out to be inevitable in the Nineteenth Century, when the little town had to introduce compulsory education with having neither the personnel nor the financial means necessary.»<sup>67</sup>*

Moreover, some tasks of local governments naturally exceed the size of a municipality, as intercity transportation and disposal of waste. Again, although cantons can assume these tasks, the association of municipalities can provide good solutions.

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<sup>65</sup> FLEINER, Thomas, MISIC, Alexander, TÖPPERWIEN, Nicole, *op. et loc. cit.*

<sup>66</sup> LAGO-PENAS, Santiago, MARTINEZ-VAZQUEZ, Jorge. *The Challenge of Local Government Size: theoretical perspectives, international experience and policy reform*. Northampton: Edward Elgar Editor, 2013, p. 1.

<sup>67</sup> LADNER, Andreas. *Cooperazione intercomunale*. In: *Dizionario Storico della Svizzera*. <http://hls-dhs-dss.ch/textes/i/110340.php>.

At federal level, there is no regulation about the cooperation between municipalities. Consistent with the framework of legal position of Swiss municipalities, the theme is regulated only by Cantonal Constitutions and laws. Consequently, there is a wide variety, both in legal forms and the nomenclature of the means of municipal association or cooperation, among the Cantons. In excellent summary, Andreas Ladner thus describes the evolution of such regulation:

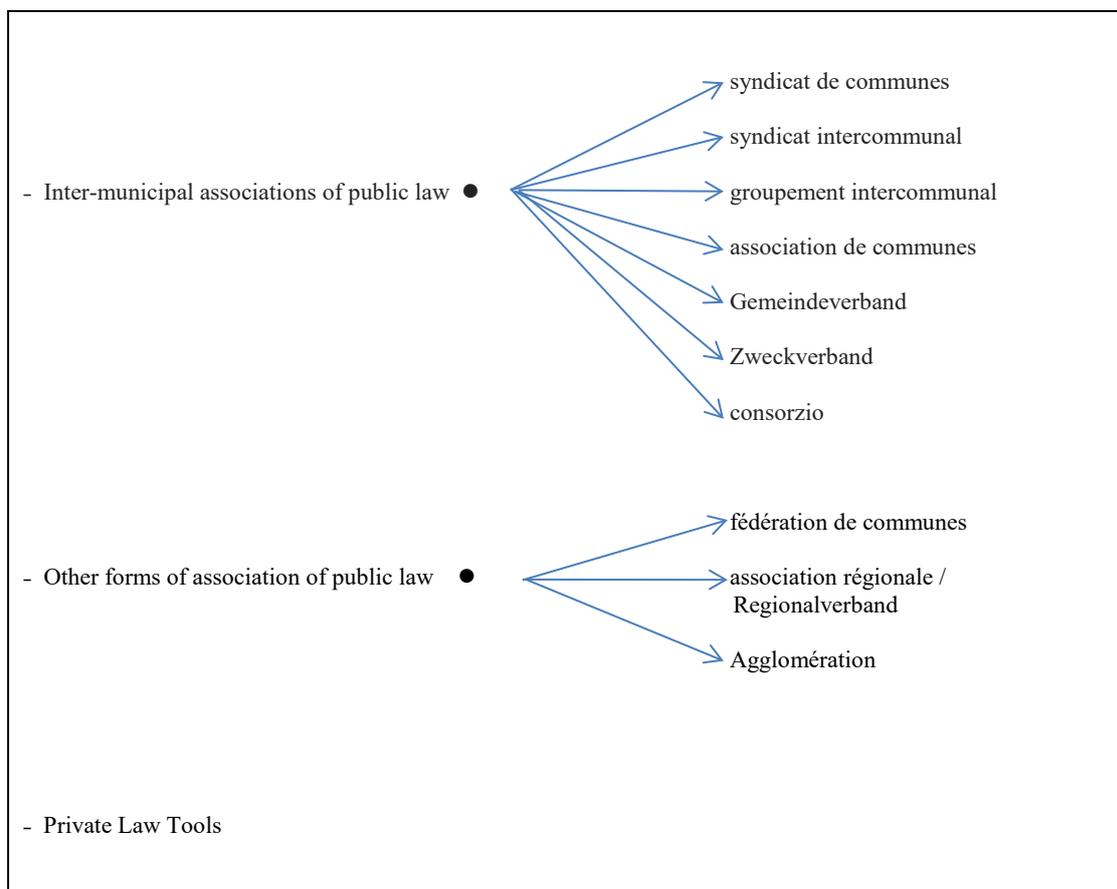
*«In 1909, the Canton of Zurich adopted a constitutional amendment that authorized the formation of municipal consortia placed under the supervision of the Canton, but with its own administrative bodies. In 1965, the Canton of Nidwalden began a phase of complete reform, which introduced in the Cantonal Constitution the inter-municipal cooperation on a voluntary basis (Neuchâtel, 1965; Obwalden, 1968; Schwyz, 1969). Today the membership of a municipality to a consortium (even through coercion) is often fixed in the Constitution of the Canton (Valais, 1975; Jura, 1977; Solothurn, 1986; Thurgau, 1987). The statutes of the consortia are frequently subject to the approval of the cantonal government (Uri, 1984; Glarus, 1988, Ticino, 1997). Other constitutions also require ensuring democratic participation, often limited in consortia (Solothurn, 1986; Thurgau, 1987; Bern, 1993; Vaud, 2003).»*

Nowadays, as mentioned by Horber-Papazian and Jacot-Decombres: «*Except the canton of Appenzell-Outer-Rhodens, who also has no law about municipalities, all cantonal laws mention the inter-cooperation as a tool to perform municipal tasks*»<sup>68</sup>. The same authors present a thorough classification of forms of inter-municipal cooperation, which can be summarized as follows<sup>69</sup>:

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<sup>68</sup> HORBER-PAPAZIAN, Katia, JACOT-DESCOMBRES, Caroline. La Collaboration intercommunale en Suisse. In : TANQUEREL, Thierry, BELLANGER, François. *L'avenir juridique des communes*. Genève : Schulthess, 2007, p.109–110. As seen above (item III.3.1), Article 15 of the Constitution of Canton Appenzell-Outer-Rhodens mentions all **districts** and defines them as «subdivision of Canton».

<sup>69</sup> Made by the author, from the information by HORBER-PAPAZIAN and JACOT-DESCOMBRES (op. cit., p. 109–113). In the left column, the terms in French were translated to English by the author. In the right column, the terms are in the original Language, like in the book. The differences between the forms of association are, sometimes, very tinny, so that the translation could be not loyal to the meaning of legal texts.



