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Key Points

(i) Federal systems and the allocation of power and resources are constantly under pressure to change and adapt to changing economic or social circumstances or political pressure from parties at both levels of government.

(ii) A formalised system of joint decision-making can serve as stabilising mechanism binding both levels of governments but at the cost of flexibility and opportunities for innovations in policy-making.

(iii) Intergovernmental relations provide a more flexible mechanism for coordination when opting-out is made possible (with or without financial compensation) thereby creating an opportunity to form agreements without imposing rules against the interests of devolved or central governments.

(iv) Judicial safeguards clarify rules of arbitration in case of conflicts. In order to be accepted as legitimate the consent or input from territorial entities on the selection of judges needs to be ensured.

(v) Procedural rules of how change is negotiated matter for the kind of dynamic that unfolds. While bilateral negotiations between one entity and the centre allows for taking differing interests in the entities into account, they also establish asymmetry in the power distribution of different territories and increase the likelihood of a spiral of distancing-catching up pattern between territorial entities.

The Meaning of Federalism

Daniel Elazar defined federalism as a combination of self-rule and shared rule with self-rule referring to the extent to which regional governments have the power to take decisions independently from central governments. Shared rule captures the capacity of a regional government to participate in and influence decisions taken at the centre, for example, through representatives in second chambers of parliaments. In reality, federal states differ in how they combine institutional arrangements that allow for self-rule and shared rule, for example Canada towards self-rule and Germany towards shared rule.

The institutional arrangement that has been put in place at one point in time remains exposed to pressures for change caused by social or economic developments or actors pursuing different interests at different levels of government. In consequence, federal systems are constantly in flux. Problems of efficiency, transparency and accountability have, for example, often been mentioned as resulting consequences of the German system.

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of shared rule or joint decision-making. Federal reforms, like the last one in 2006, however, have been limited in their success of disentangling Lander and federal competences.

Mechanisms of Shared Rule as Linkages
Based on the definition above, mechanisms of shared rule and representation in central institutions provide the opportunity to link different entities with the centre. If these linkages establish systems of joint decision-making, the opportunities of each government taking decisions autonomously may become limited and the system overall rigid and inflexible. Shared rule can be organised in several ways, through:

- **Second Chambers**: members are selected based on a territorial basis (either directly or indirectly elected, or appointed). Territorial entities can be represented equally (like in the American Senate) or weighted according to different sizes in population (as in Germany).

- **Regional composition of cabinets**: This is a convention in Germany where cabinets reflect the regional strength of the governing party. The regional balance is maintained even in case of cabinet reshuffles, sometimes by promoting members of Lander cabinets to the federal level. The vertical integrated party system in Germany facilitates the application of this mechanism.

- **Intergovernmental relations**: Intergovernmental relations provide a mechanism for informal and formal cooperation involving central and regional governments bilaterally, or multilateral cooperation among all regional governments with or without central government involvement.

Joint decision-making
In the case of German federalism, different constitutional principles in the German Basic Law establish authority relationships of shared rule and the necessity for greater vertical coordination (after reform of 2006):

a) The functional allocation of power (Art. 83): The majority of legislative powers rests with the federal level while the Lander are responsible for execution and implementation within the federation – also called 'administrative federalism'. In consequence, coordination is used to facilitate policy implementation.

b) Joint tasks (Art. 91a) establishing joint decision-making in the areas of regional economic structure, agriculture and coastal protection; based on further agreements, coordination is also possible in the field of higher education and research or university infrastructure (esp. buildings) (Art. 91b).

c) Financial concerns (Art. 104a IV): The consent of the Bundesrat is required if federal legislation executed by the Lander creates financial duties or similar payments in kind for the Lander.
d) Joint taxation and fiscal equalisation: changes to the arrangements of fiscal federalism require the consent of Bund and Lander; decisions are taken with an informally established unanimity rule.

Vertical coordination and joint decision-making is ensured through the representation of Lander in the Bundesrat, but also through a variety of Bund-Lander commissions, Bund-Lander committees, and conferences of first ministers and cabinet secretaries establishing a tightly coupled system of intergovernmental relations in which decisions are mostly taken with unanimous consent.

Intergovernmental Relations
Vertical and horizontal intergovernmental relations serve different purposes, from agreeing and administering joint programmes, to coordinate policies with cross-border effects (such as water protection of rivers, or transport) or to share information and knowledge on policy instruments. In federal systems where the Second Chamber does not serve as a way to represent territories in central institutions, intergovernmental relations may offer an alternative linkage mechanisms and a channel for input from territorial entities into policy-making processes at the central level.

In general, those systems which lean more towards self-rule and mostly separate areas of jurisdiction for both levels of governments require from the outset less cooperation and co-decision between central and regional governments, but in reality areas of responsibilities overlap. Depending on the decision-making rule for agreements and their binding or non-binding character, intergovernmental relations can lead to systems of joint decision-making with greater constraints to all governments or they be organised as voluntary coordination leaving room for unilateral action in case no consensus can be reached.

