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1. Introduction: The problem of stability and change of federal systems

Due to the tension between unity and diversity, federal systems are highly dynamic. Consequently, one of the central questions treated in studies on comparative federalism is: how a federal system can be stabilised. This issue was raised by William Riker in the early 1960s (Riker 1964), but it has gained new interest in view of failing federations in the Balkans, in Czechoslovakia and in the former USSR. Instability is said to be caused by changing socio-economic conditions and by those holding offices at the central and lower levels as they tend to expand their power. Depending on the structure of a federation, this dynamics of the federal balance of power may lead towards over-centralisation or disintegration, both of which can end in the dissolution of a federal system.

While a legal approach to study federalism implies that stability has to be guaranteed by a constitution, most political scientists disagree with this view. According to their theories, the norms written in a constitution might be difficult to change due to amendment rules, but constitutions have to be viewed as incomplete contracts (Farrell and Héritier 2007; Rodden 2006: 37-38). Therefore, assignments of powers and competences have to be continuously renegotiated. At the same time the federal balance is being subject to power struggles which generate self-enforcing changes. To avoid

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destructive tendencies resulting from instability, scholars have suggested a number of extra-constitutional mechanisms or structural conditions that might maintain a federal system. They include institutional structures which constrain the power of the centre and assign countervailing powers to the regions (de Figueiredo and Weingast 2005), a societal consensus or a federal culture (Livingston 1965, Friedrich 1968). Riker's theory, that an integrative party system reduces incentives of federal and regional governments to change the balance of power to their individual profit (Riker 1964) still holds as the most influential theories (Filippov, Ordeshook and Svetsowa 2004, Roust and Svetsowa 2007). For multinational federations with divided societies, consociational models of accommodation through elite bargaining have been recommended (e.g. Lijphart 1977; Lusztig and Knox 1999).

Considering all these suggestions and the variables at stake, Canada and Germany are contrasting cases and therefore appropriate for evaluating the hypotheses in a comparative study. Accordingly, we should regard Canada as an unstable federal system and Germany as the proto-type of a stable federation. Canada's constitution caused ongoing conflicts between the federal and the provincial governments on competences, which are more decentralised than in all other modern welfare states; the Senate does not really represent the provinces at the federal level; the society is divided in communities claiming to be nations and not integrated by a overarching cultural identity; elite bargaining is challenged by demands for participatory democracy; and after the Second World War the party system became more and more disintegrated due to the rise of regionalist parties and regionalist tendencies in the national Canadian parties. In Germany, the federal government's powers are countervailed by a strong representation of the *Länder* governments in the second legislative chamber, the *Bundesrat*; a strong basic consensus in a homogeneous society holds the federation together which is based on a culture of cooperation; finally, a strongly integrated party system links the federal and the *Länder* level. At a glance, conflicts in the Canadian federal system seem to cause instability, while Germany appears to be rather stable not the least since federalism went through the challenges of German unification and European integration without a serious crisis.

However, developments during the last decades in both countries contradict these conclusions from theories. Canadian federalism went though serious crises between about 1980 and 1995, but meanwhile, it appeared more stable. Conflicts between English Canada and Quebec and between the federation and Aboriginal peoples still exist, but have been reduced to a level that is manageable in ordinary policies. Overall governance of the Canadian federal system works in a satisfying way. Federalism appears as robust, flexible and resilient (Bakvis/Skogstad 2008; Simeon 2006: 314-332; Stevenson 2004). German federalism was not confronted by serious crises. It survived the dual challenge of German unification and European integration with minor adjustment. However, the need to make joint policies of federal and *Länder* governments increasingly appears to constraint policy reforms necessary in face of globalisation (Scharpf 2006). During the last decade, the calls for a reform of the federal system intensified and finally led to a process of constitutional change. So far, the outcomes are limited and have increased rigidity (Benz 2008).

Thus, a comparative study of stability and change in Canadian and German federalism challenges existing theories. First, it shows that for preserving stability, the particular constitution may not really be relevant, but processes of constitutional policy are significant. In democratic political systems, instability is a problem of the constitution and to solve this problem constitutional change is necessary. Second, both cases provide empirical evidence against the prevailing assumption that an integrated party system guarantees federal stability. Not only confuses this theory cause and effect since party structures reflect conflicts and power politics and do not prevent them, it also underestimates the problems caused by an integrated party system for adjustment of federal structures as can be proved for Germany.

By comparing how constitutional problems are managed in Canadian and German federalism, this article suggests a new perspective on stability and instability of federal systems. Based on the theory of incomplete contract, I argue that constitutional policy and change play an important role in maintaining the federal balance. Then, I compare the processes and outcomes of constitutional reform in Canada and Germany and show difficulties, successes and failures for both countries. After proving that "federal contracts are often inefficient but sticky" (Rodden 2006: 227), I analyse processes of "implicit" adjustment of the constitutional contract in both countries. Empirical evidence shows that Canadian federalism has solved the problems of constitutional change in a rather pragmatic and flexible way, whereas in Germany, constitutional reforms and intergovernmental politics in a confrontation of parties and governments have driven the federal system into the trap of constitutional dogmatism.

2. Dynamics of federal systems and causes of instability

Theories emphasising the instability of federalism rightly assume that actors tend to extend their powers. They also correctly point out that an incomplete constitutional contract cannot prevent shifts in powers. However, unilateral power politics never remains unchallenged in a federal system dividing power between institutions and levels of government. Change results from interactions of actors driven by their particular interests and power and the rules guiding these actions. These driving and constraining forces constitute social "mechanisms" (Bunge 1997) determining the dynamics of a political system. In federal systems mechanisms can foster centripetal or centrifugal tendencies in the allocation of powers. A stable federalism requires a combination of mechanisms which balances these tendencies. Instability is caused by a self-enforcing interplay between mechanisms leading either to a dissolution of the federation into autonomous units or to a decline of autonomy of the constituent states in a centralist process which finally ends with a unitary state.

In Canada and in Germany federalism implies mechanisms of politics that work in different directions. In Canada, politics is determined by heterogeneous interests defined in a divided society. The central government is confronted with provincial[1] governments

[1] The Canadian federal state consists of ten provinces and three territories. In the following sections, I only refer to provinces, which includes territories, unless otherwise stated.

representing competing economic interests and linguistic groups demanding autonomy to determine their public interest. From the beginning, it was the dualism between the province of Quebec and the so called "Rest of Canada", which shaped the federal system. Both parts differ due to predominating linguistic communities, but also their legal system (civil vs. common law) and the welfare system (corporatist vs. liberal welfare system). Since the development of the Canadian welfare state, constitutional rules designed to separate powers of both levels became a matter of never ending conflict in these processes. The federal government used its spending power to implement equal services for all Canadians. But faced with the threat of a secession of Quebec and with demands of other provinces for an equal treatment, it had to concede legislative and administrative powers to the provinces. This led to a process of decentralisation, but with Quebec continuously claiming to be treated as distinct society, the competition for powers between both levels of government entailed a self-enforcing process of disintegration. As a consequence of an increasing decentralisation of powers, the federal and provincial party systems became disconnected and incongruent (Wolnietz and Carty 2006).

