CHANGING FEDERAL CONSTITUTIONS

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ISBN:

Occasional Paper Series Number 8
Changing Federal Constitutions
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Abstract

Constitutional change can occur through constitutional amendments or through constitutional evolution. Constitutional amendments take place in three phases: initiation, negotiation and ratification. Initiators – usually governments or political leaders – most often initiate reform, but pressure to do so may come from the regions or from civil society.

When federal or federalizing countries negotiate constitutional change, representatives from the central government and the regions are most often involved, but individual actors – experts, members of parliament, civil servants and civil society representatives can come from any order of government. Arenas of negotiation can be committees, commissions, conferences or conventions. Different types of bargaining and arguing can also influence the negotiations positively or negatively. Whether negotiations happen in public or private can influence the outcome, as to when certain actors join the negotiations process (someone left out until the end can feel that the "deck was stacked against them.")

Many processes of constitutional amendment go well until the ratification phase. There, an amendment could fail by losing a ballot-box referendum or by a veto cast against it by a member of a regional legislature. Yet even a failed constitutional amendment can provide "leftovers" that could be used in constitutional evolution by the passing of ordinary laws, setting of policies and the conclusion of agreements among different orders to government.

Keywords: constitution, amendment, federalism, decentralization, negotiation, ratification, Germany, Italy, Canada, France, Spain, UK, Belgium

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ARTHUR BENZ AND FELIX KNÜPLING

During the past three decades, two simultaneous processes have been taking place in nearly every country in the world: globalization and regionalization. These two processes have called for a reform of the territorial organization of many countries. Consequently, constitutional reforms have begun in a number of countries and some of these reforms have successfully made it through the ratification process. Discussions about constitutional change are ongoing, and further reforms will be necessary.

Constitutions are at the core of the organization of a state. Or, as Alan Tarr writes, "a constitution embodies a society's fundamental choices about government" (Tarr, 2005: 8). The constitution provides the basic framework and states the principles of a country. A constitution can be symbolically important in fostering unity or conflict within the country. In federations, written constitutions are essential to establish the framework within which each order of government operates.

The aim of this paper is to discuss constitutional reforms in federal and decentralizing countries from a comparative perspective in order to identify structures, processes and strategies which have proven to be indispensable for successful constitutional amendment.[1] Thereby, we seek to enable public officials, scholars, and students to learn from the constitutional reform experiences of other federal democracies by giving practical suggestions how future reforms could be designed.

The paper covers, among others, more or less recent constitutional changes in nine countries of which six countries are federal (Austria, Belgium, Canada, Germany, Switzerland and Spain) and three countries that are in a process of either federalization (Italy), devolution (UK) or decentralization/regionalization (France). Case studies include:

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1. This paper is a revised version of the concluding chapter in Benz, Arthur & Knüpling, Felix (eds.), *2012, Changing Federal Constitutions: Lessons from International Comparison,* Barabara Budrich. The book is based on the research project "Patterns of Federal Constitutional Reform" which was carried out at the FernUniversität in Hagen and the Technische Universität Darmstadt. It was funded by the German Research Foundation (DFG). The research was also supported by the Bundesrat and the Forum of Federations.

Austria: The Austria Convention (2003-2005)
Belgium: The state reform in 1999-2001
Canada: The Charlottetown Accord (1992)
France: Decentralisation Reforms in 2003 and 2008
Germany: Federalism Reform I and II (2003-2009)
Italy: The 2001 and 2006 reforms on Federalization
Switzerland: New Fiscal Equalisation Scheme (1991-2004)
Spain: Reforms of Autonomy Statutes in Catalonia and Andalusia and responses at the national level
UK: Devolution since 1997

Processes of constitutional reform can vary widely from one federal or decentralized country to another. Centralized, unitary states are confronted by different problems compared than those of decentralized or federal states. Multinational states face other challenges compared to mono-national states. In addition, federal systems with severe economic disparities are under higher pressure and constraints than economically balanced states.

