

Dr. Nathalie Behnke, FernUniversität in Hagen, Germany
nathalie.behnke@fernuni-hagen.de

"Towards a new organization of federal States? – Lessons from the processes of constitutional reform in Germany, Austria, and Switzerland"

Paper to be presented at the
ECPR Joint Sessions of Workshops, Rennes, France, April 11-16 2008
Workshop No. 20 "The politics of constitutional change"

Abstract

The recent processes of constitutional reform in Switzerland, Germany and Austria all had the aim (among others) to re-organize the federal distribution of resources and competencies. While the Swiss process is generally regarded as very successful, the German reform failed in a first attempt and the reform results of the second attempt are evaluated by most observers as quite unsatisfactory. In Austria, the constitutional convention failed as well, and informal reform processes with an uncertain outcome are still under way. In this paper the three processes are compared according to those variables which are said to be decisive for the success of the Swiss reform. Furthermore, the analysis of the elements of failure and success of the three reform processes suggests that the federal structure is changing in all three countries in a similar direction: in order to accommodate current pressures for reform, structural innovations are being made providing more flexibility of decisions and policies; and the importance of horizontal institutions of executive co-ordination is increasing.

Table of contents

- 1 Introduction
- 2 Reform processes
 - 2.1 Switzerland
 - 2.2 Germany
 - 2.3 Austria
- 3 Comparison
 - 3.1 Relevant problems and the organization of tasks
 - 3.2 Internal Actors
 - 3.3 Timing of the Process
 - 3.4 Rules of Amendment
 - 3.5 The Political Environment
- 4 Lessons

1 Introduction

All three German-speaking states – Germany, Austria, and Switzerland – have experienced in recent years serious problems of inefficiency due to their federal organisation. Prominent matters of discussion were the inefficiency and intransparency of fiscal equalization schemes, the struggle for definition of autonomous rights, competencies and resources of the subnational units – Länder in Germany and Austria and Cantons in Switzerland – and the quest for more effective modes of vertical and horizontal coordination and cooperation.¹

In an attempt to respond to those problems, all three countries have undertaken major processes of constitutional reform in order to re-define their federal structures and power distributions. Although the timing of the processes, the kind of problems addressed and especially the results of the reforms are not exactly the same, there are a great many parallels and similarities to discover in the three processes, which makes them ideal cases for a comparative approach. Undoubtedly, the most successful attempt was made in Switzerland. The reform of finances and tasks significantly simplified the existing fiscal equalization scheme and introduced several new instruments of horizontal co-operation. In Germany and Austria, in contrast, the reforms failed in a first attempt and were or are being advanced in informal executive circles. It is thus not surprising that the Swiss reform is regarded by many as a kind of role model, and conditions for successful reform are deduced from analyses of the reform processes. Whether those conditions can be transferred easily in other systems is so far an open question, for many of the identified factors are deeply rooted in the Swiss culture and tradition. Nonetheless, a glance at the successful neighbour may be instructive from a pragmatic as well as from a comparative interest: Which lessons can be learned from Switzerland and what does this mean for processes of constitutional reform in Germany and Austria?

Several factors have been identified as particularly important for the positive reform outcome (Freiburghaus 2005: 514; Braun 2008).² They are:

1. The shared perception of a high pressure for reform because the status quo is generally regarded as highly unsatisfactory and inefficient.

¹ Throughout this paper, the terms ‚federal level’ or ‚Bund’ will be used interchangeably, as the term ‚Bund’ is commonly used in all three countries under investigation. The same holds for the terms ‚sub-national level’ and ‚Länder’ (in Germany and Austria) and ‚Cantons’ (in Switzerland), respectively.

² Very similar conditions are named by Mader (2008: 101ff.) as regards the Swiss constitutional revision.

2. The existence of a consensual understanding of a frame of reference; the values and aims of the reform underlying the process were broadly accepted and promoted by politicians and experts.
3. The separation of discussion and decision on principles of just distribution on the one hand and specific distributive implications for the involved actors on the other.
4. The integrative and co-operative organization of the reform process involving all relevant actors on an equal base and stimulating broad public discussion on the topic, while at the same time securing an effective and integrative leadership.
5. The long duration of the process which enables on the one hand a broad and intensive discussion and the pacification of potential critics; on the other hand actors are bound to support the reform results when they have agreed to certain points at an earlier stage. The long reform process develops thus a dynamic of its own not to let it fail after all the work that had been invested.

By and large, these factors are offered (in varying combinations and formulations) in most analyses of the Swiss reform process as explanations of its success. In this paper, I will thus compare the reform processes in Switzerland, Germany and Austria as regards the existence and explanatory potential of those factors in all three processes. In addition, the relevance of two more 'usual suspects' in comparative studies of constitutional change is investigated: the role of rules of amendment and the political setting. These comparative observations of the dynamics of these processes lead to several hypotheses about the future development of federal structures in the three countries. For, as important as federal reforms even in long established and relatively stable federations may be, those processes under investigation in Switzerland, Germany and Austria are likely to indicate – more than anything else – the trajectory from a traditional model of federalism emphasizing clear-cut separation of competencies, rights and resources of the compounding units towards a more flexible organization of tasks producing results of a rather informal and preliminary character. This flexibility of solutions is their strength for securing the stability of the federal state, because even in the presence of conflicting interests, they may be broadly accepted.

In this paper, I will first give a very short summary of the reform processes in the three countries (section two). Then the processes are analyzed in greater detail in terms of relevant patterns of organization, negotiation and decision (section three). Finally, the comparative evidence is interpreted as an indicator for a changing organization of traditional federal states (section four). This last part is admittedly speculative, but it seems worth some consideration.