In contrast, the German federal system is shaped by centripetal dynamics of power sharing. While federalism can be traced back to a territorially fragmented development of the modern state, centripetal forces are fostered by an integrated society, organised in nation-wide parties and interest groups. Powers between the federal and the *Länder* level are divided according to functions with the federal government responsible for most of the legislation and the *Länder* for the implementation of most laws. Demands from parties and interest groups for unitary regulations were met with central legislation, which the *Länder* governments accepted as they gained participation rights and administrative powers (including the necessary resources in the system of shared tax revenues). The *Länder* parliaments, which lost in this interplay, could not mobilise countervailing powers without acting against their own government.

The vertical competition or cooperation determining the dynamics of powers has reinforced a second mechanism which in principle could stabilise a federal system. In both federal countries, but for different reasons, policies are to a considerable extent coordinated in intergovernmental relations. In Canada, coordination between the federal government and the provinces is necessary due to externalities caused in the decentralised federation. Moreover, the constitution accepts federal spending in matters of provincial competence (Watts 1999). In Germany, the need for federal-*Länder*-cooperation has its roots in the functional division of powers. As centralised legislation and decentralised implementation of laws concern closely connected functions, decisions have to be coordinated. The participation of the *Länder* governments in the *Bundesrat* serves this purpose, but actually quite a number of extra-constitutional federal-*Länder*-conferences emerged. Hence intergovernmental cooperation is a characteristic mechanism in both federal systems. However, the conditions for cooperation vary. The most important divergence refers to institutional rules for intergovernmental cooperation and the party system.

In Canadian intergovernmental negotiations, representatives of governments pursue the interests of their jurisdiction which are identical to the interests defined by the parties supporting a government in power. Conflicts reflect the plurality of provincial, territorial and federal interests with each government having to weigh up party political, societal

and institutional interests related to its own jurisdiction. This complex pattern of conflicts opens room for manoeuvre in negotiations. Moreover, the possibility of individual provinces to opt out of intergovernmental agreements and the opportunity of the federal government to make bilateral deals with provincial governments, often with the right of other provinces to opt-in, makes decisions possible even if a consensus cannot be reached. Institutional conditions of the Canadian federalism reduce the risk that intergovernmental negotiations end in the joint-decision trap (Painter 1991). Ongoing communication and unwritten rules of pragmatic bargaining contribute to the effectiveness of coordination (Simeon 2006, 228-255). But voluntary intergovernmental negotiations can hardly stop the competitive dynamics resulting from unilateral actions. As sovereign parliaments at each level can decide against intergovernmental agreements, politics in the federal system is always subject to a tension between cooperative and unilateral action of governments.

The institutions of German federalism set quite different conditions for intergovernmental cooperation. Bilateral agreements and opting out are ruled out by constitutional norms, law or agreements. Although decisions can be made with a majority of the *Länder* governments, if the federal government or, in legislation the federal parliament votes accordingly, they are often difficult to achieve. The main reason lies in a particular overlap of institutional and party political cleavages. The multilevel party system in Germany is integrated and relatively congruent (Grande 2002; Thorlakson 2005). Therefore, if governments are supported by the same party, they have strong incentives to avoid open conflicts, but if they adhere to different parties, they tend to refrain from cooperation and favour competitive behaviour. Due to the different voting behaviour in federal and sub-national elections, which can be observed in many federal systems, the party complexion of the federal government often diverges from that of a majority of *Länder* governments. If under this condition the federal government needs support from a majority of the *Länder*, conflicts framed in party political terms render policy-making rather difficult. However, a deadlock is usually the worst outcome for all participants as it prevents them from making decisions. Therefore, decisions are often made after compromises at the lowest common denominator. As a rule this requires that all participants can profit from decisions and redistributive consequences are avoided.

Despite their institutional divergence, both federal systems are challenged by mechanisms leading to instability. In Canada, the instability was caused by competition of power which was triggered by diverging interests of a multinational federation, after Quebec experienced a process of economic progress and after Aboriginal people claimed rights to govern the affairs of their communities. The confrontation between Quebec and the Canadian State appeared as a particular source of conflicts which could not be solved by negotiated policy-making alone. In Germany, the existing structures of cooperative federalism came to limits when German unification created an economically imbalanced federation and European integration challenged the traditional model of the German welfare state. The need to come to redistributive decisions revealed the ineffectiveness of joint-decision-making required by the federal constitution. Faced with these fundamental problems of their political system, governments initiated processes of constitutional change determined to re-stabilise the federal system.

3. Mechanisms of constitutional change

If federal systems are faced by evident instability, a shift from ordinary policy to constitutional policy is to be expected. However, under these conditions, a change of the formal constitution is rather difficult. Depending on the amendment rules, constitutional amendments require the approval of many "veto-players", and some of them will probably lose by a re-allocation of power. In multinational federalism, social and cultural cleavages are often difficult to settle by explicitly stated rules; and the deep conflicts on fundamental values impede amendments of existing constitutions. In territorial federalism, interests on power and resources often make constitutional change a clear zero-sum game. This is the reason, why stability should not be expected by "explicit constitutional change" alone. Change is more likely to evolve in an "implicit" way, i.e. by decisions in ongoing policy-making which affect the constitutional framework (Voigt 1999: 145-176).

Implicit constitutional change goes beyond the application of constitutional law; it alters the meaning and effect of constitutional norms without changing the wording. This is possible since constitutional contracts are always incomplete. They never precisely delimit the powers assigned to actors or institutions or the scope of decision rules. Federal constitutions in particular have to be flexible due to the inherent social, economic and political tensions between unity and diversity, centralisation and decentralisation, and intergovernmental relations and democracy (Watts 2008: 161-162). In such a context, implicit change often goes beyond an interpretation of written norm but leads to conventions[2]. For the following analysis, I regard conventions as legitimised implicit constitutional change. Legitimacy requires that rules or practices are accepted among citizens or their representatives and can be traced back to norms written in the constitution or evolving as result to constitutional negotiations. An agreement can also imply to accept ambivalence of constitutional law in cases where no consensus can be achieved. This is the result of what Michael Foley designated as "abeyance", i.e. "a set of implicit agreements to collude in keeping fundamental questions of political authority in a state of irresolution" (Foley 1989; ix).