Nevertheless, variety does not prevent us from drawing conclusions or learning lessons, as long as we use qualitative rather than quantitative methods of comparison. Both decentralized unitary and federal systems have to cope with the challenge of multilevel governance. All countries covered in this paper had to change federal or regional aspects of their constitution. Regardless of the formal rules for amendments and the types of changes, powerful actors with competing interests dominate processes of politics, either formally or informally. In unitary states as in federal countries, central governments and parliaments have to consider regional actors such as governments, parliaments, parties or organized civil society. In constitutional policy affecting the territorial organization of a state, joint decision making, i.e. the need to negotiated agreements among many actors from different levels and constituent units of a state, is the rule rather than the exception regardless of how multilevel governments work in other policy fields (Benz, 2011). Hence, we try to analyse which types of constitutional change governments have invented and applied and under which conditions particular types of policy-making succeed or fail.

Who takes the initiative and who sets the agenda?

It is usually governments that initiate constitutional reforms, even if other actors may have the formal power to do so (Kaltenborn, *2012*). By putting a constitutional amendment on the agenda, a government may respond to public debates or demands from political parties, experts or interest organizations. As a rule, however, it is governments

and leaders of parliamentary parties who set out the process of constitutional amendment and define the program of a reform.

When a constitutional change is initiated, it does make a difference whether the agenda is set by the central level, by the regional level or jointly. Reforms seem to be more successful if representatives from both levels co-operate as early as possible and define a common agenda. However, as it happened in Austria and Germany, such an agenda may include too many issues if governments cannot agree on what is feasible and instead present a "shopping list" of issues. Such a list may pave the way for package deals in negotiations, but can also end in a process overloaded with details. Here, the Swiss reform succeeded due to a clear, coherent agenda that provided guide-lines for negotiations. Moreover, a clear commitment of governments to amend the constitution, especially by the central or federal government, seems to be a necessary requirement.

Pressure from the regions can induce the central government to take the lead and initiate a reform, as was the case in Canada, Germany and the UK. Where this pressure stems from parties in regional governments claiming to represent distinct nations, reform processes tend towards asymmetric change, that is, giving different regions different powers. Canada, Spain and also the UK are cases in point.

Negotiating a constitutional change

The substance of constitutional reforms is determined in negotiation over draft bills. During negotiations, new issues can be put onto the agenda and others can be excluded. Nevertheless, actors initiating a reform have significant power to define which issues are addressed and which are excluded. Yet at the end, they need the agreement of participants in negotiation processes, while those involved in ratification are limited to voting yes or no. For this reason constitutional negotiations are highly relevant in a reform. Here, conflicts over the nature of a federal system and its multilevel structure and on the redistribution of power and resources among governments have to be dealt with.

Patterns for constitutional negotiations vary to a considerable degree, not only between countries but also between different reforms in the same country. Rules for constitutional amendment rarely define who should participate in negotiations, how the process is organized and how agreements are settled. Instead, these factors are influenced by organization of government in general, political cultures and conventions or strategies of governments. The features of constitutional negotiations relevant for success or failure of a reform are set out below.

Who gets to sit at the table?

First, the *inclusion or exclusion of representatives* participating in negotiations is of crucial importance. The literature usually lists participants as members of committees or constitutional conventions or assemblies (Elster, 1995; McWhinney, 1981: 27-36). The case studies in Benz and Knüpling, 2012, lead us to add two more types: commissions and conferences. These four basic types can be characterized as follows:

- *Committees* are established either by parliaments or by executives. In the first instance, they include members selected by parties in parliament, usually in proportion to the number of their seats. In the second case, civil servants and experts from central and regional governments elaborate a constitutional reform. Parliamentary committees often negotiate on constitutional amendments. Executive committees may be created to de-politicize negotiations. They prepare proposals for amendments and thereby define the agenda for legislation, before political parties or governments formulate their positions.
- *Commissions* include members from parliament and government. In Germany a commission used in constitutional negotiations reflected the structure of the legislature, while in Belgium it mirrored the strong role of political parties in parliament and government. Commissions are usually de facto mirrors of the lines of conflicts in the legislature.
- *Conferences* are meetings of members of governments. This category stands for an intergovernmental mode of negotiations that we often find in federal systems. In Canada, it was used to finally negotiate the Charlottetown Accord. In Switzerland, intergovernmental conferences guided and controlled the work of a committee of experts.
- Conventions constitute more inclusive negotiations. In addition to representatives of parliaments and governments from the different levels, civil society organizations are invited to participate. While usually recommended for constitution-making, conventions are rare for constitutional amendment. Austria and Scotland used this form. Conventions extend the number of actors with different interests involved in negotiations and raise expectations for reform.