2 Reform Processes

2.1 Switzerland

The reform process under scrutiny in Switzerland is the so-called ‘re-design of financial equation schemes and the assignment of tasks and competencies to the federal and cantonal levels’ (NFA – Neugestaltung des Finanzausgleichs und der Aufgabenverteilung für Bund und Kantone). The NFA began as early as 1991, when the federal ministry of finances (EFD – Eidgenössisches Finanzdepartement) published a report on the financial transfers between the federal level and the cantons.³ The results were alarming, as it became evident that not only the overall level of financial transfers – in particular from the federal level to the cantons – had increased significantly, but also the gap between poorer and richer cantons had widened, for it was the richer cantons which profited most from federal transfers. Furthermore, the existing system proved to be highly inefficient. Thus, an immediate need for further action was seen by all involved actors. A group of economic experts was charged with the elaboration of an advisory opinion (Schaltegger/ Frey 2003). The reform process was then organized in two phases. From 1994 to 1996, the first project organization elaborated the basic political guidelines for the reform. It was agreed that the reform was to be based on five pillars: 1) the horizontal and vertical financial equalization scheme; 2) the equalization of burdens; 3) the disentanglement of tasks and their financing; 4) an intensified co-operation for joint tasks between the Cantons and the Bund; 5) an intensified direct co-operation between the Cantons (EFD 2004). A second project organization from 1997 included a larger set of interested actors and served mainly at building consensus. In 2001, a legislative proposal (‘Botschaft’) was presented to Parliament. After parliamentary discussion, both chambers passed the law for constitutional reform on October 3, 2003. The national referendum on November 28, 2004, confirmed the constitutional reform (NFA fact sheet no. 3). In the next step, the laws were elaborated to implement the principles. A second legislative proposal was presented in 2005, and passed by Parliament in 2006. The facultative referendum for this reform was not held. The final – and presumably most conflictual – step was the decision on the precise numbers of fiscal transfers. But even this part was passed by Parliament without any notable resistance. In January 2008, the reform was enacted.⁴

³ Detailed accounts of the reform process and its beginnings are given in Braun (2008), Freiburghaus (2005), Wettstein (2002) and Linder (2007)

⁴ <http://www.nfa.ch/de/umsetzung/dotierung/>, reading access 04.04.2008.

2.2 Germany

The German reform process began in 2003 with the establishment of a bicameral reform commission. The commission was given the task to elaborate proposals on how the system of interlocking legislative competencies between the federation and the Länder could be disentangled.⁵ Already in the 1990ies, the richer Länder in the south of Germany had hoped to weaken the principle of comparable living conditions in all Länder by introducing some elements of competitive federalism. This impetus for reform, however, had not gained the necessary majority to enter the reform agenda. Rather, the discussion shifted to the role of Germany's second chamber, the Bundesrat, the consent of which was needed for a large proportion of federal laws. In public and political perception, the impression had arisen in the second half of the 1990ies that the Bundesrat abused its veto power for party political purposes thus creating too often situations or at least the threat of blocked politics. The central problem which induced the federal executive finally to start a process of constitutional reform was the effort to reduce the blocking potential that the Bundesrat had as a veto player in national politics. The Länder – on the other hand – had an interest in regaining more autonomy in legislative competencies and saw an opportunity for package deals exchanging veto rights for legislative competencies.

The commission was composed at equal numbers (16 each) of members of the first and second chambers (Bundestag and Bundesrat). Only they had voting rights. Further members were members of the federal government (4), the Länder parliaments (6), the cities and communalities (3) and invited experts (12). It established two working groups and seven project groups to deal with the different subjects. In eleven (partly public) sessions between November 2003 and December 2004, meetings of the project groups and one public hearing, the reform topics were presented and discussed in great detail. But in December 2004, the commission terminated its work without presenting any result. It had proved unable to fulfil its task to elaborate a proposal for constitutional reform.

The reform process, however, continued at an informal level. A small working group was set up in spring 2005, and after the elections in autumn 2005 which led to the creation of a grand coalition between social democrats (SPD) and Christian democrats (CDU and CSU), the topic of federal reform received a prominent position in the coalition contract. In this second stage, no commission was established, but compromises were rather negotiated in

⁵ For a detailed account of the reform see Benz (2005, 2006), Scharpf (2005, 2006a, 2006b), Hrbek/ Eppler (2005), Auel (2008).

small informal coalitional circles (Hrbek 2006). In their substance, however, the compromises which were finally found, built strongly on the work of the former commission and the working group. After a final controversial debate on some reform issues during a major parliamentary hearing in March 2006, in June 2006, the federal reform laws were passed quite uncontroversially in both chambers.

Formally, the reform was successful, if not at the first attempt, then at least at the second. Still, in its substance, the reform results are far from convincing. The major objective of the reform – a substantial disentanglement of competencies leading to a reduced number of laws requiring the consent of the Bundesrat on the one hand and leading to more legislative autonomy of the Länder on the other – was not reached. Estimations on the effects of the reform (Georgii/ Borhanian 2006; Burkhardt/ Manow 2006; Risse 2007) claim that the number of *controversial* laws requiring the consent of the Bundesrat will not decrease significantly; and it is very doubtful whether the newly established Länder right to pass legislation diverging from the federal laws means in fact an enhanced legislative autonomy. Most importantly, however, the success of the reform is doubtful because one major topic entailing highly controversial interests – namely the financial equalization schemes – had been completely excluded. Since 2007, a new commission has been established preparing the “federalism reform stage two” (Föderalismusreform II). In this second phase, financial transfers are to be reformed. So far, however, discussion has again been shifted to a less controversial field, namely the strategies of debt reduction, thus leaving the major threat to federal stability – the shrinking consensus on the existing financial equalization scheme – again unresolved.