Whereas explicit change is doomed to fail in federal systems, implicit change is a potential source of instability. The dynamics of federal systems outlined above changes the federal constitution in processes of policy-making. The more the incomplete contract blurs the boundaries between constitutional and unconstitutional use of power, the more a federal constitution can be destabilised by unilateral action. And if we assume that all actors holding offices have an interest in extending their power, instability is in fact an in-built tendency (Filippov, Ordeshook and Svetsowa 2004). But if implicit and explicit change are combined and mutually support each other, they can create a stabilising mechanism. The first can lead to a modification of perceptions, preferences and bargaining positions so that an agreement on formal amendment is facilitated. Ratified

2 There is no common understanding in constitutional theory of what makes a constitutional convention. Usually a rule is said to be established as a convention if it conforms to constitutional principles, if it can be traced back to a precedent or practices, and if it finds agreement of relevant actors (Heard 1989; Marshall 1984). The need for a precedent is disputed in the literature.

amendments or successful negotiations in procedures of explicit change can create a frame of reference which determines whether implicit change is accepted as legitimate. Thus, processes of implicit and explicit constitutional change can be linked in a way that reduces transaction costs and prevents illegitimate unilateral action.

The most obvious way of linking both processes consists of a sequence varying between explicit and implicit change (Héritier 2007: 241). Formal amendment of a constitution would be followed by evolutionary development in the implementation of new constitutional rules, and in case that these exceed the limit of undisputed application of constitutional law, formal amendment would be initiated once again. However, this sequence requires successful constitutional amendments at the outset. Certainly they are possible under particular conditions, as examples in some federal states prove (e.g. Switzerland, see Braun 2008; Freiburghaus 2005). Independent on whether these conditions exist or not, constitutional policy and implicit constitutional change can interact in different stages of each process.

Explicit constitutional change results from negotiations of an amendment proposal which is ratified according to rules defined in the constitution, usually with a qualified majority either in parliaments or in a referendum. Negotiation and ratification are two distinct processes with their own logics with the first determining the degree of change and the second the legitimacy. To make ratification likely, negotiations have to end with an agreement. Conflicts on powers and resources can be settled either in bargaining ending with a compromise or by package deals, but they can also be transformed in processes of deliberation on the normative reasons for distributing powers and resources ("arguing", Elster 1998). Ratification follows the logic of aggregation of votes, and voters decide not simply in favour of an agreement, but according to their own weighting of costs and benefits. Thus constitutional amendments can fail in negotiations, but they can also fail in ratification after successful negotiations. In the second case, stalemate can occur. As this situation is usually unattractive for political elites, they either resume constitutional negotiations or try to change the constitution implicitly.

From an analytical perspective, implicit constitutional change implies two stages as well. In contrast to constitutional negotiations leading to an amendment, a change of the status quo is possible not only by collective but also by unilateral action. Parliaments can make laws which de facto alter the substance of constitutional rules, governments can make decisions stretching the meaning of constitutional law, interest groups may argue for a reinterpretation of norms and governments and citizens, like governments and parliaments can initiate rulings of a constitutional court. But in order to become effective as "constitutional conventions", these changes have to find agreement in the democratic community. This can be achieved either in negotiations among the actors affected by a change or by mutual adjustments of preferences, interpretations or practices in an indirect dialogue (Devins and Fisher 2004). Both processes have to ensure that tacit approval of the constitution by citizens is maintained. In order to develop and stabilise approval in a process of collective learning, implicit changes can only evolve in an incremental process.

As mechanism of stabilising federal systems, constitutional change must fulfil the criteria of effectiveness and legitimacy. On a very general level, we can define

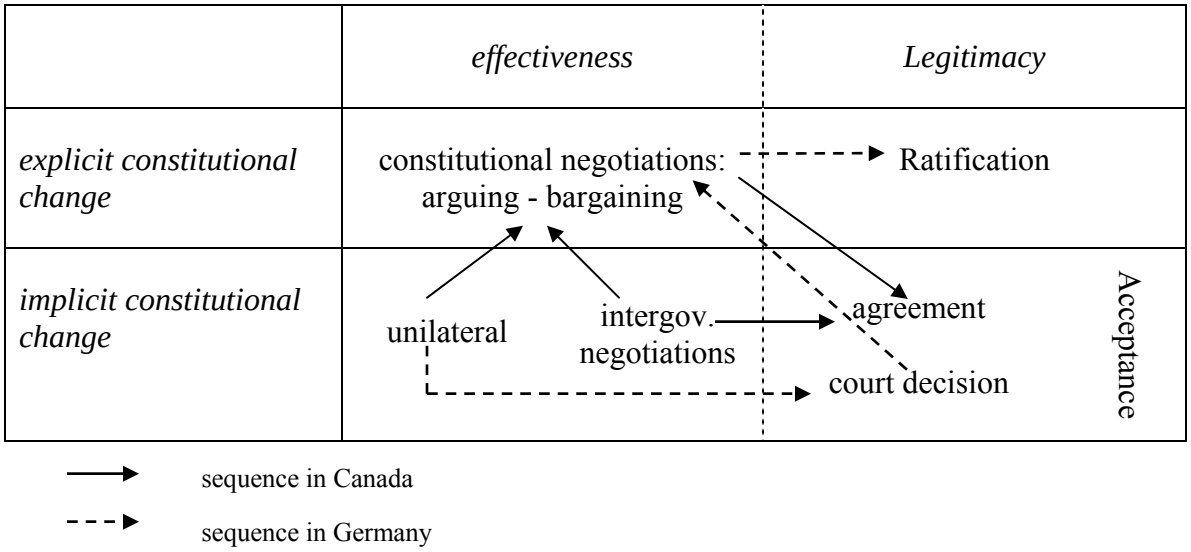
effectiveness as the extent to which the status quo is changed or final decisions conform to aims defined in the agenda. Legitimacy of explicit change results from the ratification according to amendment rules, in implicit change it can be assumed to exist, if changes are not contested by legal means or political protest.

If we distinguish these types of constitutional change and their stages, a number of potential sequences come into view: Aside from successful stabilisation of a federal system either by explicit constitutional change (which we rarely find) or by implicit change (which allows only incremental development), and aside from an "ideal" stabilising sequential alternation between explicit and implicit change, whereby constitutional amendments formalise or revise changes that have evolved in practice and implicit change implements or revises formal revisions of incomplete constitutional contracts, other processes are possible:

- If the dynamics of implicit change leads into a direction which is no longer accepted, negotiations on explicit constitutional change are likely to be initiated and might lead to delegitimize what so far has been regarded as conventions.
- If implicit change is blocked by conflicts, it can trigger constitutional negotiations aiming at reform, which may at least contribute to redefine conventions.
- Constitutional negotiations that result in an agreement or a partial solution of conflicts, but are not ratified, can support implicit change, as far as this finds approval.
- During processes of constitutional amendment, implicit change can influence the negotiation positions of actors, if it leads to a modification of the status quo.