Table 1: Varieties of constitutional negotiation bodies

	Parliaments	Governments	Civil Society
Committee	Canada, France	Italy, Switzerland	
Commission	Belgium, Germany		
Conference		Canada, Switzerland	
Convention	Austria, Scotland		

As table 1 shows, different types of constitutional negotiations can be combined in a reform process. This was the case in Canada and in Switzerland where negotiations took place in different forms and where they had been opened to participation of civil society organisations and – in Canada – to individual citizens.

Modes of negotiation

The type of organization selected for preparing proposed amendments influences the mode of negotiation. According to theories of negotiations, we can distinguish between *distributive bargaining, integrative bargaining* and *arguing* (Benz, 2007). In *distributive bargaining,* actors pursue their individual interests, stick to their negotiation positions and try to achieve their claims as best as possible. Typically, these negotiations end up with package deals allowing each side to win in one issue area by exchanging concessions on others. *Integrative bargaining* is defined by similar behaviour of actors but here they are willing to make mutual concessions on an issue in order to come to a compromise. If actors negotiate in the *arguing* mode, they aim at a consensus.

In reforms to the multilevel organization of a country, governments and parties tend towards redistributive bargaining, whereas experts from the executive or from the academic sector and representatives of civil society organization are more likely to search for compromises or negotiate in the arguing mode. This would mean that commissions and conferences tend towards distributive bargaining and committees and conventions support integrative bargaining or arguing. However, such a conclusion is not supported by empirical evidence.

Using different structures for negotiations

The case studies covered in this paper reveal another significant feature of constitutional negotiation. Seldom do negotiations take place only in plenary meetings of the different types. Consequently, different modes of negotiation emerge in the specific arenas.

The following lines of differentiation seem to be particularly important:

Along *sectoral* lines, arenas of constitutional negotiations are regularly divided into sub-committees. They are set up to work on specific matters and to elaborate specific final proposals. Sub-committees often aim at compromises.

When considering *membership,* negotiations can be differentiated into arenas with different types of actors. In Canada and Switzerland we find parliamentary committees as well as conferences of regional government leaders. This separation of particular groups of actors allows for different modes of negotiation to emerge. In contrast, if a plurality of actors come together in commissions or conventions, political party orientations or interests of governments are likely to prevail in processes of distributive bargaining.

Moreover, the *territorial* structures of a country can be reflected in constitutional negotiations. Actors can form coalitions of central/federal or of regional representatives. In Germany, for instance, the *Länder* governments coordinated their positions in the negotiations on a modernization of the federal systems in separate meetings before the commission met in plenary. Processes of negotiations can be also organized both at the central/federal level and at the regional level (see Nadia Verrelli, 2012, for Canada). Moreover, regional interests can be included in symmetric or asymmetric ways. The second alternative can be found in the UK, where distinct processes of constitutional change were organized for Scotland, Wales and Northern Ireland (see Mitchell, 2012). A territorial structure of negotiations can reinforce distributive bargaining, but at the same time it reduces the complexity of conflicts making them better manageable in package deals (for example, see Hofmann, 2012).

A further aspect distinguishing patterns of constitutional negotiations has to do with the role of *experts*. Experts have been included in all major reforms in federal or federalizing systems. They can be member of committees, commissions or conventions, but usually not of intergovernmental conferences. More often than not, they participate in hearings or provide expertise on particular issues. Experts can come from the academic sector, from departments of central or regional governments, or from private interest organizations.

As the case studies above indicate, experts are more influential if they can informally but continuously communicate with participants in negotiations. Moreover, they are better able to contribute in sub-organizations than in official negotiation arenas where they compete with politicians for attention of media.

While political *leadership* is important in constitutional negotiations, it is rare to find heads of governments who engage in constitutional reforms in federal systems. Pierre Trudeau, who in the early 1980s

fought for the "patriation" of the Canadian constitution, and Tony Blair, who started with an ambitious reform agenda including devolution of the United Kingdom, were exceptions. In constitutional negotiations, ministers or leading members of political parties chair the meetings and moderate processes. They play an important role in managing political conflicts, especially in final stages of the process. In earlier stages, they initiate, organize and coordinate the work of different groups. Chairpersons in constitutional negotiations need both political skills and management capacities in form of an effective secretariat. Their effective power largely depends on a combination of neutrality and competence in constitutional law.