2.3 Austria

The Austrian Constitutional Convention was established on 30 June 2003. It had the task to elaborate a proposal for a fundamental reform of the constitution and state structures within 18 months. The Convention was composed of 71 persons, among which representatives of the federal government, the courts, the court of accounts, the Länder parliaments and governments, the parties, the cities, communalities and unions as well as some experts. It was thus composed much more broadly than the Swiss and German reform commissions. It was split in an executive committee under the chairmanship of Franz Fiedler, the plenary, and ten working groups.⁶ Among the ten working groups of the convent, group no. 5 dealt with

⁶ For a description and evaluation of the work of the Convention see Bußjäger (2005, 2006), Funk (2005).

questions of territorial distribution of tasks between the federal, the Länder and the communal levels; group no. 10 with the financial constitution, especially the fiscal equalization scheme. In seventeen plenary sessions between June 2003 and January 2005, a large array of topics of constitutional revision was discussed. The final report was presented to Parliament in its plenary session on 28 January 2005. The proposal, however, had no immediate repercussions on legislative activity. Between July 2005 and July 2006 a parliamentary committee elaborated further on some of the suggestions of the final report in 10 sessions. In February 2007, an expert group was established in the chancellor's office to make proposals for reform. Base on those proposals, in 2007, several constitutional amendments were passed into law, although none of them directly touches the federal organization of Austria. The reforms were: a "democracy package", some editorial work in the federal constitutional law, a new regulation of independent agencies, the establishment of an asylum court in Parliament and a new budgetary law.

All three processes took thus place within a relatively short corridor of time (1994-2008). All focussed on a re-organization of the federal structure as regards distribution of competencies and fiscal constitution. All set up special commissions and working groups to deal with the complex and highly technical issues in order to elaborate proposals for constitutional reform laws. All commissions were composed broadly in order to account for different political and societal interests. The only reform which was clearly successful, however, was the NFA process in Switzerland. The 'Federal Reform I' in Germany failed at a first attempt, and so did the Constitutional Convention in Austria. In both cases, rather informal circles of politicians and experts were charged in the second phase with the elaboration of proposals. While the work of the official commission or convention had been open to the public and quite transparent, those circles and networks in the second phase work behind closed doors and unaccountable to the public. A constitutional reform law was passed in Germany in 2006, the Austrian reform of the federal structure is still not accomplished. What, then are the reasons for the success in Switzerland? Is there reason to assume that under similar conditions, the reforms in Germany and Austria would have been more successful, too? Which general lessons can be learnt for the organization of processes of constitutional reform in federal structures? These questions will be addressed in the next section.

3 Comparison

3.1 Relevant problems and the organization of tasks

The NFA process in *Switzerland* was focussed on the federal distribution of tasks and finances. It was, however, part of a larger process of constitutional reform. First, there was a revision in the narrower sense, or, as the Swiss use to name it, the constitutional “mise a jour”. It aimed at re-organization, reformulation and updating of some overaged parts of the constitution which had never been overhauled since 1874. Although this task was very big in the number of issues addressed, it was accomplished with surprising ease: After five years of work, discussion and public debate (1994-1999), the constitutional revision was accepted in a referendum. The larger project of constitutional reform, however, consisted of several building blocks which were dealt with in overlapping periods and which were closely linked to each other (Koller 2008: 73f., Mader 2008: 98): the other reform projects were a parliamentary reform (accomplished in 2002), a major judicial reform (accomplished in several laws between 2002 and 2008) and the NFA (accomplished in three stages between 2004 and 2008).

The NFA process was based on three major premises about which there was broad consensus among the involved actors: *First*, it was generally agreed that a reform of federalism meant to maintain and safeguard, even to strengthen cantonal differences (Freiburghaus 2005). *Second*, the connection of financial equalization schemes on the one hand and of distribution of tasks and competencies on the other was never disputed. Rather, the connection was regarded as strictly necessary because the finances need to follow the tasks (Braun 2008). The simultaneous discussion of tasks and finances made it possible to enact a comprehensive vision of federal relations. This vision was shared between the political decision makers and the experts who accompanied the process. It aimed clearly at implementing elements of New Public Management, i.e. efficiency, competition and cost reduction (Braun 2008). *Third*, the separation of decisions about the basic principles in a first reform phase and the – more conflictual and more complicated – decisions on the precise numbers and schemes of financial transfers in a second reform phase (Wettstein 2002: 47). In this way, it was much easier to build large consensus in the first phase which then restrained the leeway for defection in the second.

To sum up, it seems that one of the secrets of the Swiss reform process lay in the way of organizing different reform topics. It was broad enough to take into consideration the close interconnectedness of different aspects of reform. On the other hand, the reform blocks were

separated timely and personally in order to reduce complexity and to come to substantial results.

In *Germany*, the reform had from the very beginning a much narrower focus. A larger constitutional reform dated back in 1994, when after the German Unification the attempt had been made to seize the chance of a major restructuring, the success of which may be reasonably doubted (Benz 1993). Back then, however, matters of federal redistribution of tasks and competencies had been excluded altogether. When the federal reform commission was established in 2003, it had the explicit task to elaborate proposals to modernize the federal order as regards legislative competencies and financial relations between the Bund and the Länder in order to render the political process more efficient, transparent and to secure the capacity of the Bund to act and to decide responsibly.⁷ In fact, during the sessions of the commission, the focus was narrowed again on a re-organization of legislative competencies with the aim to reduce the number of laws which needed consent by the Bundesrat, especially due to Art. 84 Basic Law. The financial relations between the Bund and the Länder, on the other hand, were – in clear contrast to the NFA process – excluded from the discussions. It was argued that a reform of financial relations would entail even more conflict of interest than the reform of tasks and competencies. Thus, in order not to put at risk the chance for compromise in the latter matter, the former was carefully avoided and postponed to a second reform phase. The fiscal reform is currently under way. On 8 March 2007 a reform commission was constituted. It is expected to present proposals until 2009.

