The Status of French »New Communes«

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French decentralisation reform includes a reduction in the number of communes through the promotion of »new communes«. After the failures of 1959 and 1971, a new attempt started in 2010. The »new commune« is an example of a new, improved and modernized system for merging communes. It is a simpler and more flexible than the earlier system enacted in the Marcellin Law of 1971. From a modern perspective, mostly inspired by the school of the New Public Management, the merger of communes should save money and improve local public management. Legal and institutional analysis shows certain advantages and some critical points in that regard.

Key words: decentralisation – France, territorial organisation, mergers system, new commune, local public management, administrative efficiency

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1. Introduction

The French decentralization reform is extensive in scope, and includes a reduction in the number of communes through the promotion of »new communes«. It ended in adoption of a law on December 16th, 2010 (Law n°2010–1563; Verpeaux, 2011). After the failures of 1959 and 1971, this was the third French attempt to decrease the number of French communes. While some reactions are favourable, there is also resistance, in particular from within the rural population, those most directly concerned by the communal upheaval.

For its part, the socialist opposition group in the Parliament fought against the reform, especially against the creation of new communes, in the name of defending the democratic advantage in the high number of French communes. Thus, deputy Marc Dolez expressed:

> »We reaffirm our unswerving attachment to the 36,000 communes[1] of our country, because we believe that, thanks to them, the Republic has taken root in every part of the territory. The commune represents the first level of our democracy.[2] There have been 36,000 of them – and even a few more – created since the French Revolution. Indeed, it created them from parishes; there were 44,000 at the time.[3] Today there are still a few more than 36,000. Therefore, we, for our part, are profoundly attached to this particular French characteristic, that many are inclined to question. Moreover, this is the philosophy of the bill that has been presented to us: it is a matter of putting an end to what one referred to as the disintegrating communal system, while, in our opinion, having 36,000 communes and a network of 500,000 elected local representatives throughout

[1] Only 2.3 per cent of French communes have more than 10,000 inhabitants and, apart from the symbolic and historical case of communes without inhabitants, 90 per cent of them have fewer than 2,000 habitants.

[2] The decree of June 10–11, 1793 states, in Article 2, that a commune is a society of citizens united by local relations. The decree of July 17–18, 1793 eliminates all surviving feudal rights. The decree of 31 October, 1793, by which the National Convention decreed that all denominations of cities, boroughs and villages were hereby eliminated, and that of commune replaced them, standardized the vocabulary.

[3] The first text to assert the equality of treatment of towns and of the countryside was the decree of December 14 and 22,1789. This decree of the National Assembly asserted that there would be a municipality in each town, borough, parish, or country community. The towns were no longer privileged territories after the declaration of August 4, 1789 abolished their privileges.

> our territory is a considerable advantage for the Republic and for our democracy.« (Dolez, 2010).

Nonetheless, there is room for scepticism about this common notion of the »democratic richness« stemming from the profusion of French communes when an eminent legal specialist on decentralization, a former mayor himself, writes that »a certain doubt arises with respect to this certainly classic but rather idyllic depiction of local life, which, at best, is only true of the small communes« (Debouy, 2007: 323–324).

The legislative majority on the right, currently represented in the National Assembly almost exclusively by the UMP, advocates for a managerial approach to the law through the voice of deputy Dominique Perben, the Rapporteur of this law in the Assembly. According to this view, French communes are too numerous and far too poor. Thus, the merger of communes, forced or voluntary, is primarily a way to share financial, human and material resources, to provide wider and better service.

In sum, while »the addition of more poverty certainly does not create abundance« (..., nonetheless, in principle) »the movement to bring together the savings engendered by combining measures and eliminating duplication« should improve local public management of small and medium-sized French communes (Courtois, 2009: 90).

Rightly or wrongly, many think that it is in the procedure of merging communes, or more accurately, in the related omissions or complications, that we must find an explanation for the small number of mergers since 1971. Thus, they are asking for an improved system, one that is simpler and more flexible. In fact, this is what the law has given them.