- If unanimity forms the principle for coordination in order to reach an agreement on, for example, a framework for social policy or a tax arrangement, finding a consensus becomes a prerequisite. Governments of entities and the centre will be constrained in their legislative autonomy and become dependent on the willingness of the other to cooperate.

- In comparison, if no consensus can be reached with all participating governments, allowing individual governments to opt out while others proceed with the agreement reduces the constraints on governments. If an attempt to coordinate policies or implementation does not lead to an agreement each government will have the leeway to legislate autonomously with potentially diverging outcomes across the country but at the same time preserving the jurisdictional boundaries of each level.
Voluntary coordination with opting-out opportunity therefore preserves the autonomy of all governments involved and allows for greater flexibility in reaching agreements. It may also lead to greater differentiation or fragmentation of policies that apply to different entities of the state.

Judicial Safeguards

Constitutional principle serve to define or clarify the relations between entities and between entities and the centre. They establish, for example, a hierarchy of norms like in Germany, or equality of legislative acts from federated entities and the federal government like in Belgium.

Using the example of German federalism, one of the principles is the eternity clause ensuring that constitutional reforms that would abolish the federal system itself, democracy or human rights are inadmissible under Art. 79(3). This clause does not prevent a restructuring of Länder but makes it impossible to abolish them entirely through any kind of reform.

The principle of federal comity or loyalty dates back to an early ruling of the German Constitutional Court on the distribution of funds for building houses. It obliges both the federal level and the Länder to conduct their affairs in a manner ‘friendly to the idea of federation’. The principle covers not only federal-Länder but also Länder-Länder relations and it governs not only the substance but also the style of conduct. It basically established the principle of taking decisions with unanimous consent and that no Land can be outvoted by the other Länder. Over time, that principle was enshrined into the system of intergovernmental relations and joint decision-making that is governing the German federalism. Conferences of Lander secretaries of culture and education, for example, decide upon resolutions with unanimity by convention.

A third judicial safeguard for federal states can be embodied in the selection processes of justices for the Supreme or Constitutional Court. In Germany, Länder have influence over appointments through the Bundesrat. According to Art. 94 of the Basic Law, half of the in total sixteen justices of the Federal Constitutional Court are to be elected by the Bundestag ‘and half by the Bundesrat’. In Canada, an informal convention has been established to ensure that three of the nine Supreme Court judges are appointed from the Quebec bar. Other provincial governments may submit lists with suggestions for appointments but have no formal say in the selection process.

Procedural Rules for Adaptation and Reform

Comparative research on constitutional reforms shows that the way a negotiation process is organised matters for the question how similarly or differently powers are distributed
across the entities and what kind of power regionalist or nationalist parties have to push for more autonomy for the particular entity they are representing.

- Reforms, that are negotiated **between governing and opposition parties at the centre**, lead to equal treatment of entities – meaning every territory is granted roughly the same powers and autonomy. Federalisation in Belgium followed this style of negotiation mode. Even though Flemish and Francophone parties had quite distinct interests (decentralisation of education and culture vs. decentralisation of economic policies), the necessity to form a consensus between them led to rather symmetric power distribution between Communities (Flemish and Francophone) and Regions (Flanders and Wallonia).

- A second option is to include representatives of all territorial entities in what has been called **multilateral negotiations**. A substantial reform to Canada’s federal system requires the consent of the majority or even all provinces, ensured by the premiers in so-called First Ministers Conferences and since 1982 by a positive vote in provincial legislative assemblies within a three years window. That multilateral negotiation process produced outcomes saw each province getting the same powers despite Quebec’s distinct character (being the only province with a majoritarily francophone population and civil law tradition) and demands for special recognition and for different powers in comparison to the other provinces.

- **Bilateral negotiations**, in contrast, have been the source of asymmetries between different parts of a state, particularly evident in the UK and Spain. Here, differences in demands from Scotland or Wales – there from Catalonia and the Basque Country – could translate into different agreements due to bilateral negotiations between the centre and representatives of the parts after devolution in 1999.

As it is parties negotiating for changes to the allocation of power, their power to push for a certain outcome is enhanced or limited by the way the negotiation process is organised. Especially for those parties campaigning only in one territorial region and potentially threatening the electoral success of a party governing at the centre, a bilateral negotiation setting offers the opportunity to push for further autonomy or resources for that particular entity. In a multilateral negotiation process, in contrast, particular interests need to be balanced and brought to a consensus with representatives from other entities as well as the centre. Here, preferences for special treatment or asymmetric solutions are more difficult to realise and parties with campaigning across the entire country (so called state-wide parties) have greater power to promote symmetric changes.³

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Considering that pressures for change and adaptation are a central feature for federal systems, it matters for the long-term dynamic how the process in which actors are negotiating over changes is organised.

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