As regards the premises of the reform process, there are several differences to be noted compared to the NFA process: While tasks, competencies and finances were not dealt with simultaneously, but rather separated into two distinct processes which followed one another, the deliberation on the general guidelines and principles of the reform was *not* separated from the bargaining on specific technicalities. This made it difficult to come to any agreement at all, because every proposal for a general principle to be followed could be immediately watered down by the discussion on its precise distributive implications. As a consequence, bargaining over details dominated the negotiation process, and the results cannot be regarded as parts of some overarching vision. This lack of consensus on general principles, finally, was mirrored in the lack of consensus on the direction of the reform: the federal level hoped to cut back Länder influence on federal legislation in the Bundesrat and tried to get rid of some

⁷ Slightly abbreviated translation of the official formulation of task for the commission. See http://www.bundesrat.de/cln_050/nn_276146/DE/foederalismus/foederalismus-node.html?__nnn=true.

costly tasks and obligations, while the Länder, on the other hand, aimed at regaining more legislative and financial autonomy, although without losing financial transfers from the Bund. So, the smallest common denominator, empty as it is, on which the different actors could agree, was that of disentanglement of competencies. As a guiding principle, the idea of disentanglement is not very useful, however, for it is open to many possible interpretations (Benz 2005).

In *Austria*, the federal reform was included in a major process of a constitutional convention established in 2003 and aiming at a revision or at least re-consideration of all relevant constitutional issues. This herculean task to elaborate a proposal for a fundamental reform of the constitution and governmental structures was to be accomplished within 18 months. Among ten working groups dealing with such diverse fields as ‘public tasks and objectives’, ‘a catalogue of human rights’ or ‘administrative reform’, to name just a few, working group no. 5 was dedicated to ‘distribution of tasks between the Bund, the Länder and the communalities’, working group no. 10 to the ‘fiscal constitution’. Although both kinds of problems were thus addressed in the same convention process, their separation in two different working groups made it difficult to consider repercussions and to create the necessary connection between the two strands of discussion (Weiss 2008).

The re-consideration of the distribution of tasks was perceived as a pressing problem, because the existing distribution was deemed to be too complicated, with many exceptions and following no clear cut criteria (Funk 2005). Still, while this necessity of reform was broadly agreed, in contrast to Switzerland there was no broad consensus on the fundamental importance of maintaining or even strengthening the federal structure. Rather, the argument that with the EU as an additional political and administrative level, the Länder are unnecessary and create only additional costs and complexity of decision mechanisms is quite common in the public debate. The pro-federalism movement was never very strong in Austria and had even lost some impetus in the years preceding the convention (Erk 2004: 4ff.; Weiss 2008: 84). Thus, the Länder were in a weak position and unable to use the convention to enlarge their competencies. Rather, they took a defensive stance, trying to protect at least the rights they already had. One of the major problems of Austrian federalism is that the Länder themselves don’t think it a very important issue.

Not only was it doubted that the Austrian federalism needed any protection at all; furthermore, even worse than in Germany, the process lacked any clear political vision about the direction of reform. Thus, the impetus for reform got lost in the number of tasks

addressed, in the insufficient connection of interconnected topics and in the lack of political direction which might have helped to reduce the complexity of diverse proposals.

One of the most difficult problems to be solved in the organization of a reform process seems thus to be the question how to deal with the complexity and interrelatedness of topics. On the one hand, the problem solving capacity of any reform commission is clearly overstretched when the reform encompasses many different topics which are to be dealt with in great detail, as it happened in the Austrian Constitutional Convention. On the other hand, there can be no satisfactory solutions found for a problem when a relevant interrelated topic is excluded altogether. There may have been some truth in the reasoning in the German process to postpone the debate on the financial constitution, because otherwise the financial conflicts would have made a compromise on the distribution of tasks almost impossible. But the assignment of tasks and competencies must remain incomplete as long as the financial responsibilities for them are not clear. In Switzerland, a complex reform of major constitutional topics was accomplished due to a system of building blocks based on the constitutional revision. The success of the NFA, however, is essentially based on the close linkage of tasks and finances. What seems to be important, however, to solve complex problems, is the separation of deliberation about the guiding principles of a reform on the one hand and the bargaining about hard money on the other.

3.2 Internal Actors

The role of leadership was emphasized by commentators on all three processes. In *Switzerland*, leadership is assumed to have played a major role in helping the process succeed. At the political level, the federal department of finances (EFD – Eidgenössisches Finanzdepartement) formulated clear guidelines for the reform which were implemented at the operational level by civil servants at the EFD. With their expert knowledge, they were able to present the complex facts in a comprehensible way, to steer the discussion back to the politically given guidelines and to coordinate the communication with the cantonal representatives (Wettstein 2002). The given guidelines – to enhance efficiency, to strengthen subsidiarity and to promote New Public Management (Braun 2008) – were highly consensual and supported even by the experts who accompanied the process. The experts were given a relatively big weight in the process: as early as 1994, they elaborated an advisory opinion on the reform which strongly supported the dominant political opinion that a reform to enhance efficiency was strongly needed (Schaltegger/ Frey 2003). Beyond that, throughout the whole reform process, experts were given voice and were taken seriously in their opinions. They

added further expert knowledge to an already quite homogenous group with a high level of expertise, as the reform process took place mostly within the financial administration.