Changing the processes of negotiation

Beyond the differentiation of structures, patterns of constitutional negotiations can also be distinguished according to *particular features of processes*. Three deserve mentioning:

- First, negotiating bodies can meet in *public or private*. Commissions and especially conventions are usually open to the public, whereas committees and conferences most often hold closed sessions. Negotiations can alternate between public and private meetings in the course of the reform process. For example, the new system of "new fiscal equalization" in Switzerland was increasingly opened to the public with the consequence that debates became more specific and interest groups or citizens could respond to amendment proposals (Freiburghaus 2012). The German commission excluded the public when it dealt with fiscal issues. However, the effect of public negotiations depends on the context. It seems to be necessary to open processes to the public in the very early stage of a reform, be it in form of a convention (as in Scotland) or parliamentary committees consulting with citizens (as in Canada).
- Second, different processes have different timetables. Negotiations organized in various arenas can proceed simultaneously or sequentially. Usually we find a sequence of plenary meetings, followed by work in sub-committees, and final discussion and decision in the plenary. Therefore, a reform that takes place in several steps, as described by Anton Hofmannfor Germany (Hofmann, 2012), has some advantages. However, splitting up negotiations on the reallocation of powers and negotiations on financial issues allows participants to postpone controversial matters to a later stage, with the consequence that a constitutional reform likely ends as an unfinished project. The Swiss experience with a sequential organization of the reform seems to be more promising. Here, the

principles of the reform were negotiated and decided in a first stage, with the further process being concentrated on the implementation of these principles.

- Third, negotiations are often supplemented by consultation with interest organizations or citizens. While negotiations aim at an agreement, consultations are about the gathering ideas and opinions or about convincing citizens. In Canada, the Charlottetown process provides an instructive example of various ways to consult with citizens or associations. Here, the government organized conferences and invited citizens to issue opinions either by mail or telephone. However, as a number of studies has revealed (Kincaid and Cole, 2011), citizens and their representatives in associations often issue ambivalent opinions on territorial structures of a political system. While demanding decentralization in general, they often argue for centralization when it comes to powers favourable to their particular interests, or against it when it does not favour them.

Making negotiations effective

As Keith Banting and Richard Simeon once wrote, "constitution-making is a continuation of politics by other means; it involves not a radical break but an extension and often an intensification of normal processes" (Banting and Simeon, 1985: 17). In constitutional change, this often implies that negotiations hardly differ from usual patterns of politics and policy making. As a consequence, distributive bargaining between parties or actors in intergovernmental relations prevails, and more often than not, these actors are more interested in their day-to-day affairs than in constitutional rules.

In federal and regionalized states, such patterns of negotiations are prone to end in the "joint-decision trap" (Scharpf, 1988) which at best allows agreements on marginal changes of the existing constitution. Integrative bargaining and arguing on constitutional principles and norms have a better chance to evolve if multilevel constitutional negotiations clearly differ from politics as usual.

At first glance, constitutional conventions seem to provide a best form to separate constitutional and normal politics. But as the Austrian example proves, this is not necessary the case. A convention can either be exploited by parties as an arena for playing their political games, or it can turn into a venue for more or less academic discussions which are ignored by those holding power in the legislative arena.

Strategies other than conventions have proved to be more effective in this regard. In general, highly differentiated patterns of negotiations are less threatened to be drawn into usual politicking, while they also provide feedback from constitutional negotiations into political processes.

Again Switzerland and Canada provide cases in point, to a certain degree also Germany and the UK. Contrasting examples of less differentiated constitutional negotiations are presented in particular in the case studies on Belgium, France, Italy and Austria. These are exactly the countries where federal reforms or decentralization failed, had limited effects or turned out as not appropriate to stabilize the federal or federalizing system.

When is ratification likely to succeed?

The fate of a constitutional reform is decided during the formal procedure, when proposals elaborated in constitutional negotiations are to be ratified and passed as a law amending the constitution. The term ratification means that negotiated results rarely are modified during processes of formal legislation. Parliaments can still revise any draft bill on a constitutional amendment, but usually these modifications concern merely limited aspects. When amendment bills have to pass by referendum, the people can only accept it or reject it.

This power in ratification processes is assigned by formal amendment rules defined in existing constitutions. Rules may determine who has the right to initiate a reform and they may protect particular elements of a constitution from being changed, but their main content establishes the basic provisions of the ratification process.

