INFORME

PATTERNS OF CONSTITUTIONAL REFORM CONCERNING FEDERAL STRUCTURES [1]

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Federal systems need constitutional norms in order to regulate the vertical division of power and the relationship among levels of government. Usually, federal constitutions have to cope with difficulties resulting from the multi-level-dynamics of federal political systems. In a compounded system, where the distribution of power, rights and resources is constantly threatened because national as well as sub-national actors struggle to extend their competences, thus inducing centripetal or centrifugal dynamics, a similarly stable and flexible constitution is a necessary safeguard for federal endurance. However, it seems comprehensible that federal constitutions find themselves sometimes in a dilemma of stability and flexibility. On the one hand, constitutional stability needs to be protected against to easy change which may occur from power shifts between governments at different levels. Therefore, federal constitutions are usually protected by special rules of amendment defining qualified majorities and establishing veto players. On the other hand, it is necessary to adjust constitutional rules if changing economic, social or cultural conditions require it. Thus, constitutional norms are under regular need for adaption, because an overly rigid constitution may endanger the stability of the federation in the long run. But in the light of the institutional obstacles mentioned above, constitutional reform will always be difficult to achieve.

The research project presented here examines twelve cases of constitutional reform in nine Western democracies. We consider as federal structure every organisation of the state with a guaranteed division of competences between central government and a second tier of authority. Federal reforms aim at the rearrangement of territorial organisation as well as the redistribution of power and resources on the different levels of government. As a federal reform we understand explicit reform processes in the sense that reform commissions or conventions were established to elaborate reform proposals which have to be passed according to the formal rules of constitutional amendment. Eventually we concentrate on reform processes which took place within the last 20 years.[3]

In the subsequent sections I like to present some preliminary research findings. I shall concentrate first on the definition of typical constitutional problems; secondly, the necessity to draw a clear distinction between negotiation and ratification of reform proposals will be emphasized; thirdly, the conditions of successful reform negotiations will be discussed. I will conclude with some deliberations on further research perspectives.

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3. We selected the following cases of reform: Austria, Constitutional Convention (2003-2005); Belgium, State Reform (2000-2001); Canada, Charlottetown Accord (1992); France, Decentralization Act II (2002-2003); Germany, Federalism Reform I (2003-2006); Germany, Federalism Reform II (2007-2009); Italy, Reform of Title V of the Constitution (2001/2005); Switzerland, Re-organisation of Fiscal Equalization Schemes and the Assignment of Tasks and Competencies to the Federal and Cantonal Levels (1994-2008); Spain, reform of the Statute of Catalonia (2006); Spain, reform of the Statute of Andalusia (2007); United Kingdom, Scotland Devolution (1998); and United Kingdom, Wales Devolution (1998).

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Defining constitutional problems

Three types of constitutional problems regularly occur in federations and federalizing systems. Problems of *effectiveness* arise in systems of joint decision making where the arena of federal policy-making is prone to political deadlock. Structures of power sharing and power entanglement might reinforce, so that effective governing will be inhibited. Problems of *centralisation* point to an inherent imbalance between central and regional authorities. The ability of the political system to solve problems and its capacity to accommodate conflicts between governmental levels might be subverted. Finally, problems of *integration* are typical in divided societies. Assertive regions with autonomy movements might jeopardize the stability of the state if they provoke disproportionate shifts of power. Otherwise, regional assertiveness might be misused by central authorities for the justification of the tightening of central control.

All problem types make for a de-stabilisation of the constitutional order, which has to be remedied by the means of appropriate constitutional reforms. Even though problem types intersect and superimpose each other in reality, we can distinguish constitutional reform processes due to the dominant problem. Depending on the dominant problem, reforms are intended to decentralise power and resources, to strengthen integration of the system, or to improve the effectiveness of government. The German Federalism Reform I for example followed a widespread perception of a counterproductive allocation of competences and finances, even vertically between the central and the regional level, and horizontally among the *Länder*. Therefore, effectiveness can be detected as the dominant constitutional problem.

Negotiation and ratification

Current research on constitutional reform particularly emphasizes the formal success of reforms. A reform is regarded successful if a legislative act has been passed and ratified. Formal success, however, does not tell much about the solution of constitutional problems in general and especially about the quality of negotiation results. Thus, a distinction between successful negotiations and successful formal ratification shall be appropriate. The success of reform negotiations can be assessed by at least two aspects. First, results of a constitutional reform have to be contrasted with the dominant constitutional problem. A reform can be regarded as success, if it restores a temporary equilibrium and thus stabilizes the federal system. Secondly, a comparison between the results of the reform and the tasks of the reform agenda will highlight whether reform tasks have been fulfilled or not. Large deviations between the agenda and the decision proposal suggest the inability to find a consensus on those topics that were intended to be reformed. Applying both criteria, we can distinguish between effective and ineffective negotiations. In a second step we can asses the formal ratification of reform proposals. Both dimensions can be included in a four-field table (with examples):