In the following sections, I will show that Canada and Germany followed different sequences of constitutional politics. In Canada, unilateral decisions of the federal government and implicit change by intergovernmental agreements raised conflicts which led to constitutional policy. Between 1986 and 1992, two agreements on a constitutional change were negotiated, first among governments, then with wide participation of societal groups. Both proposals were rejected in the ratification process, but provided the background for implicit change, mainly by intergovernmental agreements. In this process the federation gained stability. In Germany, the increasing inflexibility of intergovernmental policy-making made constitutional reform necessary. Constitutional amendments were ratified in 1994 and 2006. As far as they led to changes, constitutional negotiations were influenced and supported by decisions of the Constitutional Court that altered the status quo. Beyond that implicit change by political agreements turned out as not being very effective. As a result, we can observe in both countries different modes of constitutional change: In Canada, the interplay of constitutional negotiations and intergovernmental negotiations has led to continuous adjustments of rules which have corrected the disintegrative effects of inter-jurisdictional competition. In Germany we observe attempts to depoliticise conflicts in the federal system by explicit constitutional rules or by decisions of the Constitutional Court, whereby the interactions of constitutional policy and the Court explains effective change.

Table 1: Sequences of constitutional change in Canada and Germany



4. Success and failure of constitutional reform

As regards constitutional amendment, one can hardly find more contrasting cases than Canada and Germany. In Canada, the constitution was an issue since the British colonial government conceded full sovereignty to the Canadian State. However, most efforts to revise the British North America Act of 1867 have failed either in part or in total. In 1982, the "patriation" of the Constitution led to some important amendments, but the legitimacy of this Constitution suffered after the government of Quebec explicitly expressed its dissent and threatened secession. The attempt at "mega-constitutional" reform (Russell 2004) during the 1980s and early 1990s ended with the rejection of negotiated accords in the ratification process. In contrast, the German constitution was revised several times. Only one effort for an overhaul, initiated in the early 1970s, ended without any result. After German unification, the constitution was revised in 1994 and in 2006, and the legislature, with the required two-thirds majority in both Houses, passed the proposed amendments.

a) Canada: Accords failed in ratification

The Canadian constitutional questions emerged when the British government decided to affirm full sovereignty to its former colony in 1931. However, it was not until the 1960s that a renovation of the British North America Act of 1867 (BNA) became urgent. After a number of amendments and extra-constitutional agreements changed the allocation of powers between the federal and provincial governments in the postwar period, the rise of Quebec's nationalism clearly indicated that the status quo was no longer accepted in all parts of the federation. During the 1960s, several constitutional conferences ended without much progress. Finally, the federal government took the lead and in 1982 the national parliament passed the Constitution Act (Cheffins and Tucker 1976; Hurley 1996; Tremblay 1995). This act "patriated" Canada's constitution, i.e. it

transformed the BNA from a law of the British parliament into the constitution of a sovereign state. It introduced an amendment formula and a Charter of Rights and Freedom, recognised the rights of Aboriginal people and guaranteed fiscal equalisation between the provinces. By emphasising individual rights of education in English or French, the Charter contravened the interests of Quebec to maintain its French culture. In addition, the province expected an increasing power by a Supreme Court favouring centralist positions. In so far, the new constitution deviated from the federalist order of 1867, which recognized the autonomy of provincial governments and the distinctive character of English- and French-speaking Canada (Brouillet 2005). While most of the provinces accepted the approach of building a Canadian nation, Quebecers emphasised the risks for their identity. Consequently, the parliament of Quebec explicitly denied to ratify the Constitution Act. It nonetheless came into force, after the Supreme Court had denied a veto right of the provinces under the old constitutional rules. This unilateral act of the federal government, intended to constitute a multicultural but unified Canadian nation, de facto divided the country (Morton 1995; McRoberts 1997: 176-188). Quebec refused to acknowledge the constitutional change of 1982. And the issues of Aboriginal peoples were now on the agenda, but not effectively dealt with.

After the "top-down" approach of constitutional politics had turned out as destabilising for the federal system, the next attempt to overcome the impasse was made in intergovernmental negotiations. In 1985, after the Liberal party came to power in Quebec, the government of the province defined conditions for a constitutional consensus. Willing to settle the conflict, the federal government responded by starting a project of constitutional reform. A first round of negotiations between May 1986 and April 1987 ended with the Meech Lake Accord. The agenda was elaborated in meetings of top officials from all governments. They prepared a meeting of the prime ministers that took place on April, 30 1987 at Meech Lake. Michael Stein graphically describes the exclusive character of the negotiations by reporting that the meeting "was confined to a single small room, in which only the first ministers and two officials acting as recording secretaries were present. Officials with expertise in intergovernmental relations or constitutional law were assigned to a separate room and kept at arms length; they were not permitted to participate directly in any of the discussions or crucial negotiating decisions unless requested to appear and provide advice to the first ministers" (Stein 1997: 318).

Evaluated according to the criteria defined above, Meech Lake stands for an ineffective constitutional policy. The outcome of intergovernmental negotiations referred to the issues raised by Quebec but excluded matters concerning Aboriginal people and other Canadian interests in a broader reform. If the proposal had become constitutional law, it would have turned the Senate into a representation of provinces, while most amendments would have formalised what had already been political practice. By using its bargaining power resulting from its option to opt-out from agreements, to block important constitutional amendments and to threaten with secession from the federation, the government of Quebec achieved concessions concerning the formalisation of its status as distinct society, the representation of the province in the Supreme Court, immigration policy, extended veto power of the provinces in decisions on institutional matters and financial compensations when opting out from federal policies. Matters of

Aboriginal people were not considered, whereas all provinces would have profited from a decentralisation of powers. Constitutional bargaining therefore led to an agreement, which was modestly innovative, but excluded important dimensions of conflicts (Hogg 1988).

The reform packages included amendments which, according to the provisions of the Constitution Act, required ratification by the federal and all provincial parliaments. When in 1990 the three year ratification period expired, the parliaments of New Brunswick and Manitoba still had not voted on the Accord. Efforts of the federal government to save the agreement in a final conference failed in face of increasing opposition (Breton 1992; Tremblay 1995: 132-135). Groups excluded from the negotiations like Aboriginal peoples, women associations and minority language groups publicly expressed negative attitude. In several provinces, opposition parties adopted their opinions, and with this strategy they won majorities in New Brunswick and Newfoundland. Others argued that the Accord would jeopardise the integration of the Canadian federation. In general, the process was widely criticised due to the predominance of governments and the exclusion of societal groups. Intergovernmental negotiations among executives were no longer accepted as appropriate form for constitutional agreements and the final attempt of governments to react to the ratification problems revealed as futile. While Aboriginal people felt ignored in the Meech Lake process, Quebec felt betrayed when the Accord was not ratified. Again constitutional politics caused more instability than stability.