Interestingly, we cannot identify a particular pattern of amendment rules in federal systems. When unitary states change their territorial organization, decentralize powers or revise the relations between central and regional or local governments, they regularly give governments or citizens in lower level jurisdictions a right to decide, often in consultative or binding referenda. In federal systems, representatives of regions usually have veto rights in second chambers, whereas regional parliaments or citizens in regions have a say only in some states (Kaltenborn, 2012, and Closa, 2012).

As Carlos Closa (2012) shows in his study of different countries, amendment rules matter. However, neither the length or stability of formal constitutions nor the frequency of amendments can be explained by differences in these rules. Certainly, we should not underrate their effect on the legitimacy of constitutional change.

Amendments can affect negotiations indirectly (Kemmerzell and Petersohn, 2012). Actors elaborating the drafts of a constitutional reform have to anticipate potential hurdles in ratification, in particular the opinions of those veto players who threaten to reject a proposal. Anticipating a veto is easier when national parliaments and second chambers ratify the amendments, because representatives of these institutions regularly participate in negotiations and speak for their party

or institution. It is much more difficult to predict the responses of regional parliaments, let alone those of citizens in a referendum. If they have veto rights in constitutional legislation, the prospect for success or failure of reforms clearly depends on how regional parliaments and civil society associations are included in constitutional negotiation or consultation. Moreover, public debates on reform proposals seem to be essential in order to convince politicians and citizens. In these debates, proponents of a reform are in a better position if they can explain that results of constitutional negotiations are based on reasons rather than on a compromise or a package deal brokered in partisan political or inter-governmental distributive bargaining.

Constitutional evolution

Both modes of change – constitutional reform and constitutional evolution – complement each other and are linked in different ways (Behnke and Benz, 2009; Héritier, 2007). Reforms can prove ineffective and powerful actors who feel they have lost can try to obstruct the application of new constitutional rules. On the other hand, failed ratification of amendment bills need not end in a blockade but can induce "implicit" change (Voigt, 1999: 145-176) guided by agreements on normative frameworks or on perceived problems elaborated during constitutional negotiations.

The effects of constitutional reforms usually take time to develop. Constitutions have constraining and enabling effects on governance and policy-making, but they never determine out-comes. Furthermore, the effective constitution consists not only of written rules but also of a constitutional culture. For both reasons, practice needs to be adjusted to new rules. More often than not, new problems emerge which may trigger disputes about the interpretation or application of constitutional amendments.

For example, reforms aiming at a "watertight" separation of powers can prevent necessary coordination of policies between levels required to cope with interdependent tasks. For this reason, the federal government in Germany had to circumvent the constraints of a new rule prohibiting intergovernmental cooperation in education policy and child care when it wanted to support *Länder* and local governments in these policy fields. Also, the distribution of resources often turns out to be insufficient after powers have been decentralized, as illustrated by a number of the case studies. Intergovernmental relations tend to continue according to standard operating procedures set in stone during a longer history.

That intended results of a political decision differ from the real impact has been recognized in policy science for a long time. What

has not been appropriately considered is that failed decisions can have impacts, as well. Given the dynamics of federal systems or multilevel government, constitutional evolution after a failed reform deserves particular attention. In one type of outcome, evolution can gain new momentum by a negotiated agreement on a reform concept even if it is voted down in ratification. In another outcome, evolution can also be driven by the need to cope with the consequences of an imminent refusal to accept or implement constitutional change.

Canadian federalism after the failed Charlottetown referendum represents the first type. The deadlock caused by this out-come could have ended in the secession of Quebec. (Adam and Fournier, 2012). But after this alternative had been voted down by a narrow majority of Quebeckers, federal and provincial governments realized the pressure to change the federal constitution by "non-constitutional means". The principles and proposals formulated in the Charlottetown Accord provided guidelines for the decisions and the incrementally changing practices of governance. However, there are also limits and problems of such a mode of federal change, in particular the widening discrepancy of the written and effective constitution.

Federal constitutional reform in Austria ended without any agreement on amendments. The Convention failed to draft a proposal and the ratification procedures never started. In response to this deadlock, the federal government initiated work on a consolidation of the complicated constitutional law and tried to implement reforms in public administration and the court system. In this way, political pragmatism prevailed while the Convention became a "negative reminiscence" (Konrath, 2012) to justify this approach to federal change.