Graph 2 – Forms of inter-municipal cooperation

Like the merger, association of municipalities can also be, at least theoretically, **voluntary** or **mandatory**. However, given the essential feature of a process of «association» or «cooperation», where the will of the participants plays a vital role, it seems unlikely that any process entirely mandatory to have some success.

Under the constitutional law approach, the main issue in the inter-municipal associations is the **democratic legitimacy**. This concern appears in the writings of many scholars. According to Fleiner, Mistic and Töpperwien:

*«Those intercommunal cooperations give the executives of the municipalities in general more powers than they would have only within their municipality. This tendency towards more executive power which can be observed on the global level has even an important impact on the grass root level of direct democracy of the municipalities.»*

In a more specific approach, Horber-Papazian and Jacot-Decombres say that:

*«The large number of inter-municipal collaborations also explains that each municipality is not always represented by members of its executive or its legislative, in such structures. This*

*raises the question of the legitimacy of not elected municipal representatives and of the coordination of decisions taken by the local authorities.»<sup>70</sup>*

Finally, Reno Steiner, studying under the economic focus the advantages of inter-municipal collaboration, recognizes the political problems that can arise:

*«The reasons argued against an inter-municipal cooperation are essentially political and organizational. Especially one invokes the possibility of a partial loss of autonomy for each municipality. Some forms of cooperation can also lead to democratic deficits.»<sup>71</sup>*

From a purely theoretical point of view, one could say that concerns about the democratic legitimacy are **political**, while the association of municipalities would have merely **administrative** profile (hence, not political). However, in practice it is difficult to draw a clear line where politics ends and where the administration begins. To use English vocabulary, **politics** and **policies** are not distinguished as clearly as theoretical studies would suggest. The provision of services by government (**policies**) always involves, to a greater or lesser extent, options related to different views to human society and the role of the government (**Politics**). In Switzerland, the issue is even more serious because of the close connection between citizenship and Politics, due to the high degree of popular participation in decision-making.

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<sup>70</sup> HORBER-PAPAZIAN, Katia, JACOT-DESCOMBRES, Caroline. *La Collaboration intercommunale en Suisse*. In: TANQUEREL, Thierry, BELLANGER, François. *L'avenir juridique des communes*. Genève : Schulthess, 2007, p. 117–118.

<sup>71</sup> STEINER, Reno. *Collaboration intercommunale et fusion de communes en Suisse: résultats d'une étude empirique et jalons pour une gestion systématique de la coopération et de la fusion*. In: *Gouvernance locale, coopération et légitimité: le cas suisse dans une perspective comparée*. Paris: Editions Pedone, 2001, p. 112.

### III Municipalities in Brazilian Federalism

#### III.1 The Brazilian Federation and Municipalities: A historical summary

The first territorial division of Brazil, even as a Portuguese colony in the XVI Century, was the «hereditary captaincies» («*capitanias hereditárias*»), with patrimonial feature, given to «captains» who should govern them. For factual reasons (difficulties of communication and transportation, due to the great distance from each other and from them to Portugal), there was a significant decentralization, while each «captain» exercised almost unlimited power in the *capitania*.

However, at this same time, city council emerged as the main body of state power. Its functions were quite diverse, without a clear vision of what is presently called «separation of powers». The councils exercised executive, legislative, and, to some extent, judicial functions.

Thus **local government** was, since the colonial times, assigned and exercised in parts of territory equivalent to what is now called *the municipality*, around the historical and geographical concept of *city*<sup>72</sup>. The **local** power at *state level* arose later, with the exercise of administrative and some limited legislative functions by **provinces**<sup>73</sup>, after the Independence (1822) and the first Brazilian Constitution (1824).

Several scholars refer to the great power of City Councils during this period, outshining sometimes the provinces and their governors. They also had a key role in the Independence, and ratified the first Brazilian Constitution<sup>74</sup>.

During the imperial period (1822–1889), the City Councils have retained their importance, although the provinces were stronger than in the colonial period.

With the advent of the Republic in 1889 (the first republican constitution was passed in 1891), Brazil adopted a model copied by the American federation, inspired by Rui Barbosa<sup>75</sup>, with the assignment of broad powers to **local** government – meaning the **state** and not **municipality** – tempered by guarantees of municipal autonomy.

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<sup>72</sup> The word «city» is used here in the meaning of «human settlement», urban or rural. It expresses a social and geographical idea, without a political or legal content.

<sup>73</sup> The *captaincies* were originally private-featured, as a **property** of the captain. Gradually they became «royal captaincies» («*capitanias reais*»), returning to the domain of the King, often due to the lack of interest from heirs of the first captains. At the end of the XVIII Century, were used both denominations «*capitania real*» and «*provincia*» (province), with the same meaning. After the independence (1822), were used only the word «*províncias*». Cf. TRIGUEIRO, Oswaldo. *Direito Constitucional Estadual*. Rio de Janeiro: Forense, 1980, p. 14–15.

<sup>74</sup> VILLA, Francisco Machado. *O município no regime constitucional vigente*. Rio de Janeiro: Freitas Bastos, 1952. p. 14. It is important to note the difference between this fact (ratification of the Constitution by the City Councils) and what happened in the history of Switzerland and the USA, where such ratification fell to the cantons or states.

<sup>75</sup> Rui Barbosa was the most important and famous Brazilian jurist at this time and played a key role in the draft of 1891 Constitution. He was an enthusiast of American Constitutional Law.

During the term of the successive republican constitutions (1934, 1937, 1946, 1967 and 1969), the position of the municipality did not change significantly. For this reason, most part of scholars had recognized the municipality as autonomous **political** entity (and not merely **administrative** one) <sup>76</sup>.

### III.2 The municipality in current Brazilian Law

#### III.2.1 Overview

The 1988 Constitution addresses thoroughly about Municipalities. The first article, innovating in comparison with previous constitutions, has the following contents:

*The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on:*

In the article 18 is clearly expressed the autonomy of all federal entities without distinction between states and municipalities:

*Article 18. The political and administrative organization of the Federative Republic of Brazil comprises the Union<sup>77</sup>, the states, the Federal District and the municipalities, all of them autonomous, as this Constitution provides.*

The Articles from 29 to 31, divided into various items and paragraphs addresses about the organization and functions of municipalities, dealing with details such as the number of members of the City Council (article 29, IV) and their remuneration (art. 29, VI). Nevertheless, article 29 stipulates that municipalities edit their own laws of organization<sup>78</sup>, dealing with the exercise of power at the local level.