As a consequence, the federal and provincial governments changed the mode of constitutional negotiations (Hurley 1996: 114-125). The process leading to the Charlottetown Accord signified a clear departure from the traditional intergovernmental process. It was open to participation of citizens and interest groups and produced results that were, compared to the Meech Lake Accord, more comprehensive and more effective. At the federal level, the government set up a commission, which between November 1990 and July 1991 elaborated suggestions to promote a dialogue with citizens. A joint committee of the Senate and the House of Commons (Beaudoin-Edwards Committee), established in December 1990, reviewed the amendment formula. It proposed a consultative referendum, which was adopted by parliament in June 1992. In a different composition, the committee (Beaudoin-Dobbie Committee) became a central arena for negotiation on constitutional amendments. The agenda of these negotiations was set with a list of 28 proposals elaborated by a committee of the cabinet and published in September 1991. In addition to the discussions in the joint committee of the Parliament, the government initiated five public conferences convened and directed by independent organisations or institutes. They include between 200 and 260 participants representing the parliament, the regions, the Aboriginal peoples and different interest groups. Moreover, individual citizens were invited and selected in a lottery. Supported by the federal government, a similar process was organised by the four Aboriginal associations. The parliamentary committee on its own held public hearings including 700 witnesses and received over 3000 submissions. In the provinces and territories, parliaments set up committees or task forces which organised similar public consultations in order “to get a clearer understanding of the views of the people” (Hurley 1996: 117).

Conforming to the broad participation of interests groups and citizens, the agenda included all relevant constitutional issues (Cameron and Smith 1992). Both the

"parliamentary" negotiations in the committees and the participation of associations, citizens and experts led to significant changes of the government's original proposals (Russell 2004: 181). The final public conference summarised the negotiations in a consensus statement. The Beaudoin-Dobbie Committee produced a report by unanimity. It was not till the end of these negotiations in parliaments and in public that constitutional negotiations shifted into the intergovernmental arena, where executives from federal and provincial governments formulated the definitive agreement in closed-door meetings. This was where the Charlottetown Accord finally was settled.

This process clearly deviated from former practice of constitutional policy and turned intergovernmental bargaining into an unrestricted exchange of arguments among a plurality of actors. Peter Russell rightly commented "Canada surely had a look on the entry of the Guinness Book of Records for the sheer volume of constitutional talk" (Russell 2004: 177). The risk of overload with unstructured information was managed with the help of experts who compiled the material into reports. The open participation generated new proposals and alternatives and stimulated collective learning in communications and negotiations that came close to "integrative bargaining" (Stein 1997: 325). It confirmed what Alan Cairns had observed in earlier constitutional negotiations: "Possibly the most striking feature of the diffuse constitutional review process was how shifts from one arena to the other changed the agenda of the actors" (Cairns 1985: 121-122). That the final agreement was negotiated among a limited number of actors was a matter of practical necessity. That these actors only included executives appeared as a regression into exclusive intergovernmental bargaining, which no longer appeared legitimate. However, this time governments constrained the scope for bargaining by giving citizens a voice in a consultative referendum.

With constitutional negotiations taking place in different arenas, the Charlottetown process generated innovative results without excluding relevant matters, thus pointing beyond the Meech Lake Accord (see Table 1, below). The final document proved that the process was not overloaded (Manfredi and Lusztig 2000), but managed in a way that led to a result. It ended with agreements on most issues in the constitutional disputes some of them revealing new perspectives. To be true, the final document was not well structured and included proposals to amend the constitutions and declarations on issues requiring future political agreements. But in fact what was published as "consensus report" was not a document to be ratified in an amendment process. Rather it was a summary of agreements on how the Canadian state should be reformed in future processes. This character of the Accord has to be taken into consideration in order to understand its effects on implicit constitutional change

Regarding its substance, in a number of its sections the Accord recorded a compromise at the lowest common denominator. Examples were the rather complicated "Canada clause" dealing with the issue of unity and diversity and the lack of a proposal how the Senate should be elected. In other parts, e.g. the suggestions for a social and economic union, it sounded like a wish-list. Also problematic was the guarantee of at least 25% of seats for Quebec in the House of Commons, a deal among governments

which had no basis in the preceding consultations.[3] However, for quite a number of important issues, the Accord at least paved the way to solve enduring constitutional conflicts, e.g. concerning the allocation of competences, the spending power of the federation, the internal market, the amendment rule and in particular Aboriginal issues. Many proposals formulated no precise constitutional rules but defined goals for further constitutional negotiations or constitutional principles, whereas detailed regulations were proposed for few issues like the representation of Quebec in the Court and in the national parliament as well as for procedures of legislation. Competence allocation between the federal and provincial governments should be determined in a rather flexible way, in particular by allowing intergovernmental cooperation instead of federal policy-making if requested by provinces. Thus, the Accord pointed in the direction of a decentralised and cooperative federalism. Detailed division of competences, rules for intergovernmental relations and other consequential amendments were partly discussed, but with no result. Taken as an isolated document, the fuzziness of many statements might be criticised. But taken as an "incomplete contract", the proposed changes could have framed a process to be continued in the legislative and intergovernmental arenas.

The Accord documented a consensus among all governments of the federation and representatives of Aboriginal peoples. Because not all disputes could be settled, dissenting opinions were recorded though not made public. The idea was to test and strengthen the agreement by a consultative referendum. This strategy implied risks, but also a chance to finally solve a constitutional crisis. The intense public consultation with citizens and interest groups provided a good basis for a positive outcome. Immediately after the end of constitutional negotiations, opinion polls indicated that a majority of citizens supported the agreement.

However, the referendum[4] failed due to a majority of no votes in Canada and in six provinces. This was partly due to deficits in the structures of constitutional negotiations leading to the Accord, but also caused by confrontations among political leaders in public discussions after the agreement. The process suffered from three serious flaws: First, there was no close connection between the public consultations organised by parliamentary committees and the ensuing intergovernmental elite bargaining (Stein 1993, 1997). This became obvious when the final compromise included a guarantee for Quebec's 25% of seats in the House of Commons. Such a rule was never an issue in the previous negotiations and was widely unpopular because it affected norms for democratic representation. Secondly, constitutional negotiations could not effectively bridge the divide between English Canada and Quebec. Representatives of the province participated in all arenas of public discussions, but in the decisive intergovernmental negotiations, the government of Quebec did not take part before the final meeting. Third, public debates on the referendum accentuated disputes and ignored what had been accomplished. Instead of promoting the reform, politicians and leaders of associations rejected the whole accord.