In view of the risks of federal constitutional reforms, pragmatic ways of shaping constitutional evolution seem of utmost relevance. On the one hand, "implicit constitutional change" can be advanced by "adaptation through experimentation" (Bednar, 2011) which later can be transferred into constitutional amendment. On the other hand, constitutional negotiations can pave the way for incremental change by constitutional or non-constitutional legislation, if ratification of an ambitious reform fails. However, such a strategy would require an organization of negotiations supporting arguing, the creation of legitimacy for reform ideas or proposals by public consultation, and a long-term perspective of federal constitutional policy.

Conditions influencing constitutional change

The variety of patterns of constitutional change in federal and federalizing systems can be explained by the different conditions influencing reform processes and evolution. In addition, events in the national or

international contexts may impact on federal change. Finally, constitutional reforms have their own history. Later reforms sometimes built on earlier reforms which had continuing effects on agendas, substance and outcomes on ensuing constitutional debates.

In the national context, Richard Simeon pointed out historical legacies, society and democracy and the broader political system (Simeon, 2009: 249). All three conditions can be observed as relevant in the cases mentioned above. Here are some illustrating examples:

The history of a country influences constitutional change. Theories of institutional change call attention to path dependency, which is clearly visible in constitutions concerning the multilevel organization of government (Obinger, et al., 2005; Pierson, 1995). Decisions taken during times when a multilevel order of government evolved, later became entrenched in institutions that provided a power base for particular interests. Some years ago, Gerhard Lehmbruch used this theory to explain the rather stable constitution of German federalism (Lehmbruch, 2002).

The story of French decentralization illustrates this aspect, too (Le Lidec, 2012). Here, the way the Senate is elected gives representatives of small communes a veto power against the creation of more efficient decentralized structures. The Austrian constitution may be an extreme case of intransigence of constitutional law, but other federal constitutional reforms, too, are made difficult by the legacies of history and the increase of interdependent rules. History also results in combinations of sometimes incompatible, sometimes reinforcing structures that are difficult to change without a complete overhaul of the political system. The Canadian Senate in a decentralizing federalism, the German *Bundesrat* in a party democracy made up of competitive parties, or asymmetric regional autonomy in Spain, Italy and the UK are only the most obvious examples.

Also, societal conditions must be considered when comparing federal constitutional reforms (Banting and Simeon, 1985). In multinational countries, the basic challenge is to meet the demands of regionally concentrated "distinct societies." Here, citizens and regional parties mobilize against the power of the central government, press for constitutional reforms and regularly demand fundamental changes to the political system. As a consequence, the level of conflict, the attention of the public and the intensity of discussions is higher than in homogeneous nation states. Reforms are framed as politics of identity, and distributive conflicts between governments are eclipsed by value conflicts within society.

The broader political system sets important conditions for constitutional change. Consensus democracies imply different patterns of policymaking and a different culture of managing conflicts than majority

democracies (Lijphart, 1999). The Swiss case stresses that the long experience of consensual policy-making has contributed to successful negotiations on a reform of the federal system. The contrasting case is Belgium, also a small country with a tradition of consociational democracy, where, after the process of federalization by means of constitutional policy had come to a halt in the 1990s, the confrontation between the regional parties until recently prevented a consensus on a reform the state necessary to hold the federal system together.

In majority democracies, party competition can be moderated, but never restrained by the political leadership of heads of government. In France, decentralization resulted from reform projects of presidents who defined the political agenda, but could not manage conflicts on details of the multilevel organization of the state. In Canada, the UK and Italy, prime ministers played a similar role in a democracy characterized by party competition, majority rule and a strong executive in the parliamentary democracy.

Beyond these enduring conditions, the chances for a reform to succeed very much depend on favourable circumstances. Such situations could be elections bringing about a change in parliamentary majorities, massive protests of groups in society, the success of regionalist parties, or changes in the international environment (such as the significant steps in European integration we saw in the 1990s). These conditions can create, if not a "constitutional moment" (Ackerman, 1991), that is, a transformative situation which gives rise to a new paradigm of governance and federalism, then at least a "window of opportunity" (Kingdon, 1995), a situation favourable for a major change in institutions and policies.

However, experience tells us that dramatic changes or revolutions usually cause more stability than change. German unification caused high expectations for a reform of the state, in particular for the federal system, but the constitutional negotiations ended with minimal constitutional amendments, which Charlie Jeffery rightly characterized a "non-reform of the federal system" (Jeffery, 1995). Likewise, governments struggling with a severe economic crisis can hardly manage to carry out a comprehensive constitutional reform and may reduce changes to rules such as a law restricting government indebtedness or modify powers to raise revenues. However, the perception of an incremental economic decline can mobilize political support for a reform (Freiburghaus 2012).