The Brazilian Constitutional Court («*Supremo Tribunal Federal – STF*») built the theory of the «principle of symmetry». According to this theory, states and municipalities are obliged to repeat, in state constitutions and municipal organic laws, the «main principles» of the federal government organization. The understanding of what would be those «main principles» has being quite wide, leaving virtually no space to the exercise of autonomy (concerning these fundamental laws) by sub-national entities.

The Federal Constitution determines which taxes may be levied and collected by municipalities, as well as determines parts of federal and state taxes that must be compulsorily transferred to municipalities (articles 156 and 158). There is also a compensation fund («*Fundo de Participação dos Municípios – FPM*»), formed by parts of two federal taxes, to mitigate (at least in theory) inequalities between municipalities (article 159, I, b).

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<sup>76</sup> CARNEIRO, Levi. *Problemas municipais*. Rio de Janeiro: Alba, 1931, p. 25. MEIRELLES, Hely Lopes. *Direito Municipal Brasileiro*. 6. ed. São Paulo: Malheiros, 1993. p. 45–46. LEAL, Victor Nunes. *Problemas de Direito Público*. Rio de Janeiro: Forense, 1960. p. 318. SILVA, Carlos Medeiros. A evolução do regime federativo. In: CAVALCANTI, Themistocles; SILVA, Carlos Medeiros, LEAL, Victor Nunes. *Cinco Estudos*. Rio de Janeiro: Fundação Getúlio Vargas, 1955. p. 91.

<sup>77</sup> The expression «federal union» (in Portuguese: «união federal», or simply «união») matches with the concept of «confederation» in Swiss Law.

<sup>78</sup> In the previous Constitutions (before 1988), this «municipal law organization» was a task of the States. Some scholars argue that, after 1988, this law of organization would be called the «municipal constitution».

### III.2.2 Legal recognition of municipalities

As seen above, the Constitution recognizes municipalities as legal entities of public law. In addition, federal entities (Union, states and municipalities) are autonomous. Their autonomy must be exercised according to the limits established only by the Federal Constitution.

### III.2.3 Categories of municipalities

In Brazilian law, there is only the **political municipality**, originated in Portuguese colonial pattern.

Brazilian municipalities are **symmetric**, i.e., there is a single pattern (*cf.* II.3.4, below) for all municipalities, regardless of size, region or economic development.

Nonetheless, there is great factual diversity: the largest Brazilian municipality (Altamira) covers 160.000 Km<sup>2</sup>, while the lowest (Santa Cruz de Minas) covers less than 3 km<sup>2</sup>. The most populous (São Paulo) has more than 11 million inhabitants, while the least populous (Borá) has less than 1.000 inhabitants.

These inequalities are more evident and easily noticed in the number of inhabitants, as can be seen below:

inhabitants	quantity	%	% acum.
Up to 5 000	1.257	23	23
From 5 001 to 10 000	1.294	23	46
From 10 001 to 20 000	1.370	25	70
From 20 001 to 50 000	1.055	19	89
From 50 001 to 100 000	316	6	95
From 100 001 to 500 000	233	4	99
More than 500 000	40	1	100
	5.565	100	

Table 2 – Brazilian Municipalities

### III.2.4 Autonomy and functions

The Brazilian municipalities have great political and administrative autonomy. They exercise exclusivity legislative function in themes defined as «local interest» (article 30). Although subject to judicial review by state and federal courts, municipal laws cannot be amended or superseded by the other branches (legislative and executive) state or federal.

Regarding the administrative functions, the sharing of responsibilities in the Brazilian federation can be summarized in the following table:

**EXCLUSIVE RESPONSIBILITIES**

<b>UNION</b>	<ul style="list-style-type: none"> <li>- defence and federal police</li> <li>- foreign affairs</li> <li>- financial system (banking, currency, credit)</li> <li>- national highways</li> <li>- postal service</li> <li>- social security</li> </ul>
<b>STATES</b>	<ul style="list-style-type: none"> <li>- local police</li> <li>- gas distribution</li> </ul>
<b>MUNICIPALITIES</b>	<ul style="list-style-type: none"> <li>- preschool and primary education</li> <li>- public transport (inner-city)</li> <li>- land use and construction policy</li> </ul>

**SHARED RESPONSIBILITIES**

<b>UNION AND STATES</b>	<ul style="list-style-type: none"> <li>- Science and Universities</li> </ul>
<b>UNION, STATES AND MUNICIPALITIES</b>	<ul style="list-style-type: none"> <li>- Health and social welfare</li> <li>- historic, artistic and cultural preservation</li> <li>- assistance to disabled</li> <li>- culture</li> <li>- environment preservation</li> <li>- combating poverty</li> <li>- tourism and leisure</li> </ul>
<b>STATES AND MUNICIPALITIES</b>	<ul style="list-style-type: none"> <li>- water supply and distribution</li> <li>- sanitation</li> </ul>

Table 3 – Sharing of responsibilities

### III.2.5 Organisation of local government

The Executive power in the municipality is exercised by the mayor, directly elected for a term of four years, admitted one consecutive re-election<sup>79</sup>. Mayor chooses freely his assistants («*secretários municipais*»), without consultation or approval by the City Council. Legislative power is exercised by a City Council composed from 9 to 55 members («*vereadores*»)<sup>80</sup>, also elected for a term of four years.

At federal level, there were only two *referendums* since 1988<sup>81</sup>. At local level, the author is unaware of any actual occurrence of popular consultation, except for the creation of new municipalities (cf. Item III.4, below).

There is no municipal judicial power. In Brazilian law, the judicial power has federal and state branches, with functions defined in the Federal Constitution.

### III.3 The Municipalities in State Law

Since municipalities are widely regulated by the Federal Constitution and their own laws of organization, not any space left for the state power over the municipalities<sup>82</sup>.

Nevertheless, some state constitutions (all passed in 1989) established limitations on municipal autonomy, or created obligations for municipalities, other than those contained in the Federal Constitution. In several decisions, the STF declared the unconstitutionality of such clauses in state constitutions.

The executive (Governor) and the legislative («*assembleia legislativa*») branches of the state have no supervision power or control over municipalities.

### III.4 Creation, Merger and Dissolution of Municipalities

The number of municipalities in Brazil has been growing steadily. This growth takes place through the creation of municipalities, always through a process of dismemberment, in which a portion of an existing municipality is emancipated, and began to form a new municipality. The intensity of the phenomenon is demonstrated in the following table:

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<sup>79</sup> There are no limits for not consecutive re-elections.

<sup>80</sup> The article 29 of the Federal Constitution establishes the exact number of *vereadores* each municipality must have, according to the number of inhabitants.

<sup>81</sup> In 1993, as determined by the Constitution itself, the people chose the form (republic) and the system (presidential) of government. In 2004, was rejected the proposal to ban the manufacture of firearms in the country.