	Ratification	*failed ratification*
Effective negotiations	**Successful constitutional reform** Switzerland: New Fiscal Equalization Scheme 2005	**Missed constitutional reform** Canada: Charlottetown Accord 1992
Ineffective negotiations	**Flawed constitutional Reform** Germany: Reform of Federalism 2006/2009	**Failed constitutional reform** Austria: Austrian Convention 2003-2005

A first preliminary result points to the fact that successful negotiations and successful ratification not always convene. On the one hand, we can observe the ratification of flawed negotiation results, if negotiation and ratification are dominated by the same group of actors. This happened for example in the German Federalism Reform, where

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after a short phase of open communication negotiations quickly turned into usual bargaining between representatives of the federal and the *Länder* governments. The modes of interaction differed only slightly from those of normal politics. Institutionalized bargaining led to the exclusion of crucial questions, like the fiscal constitution, and to an agreement on the lowest common denominator of the actor's particular interests. On the other hand, effective negotiations might subsequently fail to reach formal ratification. The Canadian Charlottetown Accord for example based on the inclusion of a multitude of societal actors and open discussions. Negotiations took place in structures clearly differing from those of normal policy-making, and the broad direction of the reform was determined in a pluralistic process. Intergovernmental negotiations eventually serve to shape the concrete reform proposal but largely followed the intentions of public deliberation. Notwithstanding the inclusion of civil society at the stages of agenda setting and policy formulation, ratification failed in a national referendum. Negotiation and ratification were just loosely coupled in the Charlottetown process. This facilitated the problem orientation of negotiations, which took not exclusively the course of bargaining. But the decision of the citizens in the referendum could not be anticipated sufficiently. Similar challenges occur for example if many regional parliaments have to ratify and if different coalitions of regional parties need to make a decision.

The differentiation between negotiation and ratification points to the insufficiency of common variables employed in the analysis of formal constitutional reform. Particularly the aspect of constitutional rigidity accounts for hurdles of ratification, but does not contribute much to the explanation of successful negotiations. In the subsequent section I shall concentrate on conditions of successful negotiations, whereas the research project examines both, negotiation and ratification.

Conditions of successful negotiations

On the basis of our case studies we are able to identify some crucial conditions of successful negotiation. Thereby, we can distinguish procedural from rather external factors. One important aspect is the differentiation between arenas of constitutional and normal politics. The degree of problem solving in constitutional reform processes depend on an agreement about underlying norms. Therefore, actors are summoned to abandon day-to-day interest conflicts while referring to general principles. If negotiations take place in committees of intergovernmental or parliamentary institutions negotiations are prone to turn right from the beginning into a process of bargaining. Delegates are then identified by other members of such committees as agents standing for a particular position. They are expected to be committed to their parties and each negotiator expects nothing else as bargaining tactics of the other side. The Austrian Constitutional Convention for example suffered from the competitive nature of party politics, because the members acted as agents of parties. Due to the increasing confrontation of political parties, the Convention consequentially failed and concluded without presenting a reform proposal.

The quality of negotiations is affected further by the inclusion of civil society or consocial actors. It seems obvious that the participation of societal actors might countervail the institutional self-interests represented by intergovernmental and parliamentarian actors, who often restrict themselves to defending power and resources. Just as well, the consultation of independent experts might strengthen consensual orientations during negotiations.

Within negotiations we can distinguish two dimensions of process differentiation: *horizontal differentiation* describes processes where negotiations move through different stages including different kinds of actors at each stage. In case of the new fiscal equalization scheme in Switzerland agenda setting took place in the executive arena, where civil servants from the federal and the cantonal level closely co-operated with experts.

Then, politicians negotiated the proposal with representatives of interest groups opening up negotiations to the consocial arena. Finally, the constitutional proposal has been fixed in the parliamentary arena by both houses of the Swiss parliament. In the Swiss case, horizontal differentiation was similarly connected to the principle of *sequential differentiation*. The first sequence exclusively concerned the common understanding of problems, the conceptual framework of reform, and guiding principles. Details of implementation where negotiated in a second sequence within these framework and in the light of the stipulated principles.

At last, the prospects of successful negotiations are influenced by external factors facilitating or constraining consensus. Negotiations under the pressure of time might breed bargaining, premature compromises or poorly conceived package-dealing. Economic, social or external crises can similarly influence negotiations according to shifting preferences of actors or diminished opportunities. The economic big picture is also important for the fate of negotiations. A relaxed budgetary situation establishes a leeway for compensation payments in favour of economically weak actors, while tough financial conditions narrow the scope of alternatives and trigger self-serving orientations among negotiators.

Research perspectives

One essential insight at the current stage of research concerns the importance of multicausality. Even though we are able to identify important factors of explanation on the basis of the case-studies, obviously no single factor explains the success of constitutional negotiations by itself. Thus, it seems appropriate to put the factors mentioned above under more systematic scrutiny by means of configurative comparative analysis. Such research has to meet the subsequent purposes: first, it has to examine whether there are common patterns of negotiation success among all cases. Secondly, if we cannot detect such common patterns we are required to differentiate subgroups of cases probably distinguished by the underlying constitutional problems. And finally, we attempt to identify necessary and sufficient conditions of successful reform negotiations.

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