Furthermore, expectations from the new measure in terms of improving public action are high, since the central government is providing financial incentives to communes interested in merging. Therefore, Articles 21 to 25 of the Law on the Reform of Territorial Municipalities aim to improve the merger of communes in France, despite the existence of a large number of structures of intermunicipal cooperation. They are now subject to Chapter III, part 2 of the General Code of Territorial Municipalities (CGCT) (Art. L. 2113-1 to L. 2113–22 CGCT). As a consequence, the »new commune« is an example of a new, improved and modernized system for merging communes.

2. An Improved System for Merging Communes

The Government's wish to replace the system for merging communes, created the Marcellin Law of July 16, 1971, with a simpler and more flexible system in terms of the procedure to create »new communes«.

2.1. A Simpler System

Apparently, the deputies, the Senate (as passed on the first reading, as is constitutionally required in France, for any proposed legislation related to local government)[4] »offered many improvements to the measure proposed in Articles 8 to 11 concerning new communes. However, they risk never coming into effect. Moreover, the conditions for creating these communes have become more problematic« ... Thus, the Law »modified the rules for creating new communes to the point of making them more restrictive than those currently governing communal mergers. Consulting the population, which was only obligatory in the initial text in the absence of unanimous agreement of municipal councils, is now required. In addition, the majority conditions required in this consultation are now considerably more demanding. The creation of a new commune presupposes that the project has been approved in each of the communes concerned, by a majority of votes cast, representing at least one quarter of registered voters in the commune and, in addition, that participation in the voting is higher than one half of the registered voters in all the communes concerned. If such conditions for mergers remain, it is likely that the new system of new communes will fail, much like that under the Marcellin Law« (Perben, 2010: 53).

The Draft Law, and then the Law, and the CGCT, have all proposed the creation of new communes as a replacement for communes and/or some establishments for intercommunal cooperation (EPCIs) with their own taxation (urban communities, agglomerations or communes) and their member communes. The new procedure, as revised by deputies and senators, concerns the initiative to create a new commune, as well as the question of the majority necessary to validate launching of the procedure by an EPCI managing its own taxation.

[4] Decision of the Constitutional Council n°2011–632 DC of June 23, 2011 relative to the Law Regarding the Number of Territorial Councillors of Each Département and Region.

1) The initiative for creating a new commune may be undertaken:

- by all the municipal councils of communes concerned (1° of Article L. 2113-2 CGCT),
- at the request of the deliberative body of an EPCI with its own powers of taxation (3° of Article L. 2113-2 CGCT), or
- on the initiative of the central government representative in the département (4° of Article L. 2113-2 CGCT).

The senators added paragraph two (2) to Article L. 2113-2 CGCT that also recognizes this initiative with at least two-thirds of the municipal councils of the commune members of an EPCI with its own powers of taxation, representing more than two thirds of their entire population.

According to the Marcellin Law, the merger of communes could be undertaken only on the initiative of adjacent communes. Subsequently, the multiplication of authorities who could launch such an initiative did not necessarily make the merger procedure any easier, as some claimed. Instead increased the chance of it being open.

2) In particular, the recognized initiative of the Prefect of the department hints at lively and contentious political games to come. This is all the more so since, by 2014, this same participant in decentralized administration of the French government is supposed to complete this intercommunality throughout France. To do so, this same territory must be indirectly redesigned; new communes must be created, to the point where they upset the *départementale*, or indeed regional, borders (Article L 2113–4 CGCT).

Therefore, one might imagine that, along with this role, there might be the use or the threat of using the power to launch the procedure to create a »new commune«, to force the most reluctant communes to integrate either in an EPCI, or in a »new commune«, in the name of an expected territorial rationalisation.