<sup>82</sup> The statement was widely demonstrated by the author in a previous work (FERRARI, Sérgio. *Constituição Estadual e Federação*. Rio de Janeiro: Lumen Juris, 2003). It is impossible to repeat or summarize all fundamentals within this text.

year	quantity	created	
		quantity	%
1940	1.574		
1950	1.889	315	20,01
1960	2.766	877	46,43
1970	3.952	1.186	42,88
1980	3.974	22	0,56
1991	4.491	517	13,01
1993	4.974	483	10,75
1997	5.507	533	10,72
2000	5.560	53	0,96
2009	5.565	5	0,09

Table 4 – Evolution of the quantity of municipalities

This variation reflects, to some extent, the change of regulation on this theme. Between 1950 and 1970, the number of municipalities has increased more than 100%, reflecting the ease of the procedure. In 1967, a law was passed<sup>83</sup> with much stricter criteria, leading to a drastic reduction in the rate of increase. Since 1985, with the weakening of the military dictatorship that controlled the country, municipalities were created in violation of the law of 1967, but retained. The 1988 Constitution brought much less strict criteria, so that the number of municipalities grew rapidly until 1997. The procedure was a proposal in the state legislative (*«assembleia legislativa»*) and the consultation of people, limited to the part that intends to be a new municipality. If the result of the consultation was positive, a state law was passed, creating the new municipality.

Due to an amendment of the Federal Constitution in 1997, to create a new municipality is necessary to await the passing of a federal law that will regulate the requirements and criteria. Recently, the Parliament came to pass that law. However, the President vetoed it on 11.12.2013<sup>84</sup>. Therefore, it remains forbidden creating new municipalities<sup>85</sup>.

Throughout the Brazilian territory is divided into municipalities, except the Federal District and the State District Fernando de Noronha<sup>86</sup>. Thus, the extinction of a municipality could only occur through merger. The Constitution provides for this possibility, but this never occurred. Therefore, there has never been a reduction in the number of municipalities, only increase it.

What are the reasons for this trend to the creation of new municipalities?

<sup>83</sup> Since the military coup of 1964, Parliament remained several years closed or intimidated by emergency measures. In practice, all power, including legislative, was exercised by military forces. The democratization was a gradual process, initiated in 1985 (election, still indirect, of a civil President) and completed in 1989 (direct election of a President). The 1988 Constitution was the highest expression of this process.

<sup>84</sup> Message 505, published on 11.13.2013.

<sup>85</sup> Municipalities created since 1997 are the result of processes started before this year.

<sup>86</sup> Fernando de Noronha is an archipelago 360 km far from the Brazilian coast. Due to be a permanent preservation area, access is restricted and residents need a special permit. Local government is exercised by the state government of Pernambuco.

This debate is intense and complex, involving scholars from different fields of knowledge. In the author's opinion, one of the main reasons for this trend is the «FPM» (see III.3.2, above) and its sharing criteria.

Very briefly, the main criterion for distribution of FPM is the number of inhabitants of the municipality. However, there are ranges, where the share to be delivered to the municipalities is the same: in the first range, for instance, all municipalities in the same state, with up to 10,188 inhabitants, will receive the same amount. As can be seen in the table 2, above, it includes about half part of municipalities.

So, a new municipality is entitled to a substantial share of the FPM, even if it has a very small population (for Brazilian standards, less than 5,000 inhabitants). A new municipality, with only 2,000 inhabitants, will receive the same amount of FPM that receives an existing municipality with 10,000 inhabitants in the same state. Therefore, the new municipality almost always have a «*per capita* FPM» greater than the municipality from which was separated. It is interesting to note that the original municipality also has an increase in the «*per capita* FPM», due to the reduction of inhabitants.

But who are the «losers» in this process? With the redistribution of FPM, all other municipalities in the same state have decreased the value they receive. As some states have large number of municipalities (more than 500), the loss is imperceptible in the short term. However, in long-term, as proved in works of economists<sup>87</sup>, this process of territorial fragmentation decreases the efficiency of public spending and increases administrative costs, with loss of resources for the provision of public services. It can be called a «predatory process» or a game with only losers.

Currently, as stated above, the creation of new municipalities is paralyzed by the lack of a law to define criteria. The distortions that encourage fragmentation, however, continue to exist. Therefore, it is predictable that as soon as it passed a law defining criteria, the process of increasing the number of municipalities and fragmentation of the territory will be restarted. By the same reasons, there is no encouragement to merger of municipalities.

### III.5 Inter-municipal Association and Cooperation

As seen above, the Brazilian municipalities have great autonomy, not subject to the administrative supervision of the federal or state governments. This circumstance makes the cooperation depends on the initiative and the agreement of their own. Because of political autonomy, states cannot compel municipalities to cooperate.

The Brazilian 1988 Constitution has a clause that deals with cooperation between federal entities (federal union, states and municipalities):

*Article 241. The Union, the States, the Federal District, and the Municipalities shall issue legislation to regulate public consortia and cooperation agreements between members of the Federation, authorizing the joint management of public services, as well as the transfer, in whole or in part, of charges, services, personnel, and goods essential to the continued rendering of the services transferred.*

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<sup>87</sup> GOMES, Gustavo Maia; MAC DOWELL, Maria Cristina. *Descentralização política, federalismo fiscal e criação de municípios: o que é mau para o econômico nem sempre é bom para o social*. Brasília: IPEA, 2000.

Only in 2005 was passed a law which dealt in detail the cooperation instruments (*Lei* 11.107/2005). The main one is the public *consortium*. Other subsequent laws, which addressed the issues of sanitation (*Lei* 11.445/2007) and solid waste (*Lei* 12.305/2010) made mention to the cooperation between the federal entities (union, states and municipalities) but did not bring news regarding the previous law of 2005.

All these laws deal with only **voluntary** cooperation. The **compulsory** cooperation, as already seen, would not be possible, due to the interpretation made to the political autonomy of municipalities.

In practice, inter-municipal cooperation initiatives were rare. Since 2005, with the encouragement of the new law, this situation began to change, but still slowly. According to the federal government, there are now 409 *consortiums* in Brazil, almost all of them managing only a single policy, often in healthcare<sup>88</sup>.

To understand the reasons of this fact, it would be necessary to address complex peculiarities of Brazilian politics that would not fit within the limits of this work.

However, in a nutshell, local power relations repeat the presidential federal model, with a strong preponderance of the executive branch. There is a perception (wrong, in the opinion of the author), including the Constitutional Court, that the public policy formulation rests with the Mayor, not the City Council. Moreover, there is not direct participation of people in decision-making. Therefore, and also due to a deeply rooted custom in Brazilian politics, every ruler exercises the power thinking in the next election. All acts of public authorities shall follow an «electoral logic». For almost all situations, each step of the Mayor (and in their respective levels, the State Governor and the President) is taken only thinking about how many votes that decision or policy will result in the next election.