In *Germany*, in contrast, one major complaint was the lack of political leadership. The dual leadership represented simultaneously the party political and the Bund-Länder cleavages in the persons of the Bavarian Prime Minister Edmund Stoiber and the President of the Social Democrats, Franz Müntefering. The double cleavage incorporated in the persons of the two presidents of the reform commission made an agreement highly unlikely from the very beginning. The whole architecture of German federalism with its structural rupture between party competition and Bund-Länder competition (Lehmbruch 2000) was thus reproduced in the composition of the reform commission. What is more, neither the Bund nor the Länder had a clear vision of the reform theory which they might have tried to enact. So, instead of taking an active role in promoting ideas, building consensus, mediated divergent interests and finally taking clear decisions after controversial discussions, the two presidents for most of the time restrained their own role to a – possibly neutral – moderation of the discussion (Benz 2005: 215). A group of twelve experts were invited to advise the commission, although they had no right to vote or to decide. Benz (2005: 211) however points out that the experts' influence was strongly limited. The politicians were unwilling to take up innovative ideas presented by the experts, and instead of providing a theory as an argumentative baseline for the reform vision, they got lost in technicalities and details of regulations. In the final phase of the reform process, the experts were excluded altogether, as negotiations mostly took place in small circles behind closed doors.

A lack of political leadership is also among the main criticisms of the *Austrian* reform process. The executive committee of the convention was composed of seven members representing all major political parties in Austria. The president of the constitutional convention, Franz Fiedler, was at that time President of the Austrian Court of Accounts and could have been in a position to stand for expert knowledge and impartiality. Neither were the members of the executive committee able to overcome the party political and ideological conflicts, nor was their president able to integrate their different positions and to lead the committee – which was supposed to decide consensually – to a compromise solution (Bußjäger 2005: 405). In the end, Fiedler tried to take on a leadership role when he presented his own proposal for a constitutional reform. This was, however, rather, based on his own personal ideas and not a condensation of the proposals discussed in the working groups (ibd.: 418ff.). The party political conflicts were by and large also reproduced by the nine experts representing the courts and other important political and societal institutions. Most of them

were trained lawyers and had clear party political affiliations. They even participated in internal sessions of ‘their’ party’s working groups. The typical function of experts in commission to provide neutral advise and impartial expert knowledge was in that case only very insufficiently fulfilled (ibd.: 407). The paradox of the Convention lay in its politicization with simultaneous absence of political elites demonstrating the unimportance of the convention (ibd.: 406). This combination was an important obstacle to the creation of a deliberative negotiation style (Elster 1998) and contributed to a final report, where dissenting opinions were simply presented but no compromise offered.

Although a proportional representation of major political and societal forces in a reform commission may be desirable from a democratic point of view because it secures a plurality of interests on the input side and thus enhances the chances of acceptance on the output side, in terms of effectiveness of decision-making and also in terms of agreeing on compromises, a more homogenous composition as in Switzerland seems more promising.

3.3 Timing of the Process

Timing, duration and sequence of reform processes are an aspect which is mostly neglected in comparative studies. It is, however, a set of important explanatory variables, for all processes take place in time.⁸ Koller (2008: 74) points out, for example, as regards the Swiss process of constitutional revision, that timing was of eminent importance. The motion for the revision was passed to parliament in 1997. 1998 was the 150th anniversary of the Swiss federation, and the symbolic importance of this anniversary motivated the Parliamentarians to elaborate a reform proposal within one single year, although, under other circumstances, other topics would have been very likely to be more prominent. In contrast, the timing for the Austrian Constitutional Convention was unlucky for proponents of a strengthened federalism, which was desperately ‘hors vogue’ at the end of the 20th century. The reform process in Germany took quite another direction in 2003 than it would probably have taken in 1997. Then, the prominent topic of discussion about federal reform was the introduction of competitive elements, which was five years later easily defeated by the paradigm of disentanglement. Furthermore, an important external actor altered the relative power positions of the Bund and the Länder: the Federal Constitutional Court in Germany had undergone a notable re-orientation of its sentencing practice around the turn of the millennium. While before, it had interpreted the constitution with a pro-centralizing tendency, this tendency was completely

⁸ The relevance of time for political analysis has been pointed out from a theoretical point very clearly by Pierson (2000), from a methodological point by Büthe (2002).

converted in 2004, when it set unusually narrow limits for federal framework legislation in its sentence on the introduction of ‘junior professors’ (Scharpf 2006b: 317).

Timing is not only important because macro-political trends and waves can change their direction. The duration of processes is relevant, too. It is certainly no coincidence that the Swiss reform process took nearly fourteen years to come to a successful end, while the German and Austrian processes failed after little more than two years. In the NFA process, decisions were taken in three stages of increasing specificity. Each stage was accompanied by an intense effort at communicating the objectives and rationales of the reform, at building consensus and – if necessary – at negotiating package deals and pacifying unwilling actors. The German and Austrian commissions, in contrast, worked under an enormous time pressure and had hardly time to get familiar with the technical and legal details of the topics on which they had to decide. Much less was there time to deliberate, to argue and convince, to build up consensus within the commission and to advertise for approval in the population.

3.4 Rules of Amendment

That the information of the population and the building of broad public support for the NFA was given such priority, can in part be explained by the rules of amendment. Constitutional reform in *Switzerland* requires an (obligatory) referendum, and history shows that more than once the people did not hesitate to defeat political compromises at the polls. The federal financial department knew very well that the reform had only a chance for acceptance if from the very beginning the Cantons were closely included in the process and if the public was convinced. Interestingly, however, although the Swiss political system establishes a particular high number of veto players, they rarely threaten to block political decisions (Braun 2003, 2008; Vatter/ Wälti 2003). Potential veto players are incorporated early in decision-making processes through the principle of concordance at the federal level and a close co-operation between the corresponding executive institutions at cantonal and federal levels. Even a referendum is no real threat when the elites of the cantons can be won. For the cantonal population tends to follow its political leaders if they communicate that they fully support a particular solution.