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[3] This guarantee of seats should compensate Quebec for its loss of seats in a reformed Senate.

[4] From a formal point of view two referenda were organised as Quebec did not participate in the federal referendum and arranged its own proceedings. This reinforced the cleavages in public communication which proved as ill-fated for the outcome.

In these debates the multifaceted constitutional problems turned into a confrontation of the contradicting interests of Quebec and the "rest of Canada". Such a reduction of complexity might have been avoidable in parliaments. In the referendum process this was hardly possible and the positive attitudes of a majority of citizens faded away. Fourth, the referendum was about the basic conflict between a federalist and a confederalist vision of the Canadian state which was not really settled in the constitutional negotiations (Johnson et al. 1996).

After the "mega-constitutional" reforms failed with the Charlottetown Accord, Canadian constitutional policy was in a deadlock and the federal system doomed to further disintegration. Already in 1990, a violent confrontation between the Mohawk and the Canadian government in Oka, Quebec had pointed out increasing tensions with the First Nations. After the 1992 referendum, an accommodation of diversity between the federation and Quebec seemed impossible, not least since the nationalist *Parti Québécois* (PQ) profited from the crisis in elections and won the majority in the provincial parliament. But in 1995, the PQ's strategy for secession failed as well, when citizens rejected this option in a referendum by a very narrow margin, thus revealing a divide within the provincial citizenry. The two referenda petrified the constitutional status quo and left all problems unresolved. However, the double negative vote contradicted the interests of all actors in constitutional policy, including citizens and their representatives. With their participation in the constitutional negotiations, they signalled their preferences for a change, and the status quo appeared as the coincidental result of collective action. Of course it was not appropriate to ignore a majority in a referendum and simply implement the Charlottetown Accord. But it was possible to follow the guidelines of the Accord in future policy and to implement incrementally those parts that could find acceptance. In fact, this was the way the Canadian constitution was adjusted by implicit change after 1995.

Table 2: Meech Lake and Charlottetown Accord compared

Agenda	*Meech Lake Accord*[5]	*Charlottetown Accord*[6]
unity vs. diversity	principles to interpret the Constitution: – linguistic duality, – Quebec as distinct society	"Canada clause": Quebec as distinct society in a democratic Canadian federation; Aboriginal self-government as third order
individual vs. community rights	-	respect for individual and collective rights of all people
amendment rule	unanimity for reform of House, Senate, Supreme Court, territory of provinces; compensation for province opting out of an amendment changing legislative powers	unanimity for reform of House, Senate, Supreme Court, territory of provinces; compensation for province opting out of an amendment changing legislative powers; new territories by Act of Parliament
representation in House	-	at least 25 % of seats for Quebec
Senate	Senators proposed by government of Province	directly or indirectly elected, equal representation of provinces, limited veto rights
representation in Supreme Court	constitutional entrenchment; guarantee of three judges (of a total of nine) for Quebec	constitutional entrenchment; guarantee of three judges (of a total of nine) for Quebec
competences	constitutionalisation of federal-provincial immigration agreements	constitutionalisation of federal-provincial immigration agreements; clarification of provincial competences; decentralisation of labour market policy; joint competences for regional policy and telecommunication; formal abolishment of federal power of reservation and disallowance
Economic and social union	-	free trade, common market; social rights and goals
Intergov. agreements	constitutionalisation of immigration agreements	protection against unilateral change
Spending power	compensation for provinces opting out of a shared-cost programme, if the province carries out a programme compatible with national objectives	compensation for provinces opting out of a shared-cost programme, if the province carries out a programme compatible with national objectives; conditions for using spending power
Aboriginal rights	-	specification of right for self-government; minority rights in legislation and constitutional amendments; commitment to negotiate on development of Aboriginal self-government

[5] Hogg 1988.

[6] Consensus Report on the Constitution, Charlottetown, August 28, 1992, in: Russell 2004: 275-301.

b) Germany: Ratified amendment after failed constitutional negotiation

In contrast to what we observed in Canada, the recent reform of the federal system in Germany ended with an amendment of the constitution in 2006. This reform goes back to long discussions about the problems of co-operative federalism and a first revision of the Basic Law in 1994. After 1989, German unification triggered a debate as to whether the enlarged Federal Republic required a new constitution or whether a revision of the existing Basic Law would be sufficient. As a compromise, the two Houses of the federal legislature convened to set up a joint committee responsible for reviewing the constitution. After 14 meetings and 9 hearings of experts and interest groups between 1992 and 1993, the committee submitted proposals for constitutional amendments, which found the required two-thirds majority in the *Bundestag* and the *Bundesrat*. The discussions mainly reflected the well-known complaints about joint decision-making and centralisation. However, as the impacts of unification on the federal system and on democracy were still unsure, the allocation of powers and resources between levels of government was not a major issue of the reform (Jeffery 1995). More important was the role of *Länder* governments in European integration. A new article entrenched the practice of intergovernmental co-operation in EU affairs into constitutional law, making EU policy a matter of joint policy-making. Another amendment had a significant effect on later developments. It obliged the Constitutional Court to decide on conflicts between the federal and the *Länder* governments when the application of concurrent competence for legislation is a matter of dispute.

Since the mid 1990s, public debates increasingly politicised the federal constitution and pushed for more decentralisation, more intergovernmental competition and less uniformity or fiscal equalisation. In 2003, in response to these debates, the *Bundestag* and the *Bundesrat* set up a bicameral committee determined to draft a reform of the federal system. It included 16 members of the federal parliament and 16 members of the *Bundesrat*, actually the prime ministers of the *Länder* or their deputies. The federal government, the parliaments of the *Länder* and the local governments were represented by members without a right to vote. In addition, 12 experts participated in the consultations. Most of the meetings of the committee were held in public, but the response of the media or citizens was limited. Citizens or interest groups could submit written proposals to the committee, an opportunity which was used by some groups and a few individuals. These statements were summarised by the committee secretary, but they had no real impact on the negotiations (Benz 2005). The civil servants of ministries who prepared materials and analyses for their governments had much more clout. While the *Länder* governments mainly relied on generalists, specialists from different departments had an influence at the federal level, in particular when the federal Chancellery requested the ministries to submit proposal for legislative competences that could be left to the *Länder*. In general, bureaucrats from the federal and the *Länder* level showed a tendency to make constitutional law coherent with their policies, by conceding only parts of competences and by precisely defining the division of competences and the responsibilities for expenditures.