Finally, previous reform attempts constitute a frame of reference for later reforms. Failed reforms can create a negative consensus on what should be avoided in future. A good example is the intergovernmental process ending with the Meech Lake Accord in Canada; and the Austrian Convention seems to play a similar role in current debates. Failed

reforms which ended after intense negotiations can also later be used as a pool of ideas and suggestions.

What can be learned for future constitutional policy?

Those interested in practical lessons should avoid a simple transfer of ideas or supposed "best practices." Nevertheless, as argued above, variety does not prevent us from drawing conclusions or learning lessons. Comparative studies are the most important basis for policy learning. For this reason, we summarize some tentative conclusions for future constitutional policy in federal or federalizing states.

A first conclusion which can be derived for constitutional reform in federal or multilevel system is that attention should be more focused on an appropriate organization of negotiations rather than on rules for ratification. Formal amendment rules can never guarantee success of a reform. In contrast, negotiations not only can be shaped unilaterally by majorities in parliament or governments, or at least by agreements among federal and regional governments; they can also be decisive for the substance of amendments.

A prerequisite for the success of constitutional reform processes is a political consensus among decision-makers on all orders of government that a reform is necessary. This does not rule out that divergent visions of what a reform should look like can form the basis of a negotiation process. But there needs to be some sort of pressure – be it induced by external events or domestic factors – that motivates policy makers to embark on an often lengthy and hazardous process of constitutional bargaining.

In order to open the way to opportunities for arguing about constitutional norms and in order to avoid distributive bargaining as far as possible, constitutional policy has to be set apart from normal policy and politics. To achieve this end, there is no need to organize a convention. What is essential is to define a particular arena for constitutional negotiations, to include actors beyond those dominating intergovernmental and party politics, and to unburden the agenda from issues of normal politics and from party politics as much as possible.

As explained above, the differentiation of constitutional negotiations has advantages, if it allows different participants to participate in a heterarchical structure. A plurality of negotiation arenas can open discussions to new perspectives, it also can stimulate productive compe-tition for new ideas and thus generate innovation. However, such a differentiated structure requires a coordinating committee and effective leadership.

Political leadership is extremely important for the success of constitutional negotiations, as is the timing. If there is no political majority

in favour within the various orders of government, a reform is unlikely to happen.

Participation of representatives from civil society can support negotiations in the arguing mode. Yet the complexity of federal constitutions means that consultation rather than negotiations with citizens seems more appropriate. While early hearings in the reform process can stimulate open discussion in public but can fade out without substantive input, consultation held late in the process on negotiated proposals can give citizens the feeling that decisions are already made. For this reason, consultations at different stages of constitutional policy seem to be most effective and can increase legitimacy of constitutional negotiations.

Experts are important, and experience in the different countries reveals a variety of roles they can play. Informal communication between participants in constitutional negotiations and experts, whatever the particular form may be, is preferable to participation by experts in conventions or big public hearings.

Constitutional negotiations should not only be differentiated into particular arenas, they also should be organized in a sequence. The Swiss NFA-process provides a convincing model. Here, a first round of negotiations focused on principles and concepts for a reform. Given this narrow framework, all participants had to argue on basic norms and general interests regardless of their particular distributive interests. In the second round, concepts and principles fixed after the first sequence served as guidelines and frames of reference for negotiations. For constitutional negotiations on the territorial or multilevel organization of a state, such a manner of sequencing has significant advantages.

Effective constitutional negotiations do not guarantee that the reform proposal will pass ratification. Independent on the quality of the proposal, different factors can negatively influence politics in the legislative arena or a referendum process. For this reason, constitutional negotiations should aim at producing analyses and arguments rather than simply an amendment proposal. Negotiators should understand their role as participants in a constitutional debate which continues beyond the particular reform process.

Constitutional change never ends with the success or failure of a reform project. No reform process can solve all problems at the same time. Furthermore, constitutions evolve beyond formal amendments. For these reasons, constitutional change in federal or multilevel systems should be regarded as a never-ending task. Because this task should not be left to constitutional courts and should be fulfilled in the political process of democratic politics, continuing constitutional negotiation has to be embedded in the institutional framework of a federal system.

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