A majority of two thirds in both Houses of Parliament is the required threshold for constitutional reform in *Germany*. This rule emphasizes the compromise between the governing majority at the federal level and the majority of governments at the Länder level. In situations of opposite majorities in the two chambers, as they occur ever more often in recent years, this means that de facto a grand coalition must approve of the reform laws. This may be

positive from the viewpoint of democratic theory. If, however, such a grand coalition cannot be formed on a relevant issue, then the objective discussion is easily flawed by the typical structural rupture between party competition and Bund-Länder-competition identified by Gerhard Lehmbuch (2000). That was exactly what happened in the commission on federalism reform. The party political conflict interfered with the Bund-Länder cleavage and made a mutually profitable solution nearly impossible.

According to Art. 44 of the Austrian Constitution, the amendment rules vary. Constitutional amendments can be passed by a two thirds majority of the Nationalrat, amendments of the federal structure require a two thirds majority in both chambers of Parliament, and constitutional revisions need to be approved additionally in a referendum. Although this highest threshold would have applied to the results of the work of the Constitutional Convention, the attempts to communicate the process to a broader public were quite limited. The discussions were mainly dominated by party political conflicts, whereas the Bund-Länder cleavage played hardly any role.

As a consequence, the rules of amendment seem to matter only marginally. The dominant negotiation style and the consensus orientation of the members of a reform commission do not depend clearly on a public referendum or a qualified majority.

3.5 The Political Environment

While Switzerland is generally denoted to be a semi-presidential system forming its government according to the principle of concordance, Austria and Germany are parliamentary systems. Their post World War II history can be described as an alternation in government between the two major political forces – the conservative (CDU/ CSU in Germany and ÖVP in Austria) and the social democrat parties (SPD in Germany and SPÖ in Austria), forming coalitions with minor partners such as the free democrats (FPD in Germany and FPÖ in Austria) or the Green party. While the system of concordance employed in Switzerland regularly incorporates all political parties into government, grand coalitions are rare exceptions in Germany and Austria. It is not surprising, but still noteworthy in this context that under conditions of a grand coalition, the chances for reform success seem to be much higher: In Switzerland, during the whole time since the initiation of the process in 1990 until the last ratifications in 2007, there was no significant change in the party political

composition of government.⁹ In Germany and Austria, the reform processes failed in a first round, while the governmental coalition held a tight majority and was torn by internal conflicts about the directions of policies.¹⁰ In both countries, the coalition proved eventually unable to govern, and precipitated parliamentary elections led to the formation of grand coalitions. Only then was it possible to take up the reform process again. In Germany, the coalition treaty made the federalism reform a major topic, and in fact, in secret coalition circles, the reform was hammered out and approved by parliament. In Austria, at least some bits and pieces of the reform were passed.

4 Lessons

The paradigm of ‚disentanglement‘ of competencies which was important if not dominant in all three reform processes is judged by most analyses as dysfunctional in a dual sense: First, it was little helpful to promote the reform processes, because the search for fields of competence which could be given autonomously to one federal level furthered a bargaining orientation among the involved actors and led to discussions about regulatory details instead of general principles. Second, it is no longer adequate to meet the exigencies of modern multi-level systems, where policies and finances are thoroughly interdependent and spill-over effects of regulations from one level to the next are unavoidable. This insight is neither new nor surprising and has been noted by many scholars on federalism.¹¹ What is new, however, and might initiate in fact a new trend in the organization of federal structures, is the effort to build a certain degree of flexibility in the structure of interlocking competencies across levels. This flexibility can take different shapes:

It can firstly mean that the legislative competency for a policy can be decided on a case by case base between the federal and the sub-national levels. This – rather soft form of flexibility – is generally understood to be secured by constitutional catalogues of competing legislation.

⁹ The federal election in 2003 led to a change in the ‘magic formula’ for the composition of the cabinet: The SVP (Swiss people’s party – Schweizerische Volkspartei) gained one more seat at the cost of the CVP (Christian democratic people’s party – Christlich-demokratische Volkspartei) which lost one. This change, however, is not seen as a fundamental transformation of the system of concordance (Batt 2005).

¹⁰ In Germany, the Social democrats were forced by Chancellor Gerhard Schröder onto a path of ‚Realpolitik‘, which displeased many left-wing party members. Similarly, in the Green Party, the political elite was alienated increasingly from its party base. In Austria, the conservative ÖVP had problems to accommodate the extreme right undertones of its coalition partner FPÖ, and the FPÖ itself suffered considerably from the divorce from its party leader Jörg Haider.

¹¹ See, from a theoretical point of view, the argument of fiscal federalism based on Coase’s (1937) problem description (e.g. Schaltegger/ Frey 2003: 243f.), from an empirical point of view Linder (2007) for Switzerland, Benz (2006) and Scharpf (2006b) for Germany or Weiss (2008: 87) for Austria.

In some form, competing legislation exists in all three countries under consideration. In Germany, however, constitutional practice has evolved in a centripetal direction. Most matters of competing legislation are in fact legislated by the Bund. In Austria, the competencies are very unsystematic. The reform considerations there now favour a ‘three-pillar-model’ of legislation which would correspond roughly to the German system. Under that model, an array of shared competencies is envisaged which would leave much room for interpretation (Funk 2005: 141f.).