These factors drive the mayors to a competition, each of which seeks maximum visibility among voters. Each mayor seeks also associate to his name every act of government, such as, for instance, the opening of a school or hospital.

Thus, from unvarnished view, there is no interest in cooperation with a neighbour when:

- the beneficial outcome to the people (voters) is not directly associated to the name of one politician, but to a collective effort;
- the mayor of the neighbouring municipality is from different party; or
- the mayor of the neighbouring municipality (of the same party or another) is a possible opponent in future elections, in the state or federal level.

Therefore, although a slow evolution, the pattern of local government in Brazil is still the individualism, lack of coordination and often competition (sometimes unfair and predatory) between municipalities.

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<sup>88</sup> <http://www.portalfederativo.gov.br/bin/view>.

## IV Constitutional Profile, Organisation, Merger and Association of Municipalities: A comparative Approach

### IV.1 Introduction

This chapter aims to compare the data and arguments presented in the previous chapters, in order to extract useful conclusions for the analysis of federal institutions.

In this context, following the structure of the previous chapters, there will be an item of generic comparisons and other specifics about merger and association of municipalities. First, however, it is useful to recall some data from the countries<sup>89</sup> that constitute the object of study, to better situate the reader.

	Switzerland	Brazil
area Km <sup>2</sup>	41'285	8'515'767
population (2012)	8'039'060	193'946'886
population density (in/Km <sup>2</sup> – 2012)	194.72	22.78
GDP (US\$ million - 2012)	632'194	2'252'664
GDP <i>per capita</i> US\$	78'640	11'615
HDI (2012)	0.913	0.730
HDI position (2012)	9 <sup>th</sup>	85 <sup>th</sup>
number of municipalities (2012)	2'407	5'566
average population of municipalities	3'340	34'845

Table 5 – General Information

The reading of these data is important to remember the warning of Blindenbacher and Saunders, whereby:

*«No single federal model is applicable everywhere. One cannot simply transfer an institutional model from one country to another without taking into account the varied conditions.»<sup>90</sup>*

Admittedly these huge differences between Brazil and Switzerland would recommend great caution in comparing institutions. Therefore, the conclusions may be valid and useful, since it understood in its context and with the knowledge, from the grass roots, about the reality of each country.

<sup>89</sup> Table made by the author, with informations from these websites: [www.statistics.admin.ch](http://www.statistics.admin.ch), [www.ibge.gov.br](http://www.ibge.gov.br), <http://data.worldbank.org/indicator>, <http://hdrstats.undp.org/en/indicators>.

<sup>90</sup> BLINDENBACHER, Raoul, SAUNDERS, Cheryl. *A Global Dialogue on Federalism: conceptual framework*. In: KINCAID, John, TARR, Alan G. *Constitutional Origins, Structure, and Change in Federal Countries*. Forum of Federations, 2005, p. 4.

## IV.2 The municipality in the context of each Federation

In Brazil, as well in Switzerland, the local government is deeply rooted and precedes the founding or independence of the country, so that the constitutional order recognized an already existing reality. Also in both countries the idea of *citizenship* is deeply connected to membership of a city<sup>91</sup>.

In both countries, the municipality is recognised by the Federal Constitution (article 50 in Switzerland, articles 1, 18 and 29 in Brazil), which also declares its autonomy.

However, in Switzerland municipality has always been subordinate to the **cantonal** authorities, although it is recognized some degree of autonomy, which came to be specifically mentioned in the Federal Constitution of 1999. On the other hand, in Brazil, the municipal autonomy was present in all national constitutions (including the Imperial in 1824, before the federalism) and was reinforced in the 1988 Constitution, which erased the last vestiges of subordination of municipality to the state.

As a consequence of these facts, the municipal organization is a **cantonal** matter in Switzerland, giving rise to a high degree of variation in the profile of each municipality in the canton. It is also possible the variation of kinds of municipal organization within the same canton. The municipal organization in Brazil is a matter of the **federal** Constitution that leaves a little room for self-organization to municipalities. Thus, there is no variation in the legal framework, which is the same for all municipalities. In addition, and also for historical reasons, Swiss «municipality» can assume several forms, and the **political municipality** is only one of the patterns. However, there is a tendency towards homogenization, with the different types of municipality consolidating in the political one. On the contrary, in Brazil, since the beginning, there is only the political municipality.

Another natural consequence of this profile is the fact that there is some degree of **subordination** (or at least **supervision**) of municipalities to the respective Swiss canton. In Brazil, as stated above, since the 1988 Constitution, there is no subordination of the municipality to the state.

About the internal organization of the Swiss municipality, although large variation between cantons exists, it can be said in general that the maximum policy-making body is the people themselves, delegating the decision-making to a greater or lesser extent to the City Council, elected directly. The implementation of public policy is made by the City Council, who may choose a Mayor (which is, however, a *prior inter pares*) and often has the support of a stable team of professional employees. In Brazil, both the formulation and the execution of municipal policy rests with the Mayor, who is not chosen by the City Council, but directly by the people. Although people can choose the mayor every four years, they have no direct participation in policymaking. To the City Council remains a «legislative» function, much depleted by the impossibility of directly interfering in the administration of the municipality.

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<sup>91</sup> As stated in previous chapters, the word «city» is used here in the meaning of «human settlement», urban or rural. It expresses a social and geographical idea, without a political or legal content.

All of these features can be summarized in the following table:

	Switzerland	Brazil
legal recognition	federal	federal
guarantee of autonomy	federal	federal
limitations to autonomy	cantonal	federal
typology	variety	single one
political organisation	cantonal	federal
administrative organisation	cantonal / municipal	federal / municipal
subordination to canton / state	yes	no
symmetry	asymmetrical	symmetrical
people participation	yes	no
policies formulation	people / council	Mayor / council
policies execution	council	Mayor