The agenda of the committee, prepared in informal negotiations between the Federal and the *Länder* governments, seemed to aim at a comprehensive modernisation of the federal system. In the first meeting, the representatives of the *Bundestag* and *Länder*

governments declared effective governance and accountability through a clear separation of powers to be the primary goals. They should be achieved by cutting the veto-rights of the *Bundesrat*, i.e. by reducing the number of federal bills requiring the consent of the second chamber to become law. Moreover, legislative competences should be transferred from the federal level to the *Länder* parliaments. The participation of *Länder* governments in European affairs and the sharing of burdens caused by European laws were issues, too. Under discussion were also the decision rules in the *Bundesrat*, the allocation of tax competences and federal powers to give grants to *Länder* and local governments. However, the scope of the reform was restricted from the outset by the decision not to alter the relative resource base of each government.

In fact, discussions in the commission focussed on a package deal. The federal government should profit from reduced veto power of the *Länder* governments in federal legislation and the *Länder* should gain from a transfer of legislative competences from the federal level. However, this deal was doomed to fail for two reasons. First, while the parliaments of the *Länder* fought for extended legislative powers, their governments wanted to maintain their power to prevent federal laws which place burdens on their fiscal and administrative capacities. In fact many laws have this effect as they are implemented by the *Länder* governments. When the federal government agreed to free the *Länder* from administrative regulations in federal law, the prime ministers demanded veto rights in cases when a law has financial consequences for their jurisdiction. Second, the *Länder* were divided in their demand for legislative powers. While the rich and large West German *Länder* pleaded for far-reaching decentralisation, the economically depressed East German *Länder* feared the fiscal burden of new responsibilities and disadvantages in competition among jurisdictions. Finally, the committee agreed on rules defining the veto rights of the *Bundesrat*, which hardly met the expectations of the federal government. On the other hand, legislative powers assigned to the *Länder* concerned a number of mostly less important matters, the exception being secondary education and payment for civil servants. Compared to earlier attempts to decentralise, this was significant progress. But the compromise on competences included a differentiation of types of legislative competences and more detailed definitions of federal legislative powers. As a consequence, conflicts on the division of powers are likely to increase. Moreover, constitutional rules concerning European affairs raised distributive conflicts on powers in the EU Council of Ministers, which were settled on the lowest common denominator. The federal government conceded the *Länder* governments the right to represent the Federal Republic in the Council when educational and cultural policies are at stake, which does not occur very often. The *Länder* achieved a precise definition of their financial commitments in cases when the Federal Republic is fined for infringing European law or the Stability and Growth Pact. They also successfully bargained for rules setting time limits for federal grants and constraining federal spending power to areas outside their legislative competence. Moreover, the federal government should no longer be able to assign tasks to local governments.

At the end, the committee achieved compromises on many issues, by excluding matters like the decision rules of the *Bundesrat* and, much more important, most issues relating to fiscal federalism. Nevertheless negotiations ended without the committee submitting a proposal for constitutional amendments to the federal legislature. The

obvious reason for this deadlock was a conflict on federal powers in education. But beyond this, there was discontent among the rich Western *Länder* on the suggested decentralisation, while the Eastern *Länder* took the reform package as gateway into a competitive federalism. Committed to a consensus, the *Länder* representatives blocked the final session of the committee, and the two chairpersons could only declare failure.

Regarding the substantial results, the committee on the modernisation of German federalism elaborated proposals that went beyond previous reforms (see table 2, Holtschneider/Schön 2007; Kluth 2007). Compared with the 1994 amendments, the result was less fixed to the status quo. However, in consideration of the goals, the achievements were moderate, and in view of the agenda, a number of important issues were not dealt with at all. What is ignored in many reviews of the reform is that the amendments led to rather detailed regulations of competences and fiscal responsibilities which will reduce flexibility in policy-making. Moreover, the constitution now constraints federal spending power in areas where *Länder* and local governments have the competence and it no longer allows the federal government to assign task to local governments. These rules significantly reduce options for policy-making in matters that are essential in the information age (Courchene 2008: 41-44). Therefore, considering the proposed amendments, constitutional negotiations in Germany can be hardly evaluated as more successful than those in Canada.

Nevertheless, German constitutional reform did not end in a deadlock. After the 2005 snap elections to the federal parliament and the change in government from a Red-Green to a Grand Coalition, a small group of high-level politicians of the federal and the *Länder* governments resumed negotiations and finally clarified the remaining open questions. After a dispute in the federal parliament on the federal role in education and research[7], the bill to amend the constitution passed both Houses of the federal legislature with the necessary two-thirds majority. The package for a constitutional reform prepared in intergovernmental bargaining reflected more the interests of governments and administrations to maintain their powers and resources than ambitions to renew the federal balance. But under the amendment rules of the German constitution, which set a much lower threshold for change than it is the case in Canada, explicit constitutional change nevertheless was possible. The price of this process is that federalism became more regulated by detailed constitutional provisions. They reduce its flexibility for implicit change.

[7] This dispute was instigated by members of the Social Democratic party who pleaded for powers of the federal government in research and education. It shows that the predominance of intergovernmental negotiations covered party political conflicts.

Table 3: Reforms of the German Basic Law 1994 and 2006 compared

Agenda (concerning federalism)	*Reform 1994*	*Reform 2006*
decision rules of *Bundesrat*	-	-
veto rights of *Bundesrat*	-	changes concerning administrative and financial regulations, outcome on balance unclear
Competences	reformulation of conditions for concurrent competence, procedure to settle conflicts by Constitutional Court; minor reallocation of competences, no decentralisation	decentralisation of 16, centralisation of 6 legislative competences; new types of competences prohibition of direct rule of federal government against local governments
Administration	-	-
fiscal federalism (taxing power, fiscal equalisation, federal grants)	-	minor decentralisation of taxing power; limitation of federal grants; constitutional entrenchment of current fiscal equalisation agreement (Solidarity Pact)
joint tasks	-	abolition of joint task on university construction cooperation in education and research under unanimity rule
EU and federalism	constitutional entrenchment of participation of *Bundesrat;* *Länder* representative in Council of Ministers optional	conditions for *Länder* representatives in the Council of Ministers more precise; sharing of financial burdens in case of sanctioned infringements of EU law

5. Implicit constitutional change

When only considering explicit change, neither Canadian nor German federalism prove very successful. In Germany, constitutional amendments were ratified which did not really meet the goals of the reform and have ambivalent consequences. In Canada, major reforms determined to overcome the growing cleavage between the orders of the federation ended in a deadlock. But this is only part of the story. In Canada, besides some constitutional amendments mostly concerning individual provinces according to article

43 of the Constitution Act, this negative outcome has been compensated for by implicit change, mainly based on intergovernmental negotiations. German federalism took a quite different path of constitutional dynamics resulting from the interplay between constitutional amendments and decisions of the Constitutional Court.