Flexibility can also mean that the aspiration to create uniform standards and to pass uniform regulations in all sub-national units is abandoned and some extent of ‘asymmetric federalism’ is accepted (Hueglin 2000). When Länder and Cantons can decide autonomously whether or not or how to implement a policy and how much money to spend for it, regional differences can be more easily accommodated. And, what might be even more important, the potential for conflict between the sub-national units is greatly reduced. Instead of struggling for uniform solutions which never reach acceptance by all units, it is easier to accept different solutions in different regions. This way, the federal state regains a higher level of capacity to decide and to act, and different solutions can be tested. Again, *Switzerland* may be regarded as the forerunner of flexible solutions. The Swiss federalism is generally understood to protect regional differences, whereas in Germany and Austria federalism has been regarded as a tool to harmonize and standardize regulations and conditions. The high cantonal autonomy has always allowed bi- and multilateral negotiations and contracts. This element has been strengthened by the NFA through the instrument of ‘Allgemeinverbindlichkeitserklärung’ (a declaration of general obligation of bi- or multilateral negotiated contracts among cantons), although the desirability of the enhanced obligation is regarded with scepticism on the part of the cantonal parliaments (Rhinow 2003: 6) and its effectiveness may be doubted. In *Germany*, the framework legislation as a tool for legislative harmonization has been abandoned. Instead, the Länder have the right to deviate from federal legislation in specified matters (the so-called ‘Zugriffsrechte’). Although this right goes not far enough in the judgment of some of the experts of the commission (Scharpf 2006b: 11 referring to position papers for the proceedings of the commission by Arthur Benz and Ursula Münch), it is a step in the direction of accepting more flexible solutions.

Flexibility can finally mean the implementation of timely limited solutions. One advantage of timely limited solutions can be that conflicts which cannot be solved across all sub-national units at a given moment can be accommodated by a preliminary regulation, but automatically resurface on the political agenda after a given period of time. Eventually, after that period,

new routines have been accepted, interest structures have changed or new ideas for better solutions have been found. Instruments for the limitation of laws and policies have not been introduced in the reform processes under consideration in this paper. Hueglin points at this instrument as an element of flexibility when quoting the so-called ‘notwithstanding’ clause in the Canadian constitution (Hueglin 2008: 61). According to this clause, states may enact laws which breach the catalogue of basic rights, but those laws expire after five years. In the United States, the so-called sunset legislation follows the same principle, but there it is not aimed at sub-national diversity but at testing laws at the federal level.

One consequence of the introduction of structural opportunities for flexible solutions seems to be the increased importance of institutions of horizontal co-ordination. Specifically, conferences of executive leaders or heads of departments across Länder or Cantons have developed a significant political weight. The conferences of Länder prime ministers or of the ministers of culture and education, of the interior or of finances are long established institutions in Germany. To the degree, however, that policies such as culture and education are no longer regulated at a federal level, the horizontal co-ordination of standards becomes ever more important. Similarly, the conference of cantonal directors and of the heads of financial departments in Switzerland were an important factor during the NFA process in co-ordinating the interests of the Cantons and taking a unified position vis-à-vis federal interests. On the other hand, the conferences helped to communicate the objectives and compromises of the reform to the Cantons and to build consensus and support (Wettstein 2002). In Austria, the conference of the executive heads of the Länder (Landeshauptmännerkonferenz) might evolve into a substitute for the non existent participation of the second chamber, the Bundesrat, in federal legislation (Bußjäger 2005). What the increased importance of these conferences means for the future of federalism is still unclear. It might be just a replacement for formerly hierarchical decisions, thus entailing higher costs of co-ordination and producing less efficient results. It might mean a further loss of importance of sub-national parliaments, as they are exclusively executive institutions. It probably means a loss of democratic legitimacy and accountability. But it might also prove to be an effective means to balance regional interests and to come to viable solutions, exactly because of their character of small, rather informal networks of experts.

References

- Auel, Katrin (2008): Finally an Exit from the Joint Decision Trap? The German Federalism Reform. In: German Politics, forthcoming
- Batt, Helge (2005): Die Transformation der Konkordanzdemokratie. Der Schweizerische Bundesrat nach der Modifikation der Zauberformel. In: Zeitschrift für Politikwissenschaft, 15, 345-371
- Benz, Arthur (1993): Verfassungsreform als politischer Prozeß. In: Die öffentliche Verwaltung, 46, 881-889
- Benz, Arthur (2005): Kein Ausweg aus der Politikverflechtung? - Warum die Bundesstaatskommission scheiterte, aber nicht scheitern musste. In: Politische Vierteljahresschrift, 46, 207-217
- Benz, Arthur (2006): Föderalismusreform in der „Entflechtungsfalle“. Tübingen: Eschenburg-Vorlesung 2006 des Instituts für Politikwissenschaft
- Braun, Dietmar (2003): Dezentraler und unitarischer Föderalismus. Die Schweiz und Deutschland im Vergleich. In: Adrian Vatter/ Sonja Wälti (Hg.): Schweizer Föderalismus in vergleichender Perspektive. Sonderheft Nr. 9 der Schwiss Political Science Review, 57-89
- Braun, Dietmar (2008): Verfassungsänderung trotz vieler Veto-Spieler: Föderalismusreform in der Schweiz. In: Thomas Bräuninger/ Susumu Shikano/ Joachim Behnke (Hg.): Jahrbuch für Handlungs- und Entscheidungstheorie. Wiesbaden: VS Verlag, forthcoming
- Burkhart, Simone/ Philip Manow (2006): Was bringt die Föderalismusreform?. Köln: MPifG Working Paper 06/6
- Bußjäger, Peter (2004): Föderalismus durch Macht im Schatten? - Österreich und die Landeshauptmännerkonferenz. In: Europäisches Zentrum für Föderalismus-Forschung Tübingen (Hg.): Jahrbuch des Föderalismus Bd. 5. Baden-Baden: Nomos, 79-99
- Bußjäger, Peter (2005): Klippen einer Föderalismusreform - Die Inszenierung Österreich-Konvent zwischen Innovationsresistenz und Neojosephinismus. In: Europäisches Zentrum für Föderalismus-Forschung (Hg.): Jahrbuch des Föderalismus Bd. 6. Baden-Baden: Nomos, 403-426
- Büthe, Tim (2002): Taking Temporality Seriously: Modeling History and the Use of Narratives as Evidence. In: American Political Science Review, 96, 481-493
- Coase, Ronald H. (1937): The Nature of the Firm. In: *Economica*, 386-405
- Eidgenössisches Finanzdepartement: Informationsbroschüre zur Abstimmungsvorlage vom 28. November 2004. Bern: EFD
- Elster, Jon (1998): Deliberation and Constitution Making. In: Jon Elster (Hg.): *Deliberative Democracy*. New York, N.Y.: Cambridge University Press, 97-122
- Erk, Jan (2004): Austria: A Federation without Federalism. In: *Publius*, 34, 1-20
- Freiburghaus, Dieter (2005): Bedingungen für eine gelingende Föderalismusreform: Die Neugestaltung des Finanzausgleichs und der Aufgabenteilung zwischen Bund und Kantonen in der Schweiz. In: Europäisches Zentrum für Föderalismusforschung (Hg.): *Jahrbuch des Föderalismus Bd. 6*. Baden-Baden: Nomos, 506-515
- Funk, Bernd-Christian (2005): Reform der Gesetzgebungskompetenzen im Bundesstaat. In: Karl Weber/ Norbert Wimmer/ Anna Gamper/ Irmgard Rath-Kathrein (Hg.): *Vom Verfassungsstaat am Scheideweg*. Festschrift für Peter Pernthaler. Wien: Springer-Verlag, 127-142
- Georgii, Harald/ Sarab Borhanian (2006): Zustimmungsgesetze nach der Föderalismusreform. Berlin: Wissenschaftliche Dienste des Deutschen Bundestages
- Hrbek, Wolfgang (2006): Ein neuer Anlauf zur Föderalismus-Reform: Das Kompromisspaket der Großen Koalition. In: Europäisches Zentrum für Föderalismusforschung (Hg.): *Jahrbuch des Föderalismus Bd. 7*. Baden-Baden: Nomos, 139-157
- Hrbek, Rudolf/ Annegret Eppler (Hg.) (2005): *Die unvollendete Föderalismus-Reform*. Tübingen: EZFF Selbstverlag
- Hueglin, Thomas O. (2000): From Constitutional to Treaty Federalism: A Comparative Perspective. In: *Publius: The Journal of Federalism*, 30, 137-153