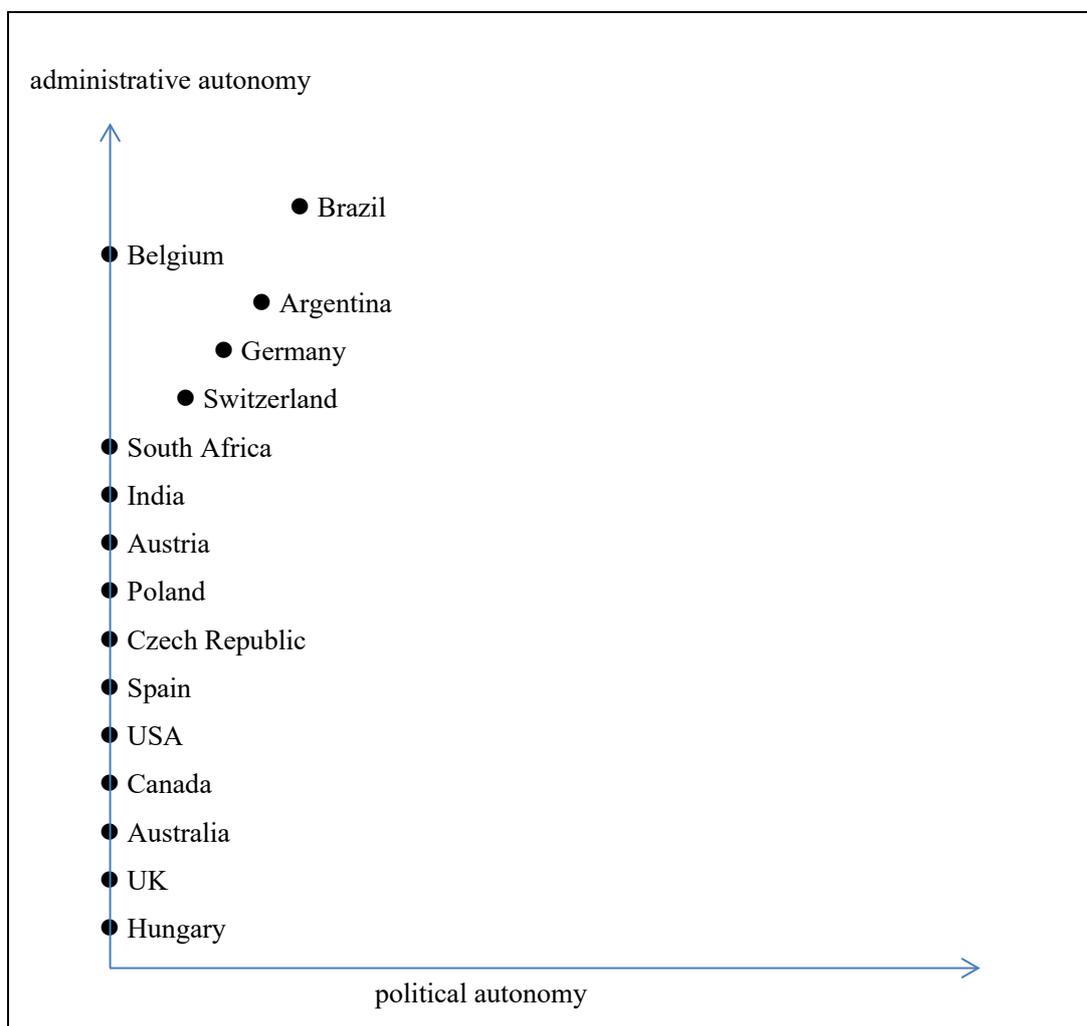
Table 6 –Legal position and organisation of the municipality

At this time, we can return to the question of «three-tier federation» discussed in Chapter I of this study. As seen in almost all federal states, and even in some unitary states, the local power always enjoys some autonomy, at least administrative. According to the opinion expressed here, this would not be enough to constitute a «three-tier federation». To this aim, according to the author, it is necessary that the municipality has some degree of **political autonomy**, provided by the **federal Constitution** (i.e., cannot be destroyed by the state or canton) and that, in addition, can be protected by a Federal Constitutional Court.

Under such conditions, also in the opinion of the author, both Switzerland and Brazil are three-tier federations, although the autonomy of the Swiss municipality is much more restricted than the Brazilian one.

Nonetheless, it is important to mention the relationship between **federalism** and **democracy**. This relationship is a highly controversial issue and is not covered in the proposal of this work. However, the author could not fail to mention the fact that the allocation of autonomy – political or administrative – to the local authorities do not always leads to greater popular participation. The above table clearly shows that, at least in the two countries studied here, this relation of cause and effect is not proven. Although the Swiss municipality itself has less autonomy, its citizens have much more ways to participate in decisions. In Brazilian municipalities, including the small ones, people are as far from decisions about local policies as from federal government in Brasília.

Finally, we can restate the graph of Chapter I, now with the inclusion of these two countries:

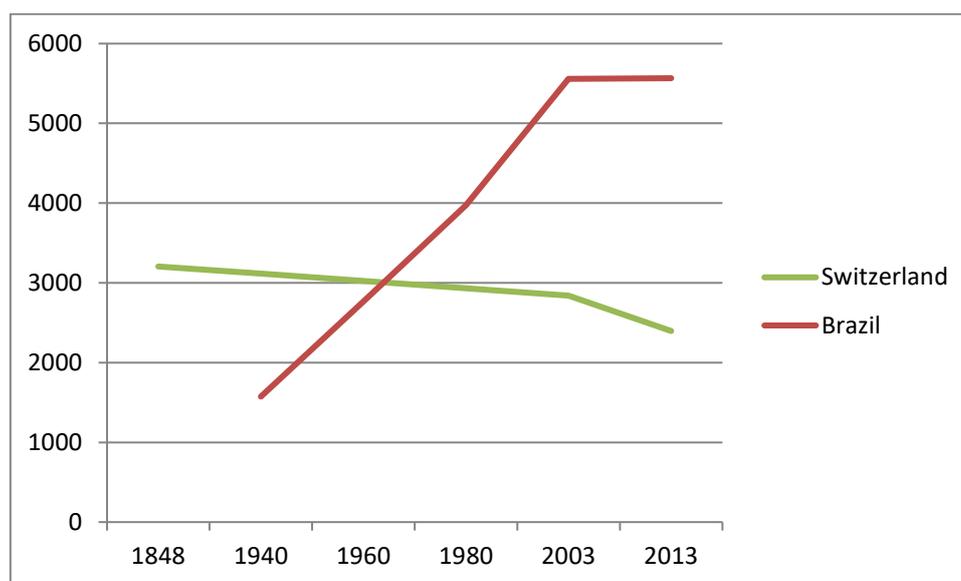


Graph 3 – Municipalities' Autonomy

### IV.3 Merger and Creation of Municipalities

Over the previous chapters, we observed that the variation in the number of municipalities is current and controversial issue, in Brazil and in Switzerland as well, though for opposite reasons. In Switzerland, there is a downward trend in the number of municipalities, through the merger, as a way to increase the efficiency of public services and rationalize the use of public resources. Although there are concerns about the democratic legitimacy and a reduction of people participation in decisions, the numbers show that the majority have been largely favourable to this process.