Far from procedural simplification, this new responsibility of the Prefect may, depending on the political circumstances, sound the death knell for many communal liberties in France. Indeed, the life of French communes has always been characterized by the principle of free administration of their organisation and management. Consequently, encouragement and freedom of choice should be the only principles governing the evolution of local institutional law. The risk of central government's recentralization is considerable in the matter of creating new communes.

3) The required majority (the ⅔ of municipal councillors of an EPCI with its own powers of taxation representing more than ⅔ of the population) demanded by the senators at the end of their first reading to justify the initiative of an EPCI asking for its transformation into a »new commune«, was simply deleted during the first reading by the National Assembly.

Consequently, the search for simplicity, proclaimed by the deputies, finally reflects a greater flexibility in the conditions for implementing the procedure to create »new communes«, principally when this is done on the initiative of the central government or at least of its representative in the *département*.

However, the Senate has managed to reintroduce this qualified majority. Thus, the agreement of the strengthened minimal two-thirds majority of municipal councils of communes concerned, representing more than two thirds of their total population, is now explicit in Article L. 2113-2 CGCT, as a necessary condition for the creation of a new commune on the initiative of the deliberative organ of the EPCI (3° of Article L. 2113-2 CGCT) or of the representative of the central government (4° of Article L. 2113-2 CGCT).

Nevertheless, the agreement of the municipal councils is reputed to be tacitly favourable to the expiration of a delay of three months from the date of notification in each commune concerned, from the deliberation of the decision-making body of the EPCI (for no. 3°), or from the prefectural decree determining the parameters of the future »new commune« (for no. 4°). In addition, an absolute majority is sufficient for this agreement since no specified majority has been stipulated. Then ... »a certain number« ... of communes will therefore »be obliged to merge, not because they wish to do so, but under financial pressure« (Néri, 2010). And where is the *vox populi* in this procedure of creating a »new commune«?

2.2. A More Flexible System

The creation of a new commune is characterized by democratic, as well as legal flexibility.

1) *Democratic flexibility*. According to certain deputies of the presidential majority, including deputy Perben, the procedure to create a »new commune« would become more flexible, given the elimination of the current Article L 2113-3 CGCT. The proposed law under discussion in the French legislature had proceeded with its elimination at the beginning of its ex-

amination by the National Assembly. However, the Senate reintroduced it. Article L. 2113-3 CGCT requires a consultation of the populations affected by the plan to create new communes. Nevertheless, compared to the original text, the text today is less rigid, concerning both the field of application of the consultation foreseen in the process of creating the new commune, and the majority required in consulting the population in order for the project to proceed. Of course, the consultation affects issuing a regular prefectural decree, but the conditions to obtain it make it more problematic.

Thus, it is only organized when the demand for the creation of a new commune is not the fruit of consensual discussions among municipal councils of the communes concerned (paragraph 1, Article L. 2113-3 CGCT). Furthermore, this formulation gives the disagreeable impression that recourse to local consultative democracy is presented as a punishment for local elected officials incapable of reaching agreement on the future of the intercommunal territory.

Similarly, the majority required for the consultation to allow the enactment of the prefectural decree to proceed is the absolute majority of votes cast (knowing that the participation can only be taken into account if it involves at least half the registered voters), corresponding to the number of votes equal to at least a quarter of registered voters (paragraph 2, Article L. 2113-3 CGCT).

The Marcellin Law of 1971 created a merger system based on free choice and democracy – no merger without obligatory consultation, and no merger of a commune whose inhabitants massively refused. This sometimes tied the hands of the prefect.[5]

The newly proclaimed democratic flexibility, for its part, signals a certain decline in local participatory democracy. How can we refer to flexibility when we prevent people even form giving their opinion on the subject of what will become of their territory, of its boundaries, in a word, of their territorial future? Is this how French politics plans to reconcile the electors with the political game?

2) *Legal flexibility*. Fortunately, legal flexibility has arrived, too. Apart from its creation, the new commune has also brought along the suppression of the EPCI or the communes that it is intended to replace.