- Hueglin, Thomas (2008): Verfassung - Verfassungsänderung - Verfassungsflexibilität. Anmerkungen zum kanadischen Sonderfall. In: Peter Bußjäger/ Felix Knüpling (Hg.): Können Verfassungsreformen gelingen?. Wien: Braumüller, 49-64
- Koller, Arnold (2008): Gelingen der Verfassungsreform in der Schweiz. In: Peter Bußjäger/ Felix Knüpling (Hg.): Können Verfassungsreformen gelingen?. Wien: Braumüller, 71-78
- Lehmbruch, Gerhard (2000): Parteienwettbewerb im Bundesstaat. Opladen: Westdeutscher Verlag
- Linder, Wolf (2007): Die deutsche Föderalismusreform - von außen betrachtet. In: Politische Vierteljahresschrift, 48, 3-16
- Mader, Luzius (2008): Die 'Totalrevision' der schweizerischen Bundesverfassung. In: Peter Bußjäger/ Felix Knüpling (Hg.): Können Verfassungsreformen gelingen?. Wien: Braumüller, 97-109
- NFA Fact Sheet No. 3: Vorarbeiten und Meilensteine.
<http://www.nfa.ch/de/dokumente/faktenblaetter/fb03.pdf>
- Pierson, Paul (2004): Politics in Time, Princeton. Oxford: Princeton University Press
- Rhinow, René (2003): Auswirkungen der Neugestaltung des Finanzausgleichs und der Aufgabenteilung zwischen Bund und Kantonen (NFA) auf die Parlamente: Hauptreferat. In: Parlament, 6, 5-9
- Schaltegger, Christoph A./ René L. Frey (2003): Finanzausgleich und Föderalismus: Zur Neugestaltung der föderalen Finanzbeziehungen am Beispiel der Schweiz. In: Perspektiven der Wirtschaftspolitik, 4, 239-258
- Scharpf, Fritz W. (2005): No Exit from the Joint Decision Trap? Can German Federalism Reform Itself?. MPIfG Working Paper 05/8
- Scharpf, Fritz W. (2006a): Föderalismusreform: Weshalb wurde so wenig erreicht?. In: Aus Politik und Zeitgeschichte 50, 6-9
- Scharpf, Fritz W. (2006b): Recht und Politik in der Reform des deutschen Föderalismus. In: Michael Becker/ Ruth Zimmerling (Hg.): Politik und Recht. PVS-Sonderheft 36/2006. Wiesbaden: VS Verlag, 306-332
- Vatter, Adrian (2006): Die Kantone als mächtige Vetospieler im Bundesstaat? Der Wandel föderativer Institutionen in der Schweiz. In: Europäisches Zentrum für Föderalismusforschung (Hg.): Jahrbuch des Föderalismus Bd. 7. Baden-Baden: Nomos, 420-429
- Vatter, Adrian/ Sonja Wälti (2003): Schweizer Föderalismus in vergleichender Perspektive - Der Umgang mit Reformhindernissen. In: Adrian Vatter/ Sonja Wälti (Hg.): Schweizer Föderalismus in vergleichender Perspektive. Sonderheft Nr. 9 der Swiss Political Science Review, 1-25
- Weiss, Jürgen (2008): Kommt diesmal wirklich eine Verfassungsreform zustande?. In: Peter Bußjäger/ Felix Knüpling (Hg.): Können Verfassungsreformen gelingen?. Wien: Braumüller, 83-90
- Wettstein, Gérard (2002): Die Neugestaltung des Finanzausgleichs und der Aufgaben (NFA) - Erfolgsfaktoren und Hürden aus Sicht der Projektleitung. In: Leges, 35-42