In Brazil, by contrast, there is a strong tendency to fragmentation and the creation of new municipalities, suppressed since 1997 because of a constitutional amendment. There is, however, considerable political pressure for this fragmentation process is resumed. That's why not occurred, since 1988, a single case of **merger** between Brazilian municipalities. The graphic displays these opposing processes:



Graph 4 – Evolution of the quantity of municipalities

Despite these opposing trends, the Swiss experience on merger of municipalities can provide important insights to Brazil, as will be developed in the next Chapter.

#### IV.4 Association and cooperation between municipalities

Despite all geographic and economic differences between the two countries, the reasons that lead to the need for cooperation between municipalities are not very different: growing cities and consequent conurbation, need of more economies of scale and greater efficiency of public services, with sharing structures.

In Switzerland, cooperation between municipalities is free, and may take a variety of forms. Some cantonal constitutions bring rules on this subject. Such rules, however, provide only general guidelines, leaving ample freedom to be adopted the different forms of cooperation. In Brazil, on the other hand, influenced by Iberian legal tradition, such agreements need to be detailed stated by law. For this reason, before this law was published in 2005, there was not inter-municipal cooperation, except in some specific sectors such as health care, where there was specific but incomplete regulation.

In Switzerland, it is accepted **compulsory** cooperation, albeit with an exception basis. In Brazil, by contrast, is only permitted **voluntary** cooperation, also because the political autonomy of municipalities, as outlined above.

A major criticism of the process of cooperation, in Switzerland, is about the removal of the decisions of the people, causing a deficit of democratic legitimacy. In a way, it's the same criticism of the process of merger of municipalities, but in another context. In Brazil, this same criticism would not be appropriate, but for not noble reasons: people are already naturally excluded from the decision-making process of municipal policies (highly concentrated in the Mayor), so that the association with other municipality makes no difference under this aspect.

Furthermore, for various historical and political reasons, there is still a tradition in Brazil of individualism and competition between municipalities, making cooperation is proportionately much smaller than in Switzerland.

In the next chapter, we will discuss the possible lessons that can be learned from these similarities and differences.

## V Conclusion: Learning from Differences

The comparative law is a field of study especially interesting by the many aspects that can be discovered, beyond the borders of a legal system in particular. However, comparative law cannot be limited to describing institutions of different countries, as an exercise of dilettantism. It is necessary to find out some sense or consequence of the comparison.

Therefore, as a result of a comparative study of law, we must try to find proposals, or at least raise questions that might lead other scholars to continue the path.

The question about creation, merger and dissolution of municipalities reflects, in some way, different forms of federalism approach by different branches of knowledge.

For economists, a federal arrangement should be, first of all, **efficient**. With a dose of fantasy, it is possible to imagine a large open map on the table, a ruler and a calculator (or, more up-to-date, a specific software), around which experts decide the «best» and more efficient division of territory. It would be up to Constitutional Law the role of enforcing this division, convincing the people that the final result would be better for everyone.

For political scientists and historians, the territorial division would result from a natural historical process, in which the emotional and social connection with political municipality should be respected by the law. Around another table, the mapping of these historical, sociological and political factors results in another territorial division, leaving to the Constitutional Law the role to turn into legal framework the respect to these factors. Economic inequalities should be mitigated by compensation mechanisms, to whose development would be called the economists at the next table. Finally, these economists would warn that no compensation mechanism is perfect and that, in the final result, the efficiency for the whole people would be lower.

Nothing could be more far from the reality than the situations described in the preceding two paragraphs! The author's aim was only to demonstrate that no science alone can deal with the challenges of the federal design. Indeed, the approach of the federal state always will fall somewhere between these two extremes, i.e., federalism as a «technique» to be used by the Economics and Management, and federalism as a pre-existing «phenomenon», to be understood and respected by these two sciences.

The clash between these different ways of looking the federalism repeats itself clearly on the issue of territorial division in municipalities. The definition of «optimal size» of municipality is a very old issue, as informed by Charron, Fernández-Albertos and Lapuente:

*«In the theoretical literature on government design, few variables have received more attention than the size of the polity. Since Plato's prediction that the optimal size of a political unit should be 5040 free citizens, the list of thinkers concerned about state size included Aristotle, Montesquieu, Rousseau, and many of the founding fathers, among others.»<sup>92</sup>*

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<sup>92</sup> CHARRON, Nicholas, FERNÁNDEZ-ALBERTOS, José, LAPUENTE, Victor. *Small is different: size, political representation and governance*. In: LAGO-PENAS, Santiago, MARTINEZ-VAZQUEZ, Jorge. *The Challenge of Local Government Size: theoretical perspectives, international experience and policy reform*. Northampton: Edward Elgar Editor, 2013, p. 55.

In the debate about the «optimal size» of the municipality, reflecting different visions of the federalism, always emerge at least two opposing views:

- the «most efficient» division of the population and the territory in municipalities, under economic and administrative point of view<sup>93</sup>, without concern about political factors;
- the maximum respect to political self-identification of individuals with municipalities, maintaining the historical territorial division, even though it is «inefficient» under economic and administrative view.

Of course, between these two extremes, infinite combinations are possible, as one can give more or less weight to either of two factors. What then would be the role of Constitutional Law in this task?

In the author's opinion, it is up to Constitutional Law the delicate task of protecting the democratic legitimacy in territorial changes, to ensure that the people be heard in such movements and at the same time keeping open the possibility that economic arguments are brought into the political debate.

This frequent antagonism between **efficiency** and **legitimacy** occurs not only on the issue of **merger** of municipalities. Same dilemma arises on the issue of **cooperation** between municipalities.

Therefore, since the merger and the cooperation have generally the same goals (efficiency and economy of scale) and face the same problems, we can say that they are **alternatives**, or – to use the economic vocabulary – **competing choices**. In other words, in a situation that recommends greater efficiency and economies of scale in one or more public services, one can choose the merger or the association. Of course, the circumstances of each case may indicate either better choice. However, it still seems possible to examine this dilemma abstractedly.

From these considerations, it is possible to develop some thinking about the countries studied in this work.

The rapid decrease in the number of municipalities in Switzerland seems an irreversible trend. The greater efficiency of public spending that results from this process is undeniable. The contrast with the Brazilian experience of greater territorial fragmentation and consequent dispersion of efforts and resources (inefficiency) clarifies the right way to increase the average size of municipalities<sup>94</sup>.

About the concerns on the democratic *deficit*, could an increase of inter-municipal cooperation be an alternative? If, instead of a merger, municipalities came together in an association, would be possible to achieve greater efficiency and at the same time preserving the participation of citizens in decisions?