[5] CE October 20, 2010, Commune de Dunkerque, req. n°306.643, AJDA 2010, n°36, p. 2023 (obs. M.-C. de Montecler).

The new commune is a double local authority (therefore, a moral person in public law) since, on the one hand, Article L. 2113-10, paragraph 2, CGCT bestows on it the status of a local authority, and, on the other, Article L. 2113-1 CGCT subjects it to the rules applicable to communes and reattaches it to the second part of the Code affecting the latter.

Therefore, according to the terms of Article L 2113-5 CGCT, the new commune logically acquires the rights and obligations of the former EPCI, and takes responsibility for all the legal acts, unilateral or contractual, undertaken by the latter. It also takes possession of all its financial, material and human assets. In terms of Section IV of the same Article, only the prefect of the department can decide on a different devolution of all or part of the goods and rights normally acquired by the new commune. This sadly reminds of the unfavourable impression of recentralisation pervasive throughout the renovation of the system of the merger of communes.

Nonetheless, after tackling the reorganisation arising from the French communal and intercommunal landscape, which revealed its limitations dating back to the French Revolution, it might be time to shift to another more authoritarian, and thus more centralized, form of management, to attain communal, or ultimately intercommunal organisational efficacy. Contrary to appearances, the system of communal mergers, reformed by the Law of December 16th, 2010, has not been without its critics. Therefore, it remains to be seen whether it meets the objectives of modernity, theoretically imputed to it.

3. A Modern System of Communal Mergers

From a modern perspective, mostly inspired by the school of New Public Management, the merger of communes should save money and improve local public management. Simply put, it should make the latter more efficient, even if this is spurred by financial incentives.

3.1. A More Efficient System

While the merger of communes through the development of new communes is a solution designed to increase the efficacy of public action, it remains to be seen whether this objective is attainable. A balanced assessment is all the more challenging, given that the maintenance of »del-

egated or associated« communes is not a measure of the efficiency of French administrative organisation, especially since the new communes do not have a mandate to eliminate the EPCIs to which the communes affected will belong.

1) Does the system of new communes respond to a democratic demand for greater administrative efficiency? »For a long time, public authorities have been concerned about this communal explosion, which means both an advantage due to its proximity and the creation of a network on the territory, and a loss of efficiency due to its draining of resources. Indeed, numerous small communes lack the necessary capacity to manage community« (Courtois, 2009: 84).

The Marcellin Law of 1971 on Mergers of Communes was a complete failure. Thus, from 1971 to 1995, there were 912 mergers of communes, affecting 1,308 communes and 151 demergers. Finally, only 1,097 communes were merged out of the 1,308. During the period 1996–2009, only 31 mergers were recorded for 35 communes involved. At the macro level, France had 38,800 communes in 1950 and 36,686 on 1st January 2009.

Certainly, a number of states in the European Union, often the larger ones, managed to merge their communes. Between 1950 and 2007, Germany went from 14,338 to 8,414 (a decline of 41 per cent), Austria went from 4,039 to 2,357 (a drop of 42 per cent), Belgium went from 2,359 to 596 (a decline of 75 per cent), Denmark went from 1,387 to 277 (down by 80 per cent), the United Kingdom went from 1,118 to 238 (a decrease of 79 per cent), and Sweden from 2,281 to 290 (a decline of 87 per cent). Only Spain had a smaller decline of 12 per cent (from 9,214 to 8,111 communes).

Meanwhile, some European countries experienced an increase in the number of communes. This was true of Italy, up 4 per cent (7,781 to 8,101 communes), and the Czech Republic. In 1989, there were 3,527 communes on the Czech territory while on January 1st, 1994, the Minister of the Interior registered 6,243. More than 96 per cent of Czech communes had fewer than 5,000 inhabitants.

Yet, the history of the practice of mergers under the Marcellin Law, whether simple or through associations, does not bode well for the success of the new commune formula or for attaining its principal and implicit objective, greater administrative efficiency. Furthermore, all the people met by the Senate Rapporteur Courtois expressed the same sceptical attitude towards the measures concerning the new commune (Courtois, 2009: 90).

2) Is the maintenance of the associated communes and EPCIs an indicator of organisational efficiency? Can the new commune conserve the old communes in the form of »delegated communes«, as the new Section 2 of the future Chapter 3 (Communes nouvelles) Section 1, Book 1 of the 2nd Part of the CGCT (Articles L 2113-10 to 19 CGCT) proclaims?

The new commune could keep some territories instead of associated communes:

- with a council of the delegated commune,
- a mayor of the designated commune, along with deputy-mayors,
- and a »city hall annex« where residents of the designated commune could take care of their local affairs, an excellent neighbourhood service.

The mayor of the designated territory will be an officer of the state and of the police. In short, all the symbols of the commune are maintained but in a delegated fashion. In the absence of precision, everything leads to conclusion that only the central commune, the »new commune«, has legal authority in public law and that it is the sole legal actor recognized on the communal territory.

Consequently, the delegated commune within the new commune is merely a decentralized communal administration on the territory of the central commune. The delegated commune will only exist and take action within the legal entity of the new commune, only under the strict control of communal institutions of the central commune. The development of the delegated commune within the new commune today called the »associated commune« is quite similar to the Lithuanian system of communal neighbourhood administrations. In administering the local neighbourhood, the delegated commune may still risk confusing the French citizens who are attempting to understand communal organisation.

This is all the more so since the new French commune might be much more modest in size than the Lithuanian commune, which really reflects decentralized administration at its best, working efficiently in the daily lives of Lithuanian citizens.

Thus, and in all respects, the expected efficiency, in terms of local public management of the new commune, may well prove disappointing. Yet, what local public management may lose, local neighbourhood democracy might preserve, especially since financial incentives to reach that point no longer exist, since the first reading in the National Assembly.

3.2. A More Encouraging System

The draft law included Article L 2113-21 CGCT that envisaged a financial incentive paid by the central government to the new communes.

»The draft law envisaged a financial mechanism to encourage the merger through the creation of a new grant. This particular grant was equal to 5 per cent of the amount of the inclusive grant received by the new commune in the year of its creation and would later increase along with its share of the average rate of the DGF. However, to avoid a windfall effect, Article 8 limits the eligibility for this particular grant: it will not be given to new communes merging again within 10 years after the first merger. Yet the »new« new commune naturally still benefits from this particular grant acquired previously ... The particular grant of 5% of inclusive subsidies has drawn a great deal of criticism. For some, such as the national union of general directors of local authorities of France, overheard by your reporter, »the incentive risks being insufficient«. They would have preferred a more attractive measure. For others, this enhanced grant that will be calculated based on the total amount attributed to communities and communes will penalize other local authorities. The AMF observes that this advantage created to benefit member communes is not justified with respect to EPCIs with their own taxation. This is why, following Ms. Jacqueline Gourault's proposal, your committee has eliminated an increase in the annual inclusive subsidy of new communes. Your legal committee has adopted Article 8 thus revised« (Courtois, 2009: 89, 91).

»At the initiative of its legal committee, the Senate has (therefore) eliminated the permanent financial incentive described in Article 8, essentially for the reason that it would lead to a decrease in the resources available for the DGF of other communities in the »communal bloc«. This elimination is, nonetheless, partially counterbalanced by the introduction, at the initiative of the finance committee of the Senate, of a guarantee in perpetuity of receipt of the Rural Solidarity Grant (RSG) by those communes that received it before the creation of the new commune« (Perben, 2010: 53).

Despite this remark, the National Assembly did not reintroduce this financial incentive because the creation of the new commune comes along with other financial advantages. Therefore, the latter will benefit from the entire operating grant of all the communes which have thus merged (Article L 2113-21), as well as all of the fiscal potential of each of the latter (Article L 2113-21) or the rural solidarity grant (Article L 2113-22 CGCT).