The answers, in the opinion of the author, are negative. As seen in previous chapters, there is a *deficit* of democratic legitimacy in the major forms of inter-municipal cooperation: the centre of decision

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<sup>93</sup> An economic model on the optimal size of municipalities, with equations and mathematical formulas, can be viewed at: MARTINEZ-VASQUEZ, Jorge, GÓMEZ-REINO, Juan Luis. *An international perspective on the determinants of local government fragmentation*. In: LAGO-PENAS, Santiago, MARTINEZ-VAZQUEZ, Jorge. *The Challenge of Local Government Size: theoretical perspectives, international experience and policy reform*. Northampton : Edward Elgar Editor, 2013, p. 8–54.

<sup>94</sup> It is necessary to say that the efficiency's growing by merger faces a limit. Beyond this limit, the municipality find out the typical problems of a big city. The question, up to economists, remains the same: where is this break-even point?

often becomes a purely executive body, without the effective participation of the assemblies and city councils. This deficit is permanent and tends to be worse, to the extent that more and more services are being included in inter-municipal specific associations. In an extreme situation, deliberative municipal bodies would play a purely symbolic role, excluding citizens of effective participation in decisions.

Here is the opinion of Professor Bernard Dafflon:

*«In terms of participative democracy, the production and delivery of local services in inter-communal associations means that citizens (residents, beneficiaries) cannot obtain informed and accountable answers for their questions from the local councillors about these service deliveries since the latter have no direct access to these functions.»<sup>95</sup>*

On the other hand, the merger has an initial impact, which consists in a dilution of each citizen's voice in the community. However, in the medium and long term, citizens tend to get used to the new municipality, directly participating in the political decisions. The problem seems to be somehow more «emotional» (about the feeling of belonging to a municipality, as their ancestors) than strictly political, assuming that all tools of direct democracy are preserved in the new municipality.

Moreover, seems to be clear that the argument of «closeness» of citizens to power wanes in an era of rapid technological improvement of communications, where meetings and decisions can be made in «virtual» ways.

Finally, a possible suggestion is the administrative division of the (new) municipality, similar to «districts» in which a canton can be divided (*cf.* item II.2.1). Of course, some word other than «district» would be used to designate this internal division of the municipality. Thus, for instance, for cultural and civic celebrations purposes, could be created «municipal districts» that would keep the memory of extinct municipalities, such as traditional festivals, cultural events and even specific holidays. It would be a way of respect, at least for a generation or two, the «sense of belonging» of a citizen to the municipality («wounded» by the merger), with almost no financial cost.

Does this process (of mergers and reducing the number of municipalities) would be applied to Brazil, in order to increase efficiency and achieve economies of scale?

First of all, obviously it would be necessary to reverse the fragmentation process. As seen in Chapter III, this process was suspended in 1997. This suspension, however, was a radical decision, which had other unintended consequences, such as maintaining specific distortions. The causes of the tendency towards fragmentation were not eliminated, nor the distortion in the allocation of resources for existing municipalities.

Noting the constitutional profile of the Brazilian municipality (*cf.* Chapter III), a compulsory merger is unthinkable. The path certainly seems to be **encouraging** the merger.

At this point, the reader is invited to review the table 2 (item III.2.3), showing the distribution of Brazilian municipalities by number of inhabitants. A simple change in the FPM distribution criteria

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<sup>95</sup> DAFFLON, Bernard. *Voluntary amalgamation of local governments: the Swiss debate in the European context*. In: LAGO-PENAS, Santiago, MARTINEZ-VAZQUEZ, Jorge. *The Challenge of Local Government Size: theoretical perspectives, international experience and policy reform*. Northampton: Edward Elgar Editor, 2013, p. 207.

for municipalities up to 20,000 inhabitants (which can be considered small by Brazilian standards) would reach 70% of Brazilian municipalities. It would be enough establishing more ranges, so that there is an effective proportionality, i.e., the less people had the municipality, would lower its share of the FPM.

With this simple step, not only there would be a «brake» in the process of fragmentation, but it possibly result in an incentive for mergers, since the union of two or more municipalities could achieve a more favourable range in the sharing of FPM. An additional incentive to mergers – inspired by the Swiss experience – could be a grant to united municipalities, at least during the first years after the merger. In the Swiss case, this grant is usually cantonal. In Brazil, however, due to what was seen in the previous chapters, it should be federal.

For the «other 30%» of municipalities, i.e., those with more than 20,000 inhabitants, is more important the issue of inter-municipal cooperation. Again, there is no way through **mandatory** proceedings. The municipal autonomy, deeply rooted in Brazilian political culture, necessarily lead to a **voluntary** cooperation. How could this cooperation be **encouraged?**

These municipalities have their own sources of revenue (taxes) that make them less dependent on the FPM, which, however, continued to be reasonably important in municipal finance (especially in the ranges from 20.001 to 100.000 inhabitants, covering 25% of municipalities). Therefore, the FPM could also be a solution to encourage inter-municipal cooperation. It seems to be simple including in FPM sharing formula a bonus for municipalities to participate effectively in associations. Another alternative, perhaps more efficient, it would be the transfer of a portion of the funds directly to the municipal association (consortium).

Therefore, relatively simple changes (without the need to amend the Constitution and without violating municipal autonomy) could bring greater efficiency and economies of scale for local government in Brazil.

Finally, it is necessary to devote a few words to the **democratic legitimacy** of these proposals.

The feeling of the author, after knowing the reality of the Swiss deliberative processes, is that Brazilian municipalities have enormous **autonomy**, but very little **democracy**. There is a serious mistake by many Brazilian scholars, who advocate increased autonomy to municipalities, under the sincere belief that it means more democracy. This, however, is not true. Greater autonomy for the municipality, under current conditions, is simply more power to local executives, without any impact on the participation of citizens in decisions.

Nonetheless, simply transfer the Swiss model of direct democracy for Brazilian municipalities would be an artificial measure, bumping the restrictions mentioned at the beginning of Chapter IV. Although possible, the author believes, without pessimism, that it would be a mission for several generations.

Thus, while this great change is not made, i.e., while maintaining the current situation, there is only a conclusion that the proposed measures would change nothing in the democracy *deficit* in Brazilian municipalities.

Therefore, an expected increase in efficiency and economies of scale, due to processes of inter-municipal cooperation or merger, would not have the counterpart of democracy *deficit*. This *deficit*

already exists, it is huge and processes of merger or cooperation would, after all, don't matter to the participation of citizens.

Those are some points where, in the author's opinion, the comparative method can produce some insights to be, at least, further developed.

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