In the absence of any financial incentive (a new and specific budgetary allocation for the new commune) it remains to be determined whether the new form communal merger is worth the "financial pain" for the communes concerned. Even if in France, for constitutional reasons, taxes must be created by law, local authorities enjoy a certain visibility, and especially stability, in terms of the fiscal resources they receive from the central government. This is because independence is meaningless if it is merely administrative. This is especially the case given that the complexity and fiscal inequities at the local level in France are increasingly subject to criticism, by both local elected officials and the population itself.

Furthermore, equalization mechanisms among local communities are flawed (Krattinger and Gourault, 2009: 144–146). Therefore, in all respects, they must be reformed (Dauphin, 2009: 866-871). This is what the central government determined to do with the 2011 Financial Law in an extension of the legislative reform of December 16th, 2010 (Dallier et al., 2011). This makes the future Article L 2113-23 CGCT less of an incentive, given that the new communes are eligible for communal equalization grants according to common law conditions.

4. Conclusion: A New Commune or a Doomed Commune?

Finally, what this law, and thereby the status of the new commune, will perhaps not manage to achieve, is to reform the culture and history of French communal liberties. The proclaimed success or failure of the new commune provides ample material for a comparative study of the local systems within the European Union, specifically for the Committee of Regions. The main lesson is perhaps that local people live closer to the land and that they address the people of the state directly; consequently, a single local model is unrealistic in all respects. As for identical uniform solutions, it is time we stopped dreaming in Technicolor.

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THE STATUS OF FRENCH »NEW COMMUNES«

Summary

French decentralisation reform includes a reduction in the number of communes (36,686 on January 1st, 2009), through the promotion of »new communes«. After the failures of 1959 and 1971, a new attempt started in 2010. The "new commune" is an example of a new, improved, and modernized system for merging communes. It is a simpler and more flexible than the earlier system enacted in the Marcellin Law of 1971. From a modern perspective, mostly inspired by the school of the New Public Management, the merger of communes should save money and improve local public management. Legal and institutional analysis shows certain advantages and some critical points in that regard. The maintenance of "delegated or associated" communes is not a measure of the efficiency of French administrative organisation; especially since the new communes do not have a mandate to eliminate the establishments for intercommunal cooperation (EPCIs) to which the communes concerned will belong. The absence of any financial incentive in case of merger does not add much to the attractiveness of territorial mergers.

Key words: *decentralisation – France, territorial organisation, mergers system, new commune, local public management, administrative efficiency*

STATUS FRANCUSKIH »NOVIH OPĆINA«

Sažetak

Decentralizacija u Francuskoj uključuje smanjivanje broja općina kojih je 1. siječnja 2009. bilo 36.686. Nakon neuspješnih pokušaja iz 1959. i 1971. novi pokušaj je započeo 2010. »Nova općina« je primjer novog, poboljšanog i moderniziranog sustava spajanja općina. Taj je sustav jednostavniji i fleksibilniji od ranijeg koji je bio utemeljen Marcellinovim zakonom iz 1971. Gledajući s moderne perspektive inspirirane školom novog javnog menadžmenta, spajanje općina trebalo bi dovesti do financijskih ušteda i poboljšanja u lokalnom javnom upravljanju. Pravna i institucionalna analiza pokazuje određene prednosti, ali i neke kritične točke u ostvarenju tih namjera. Zadržavanje delegiranih ili pridruženih općina nije mjera koja bi pridonijela efikasnosti francuske upravne organizacije, posebno budući da nove općine nemaju ovlast ukinuti oblike međuopćinske suradnje kojima će pripadati. Nepostojanje financijske motivacije u slučaju spajanja ne čini teritorijalno spajanje privlačnijim.

Ključne riječi: *decentralizacija – Francuska, teritorijalna organizacija, sustav spajanja, nova općina, lokalno javno upravljanje, upravna efikasnost*