a) Canada: Intergovernmental politics

Immediately after the Charlottetown Accord was defeated by citizens, J. Peter Meekison wrote: "There appears to be little enthusiasm on the part of Canadians and their governments to resume constitutional discussions. Paradoxically, constant reminders of our constitutional disagreements continue to surface. These two realities create a dilemma if solutions are to be found. Prudence suggests that the mega-amendment is not a realistic alternative today. … Canadians have spent so much time, energy and emotion on constitutional reform that we have ignored other means of solving our problems" (Meekison 1992: 81). These other means, which Meekison recommended, in particular intergovernmental negotiations and agreements, have been widely used in order to implement at least part of the agreements achieved during the series of constitutional negotiations. In this context, one should not underrate the impact of the accord on constitutional amendments, settled after a process of intense constitutional negotiations among the federal and the provincial governments with the participation of parliaments and consultations with interest groups and citizens in a number of conferences (Russell 2004: 163-189; Stein 1997), even if it was finally rejected in the referendum. The accord set the guidelines for the solution of at least a number of constitutional problems and legitimised governments' efforts to overcome the constitutional deadlock.

Explicit constitutional change did not come to a halt after the Charlottetown Accord, but it since then has proceeded in a piecemeal manner, often narrowly linked with implicit change. One example concerns secession. In 1996, responding to the 1995 referendum in Quebec, the federal government initiated a clarification of the conditions for secession of a province. The dispute on this right of provinces, smouldering between the federal government and Quebec, was decided by federal law. Initially, the federal government referred the question of secession procedures to the Supreme Court. The Court decided in favour of the unity of the Canadian state (Verrelli 2007: 265-326) and defined conditions for a legitimate secession, but implicitly acknowledged this right. The conditions then were confirmed by the federal "Clarity Act", after Quebec had responded with dissent. The act states that legitimacy of secession requires a clear majority of citizens voting in favour of a clearly formulated question. In addition to a referendum, the law requires negotiations between the federal government and the provinces and an amendment of the Constitution. As a consequence of this higher threshold, the power of Quebec to threaten secession has diminished. The government of the province repudiated the unilateral decision of the Supreme Court and the Parliament in Ottawa. But in practical politics, the protagonists of sovereignty have now to recognise the risks of a formally illegal act, and the PQ no longer calls for an immediate referendum on secession and meanwhile aims at confirming Quebec's nation by a constitution for the province (Turp 2008). A moderation of the conflict between the federal government and Quebec was certainly supported by the Constitutional Amendment Act 1996 (Act C-110), which

introduced a veto right of five provinces in constitutional amendment if crucial parts of the constitutions are affected.

While these legislations contributed to maintain the constitutional status quo, necessary adjustment was achieved by intergovernmental agreements (Poirier 2004), some of them implementing principles of former constitutional agreements and serving as an "*ersatz* à des réformes constitutionnelles" (Poirier 2008: 10). With the "Agreement on Internal Trade" of 1995, the federal and provincial governments defined the regulatory framework for a free market in Canada. In case of conflict, a dispute settlement mechanism will be set in motion. Implicitly, the agreement acknowledges the right of the federal government to interfere in issues of interprovincial commerce. In a similar way, the "Social Union Framework Agreement" (1999) confirmed the powers of the federal government in social affairs and established a kind of joint tasks in these matters. In addition, it introduced rules for applying the federal spending power and a new mode of intergovernmental coordination by benchmarking of provincial performance according to agreed standards. Both agreements signalled the preference for cooperation and negotiated settlements in the application of disputed constitutional powers instead of decisions by the Supreme Court or explicit constitutional change. Although real policy changes and their impact in both fields are debatable (e.g. Cameron and Simeon 2002; Jeffery 2006) and vary depending on the party in power, the agreements set the rules for cooperative federalism which some years earlier were defined in the Charlottetown Accord.

Negotiations and agreement also allowed for progress in matters of Aboriginal people (Papillon 2008). The "Nunavut Land Claims Agreement" signed in 1992 led to the creation of Inuit self-government in the Nunavut territory as from 1999. Aboriginal organisations have gained access to various intergovernmental organisations although they have been neither accepted as a third order of government as suggested by the Charlottetown agreement nor as partners in a treaty-based federalism. With organisations of Aboriginal self-government emerging, powers for administering federal grants have been decentralised. The effects of these developments are to be considered as mixed so far. In any case, even without formal constitutional amendment, relationships between Aboriginal people and federal and provincial governments have begun to change significantly, and the evolution of multilevel governance is proving a more successful way to cope with the still existing problems and conflicts (Alcantara 2008; Papillon 2008: 308).

The installation of the Council of the Federation in 2003 by an agreement among the provincial governments signified a shift in intergovernmental structures. This institution has put horizontal relations between all provinces on a more regular basis. By coordinating their policies the provinces can prevent federal interference into their affairs. The Council can also contribute to a more robust integration of the Canadian federation which in the past had been jeopardised by bilateral arrangements between provincial and federal governments and the opt-out strategies of some provinces, in particular Quebec. Under the conditions of a multinational federation and the increasing economic divergence between regions, such an institutionalised mechanism of coordination (which is not available in other multinational federations) can work as a stabilising element (Courchene 2005). In contrast, the federal government preferred collaboration with the

provinces on specific programs through contacts at the official or ministerial level rather that meetings of first ministers (Papillon and Simeon 2004: 123).

After a decade of remarkable implicit change in Canadian federalism, two of the most contentious issues of constitutional policy still remain open questions. One is the reform of the Senate, the other the status of Quebec and the relations of this province to the Canadian government. Regarding both matters, the outcome of constitutional negotiations during the 1980s had produced no real solutions. For the Senate, the constitutional negotiations had paved the way for an elected and effective Senate but a number of important questions had been avoided. As to the second issue, the "Canada clause" formulated in the Charlottetown Accord had only covered the conflict by widely interpretable norms. Both issues are still under dispute, but some important developments have to be reported.

A reform of the Senate is still on the agenda, but only a moderate internal change by federal law seems realistic. In the Throne speech of 2007, Prime Minister Harper announced such a reform, which has been prepared in a special committee of the Senate. On November 13, 2007, Bill C-20 was introduced in the House of Commons intended to give provincial electors a consultative voice in the nomination of Senators. In the same session, the House held the first reading on bill C-19 which should reduce the tenure of Senators to an eight year term. In a motion of its parliament, Quebec has contested this legislation as unconstitutional and in a hearing in the Senate a number of experts supported this opinion. Independent of the outcome of this process, Harper, like his predecessors (Hurley, 1996: 83), has nominated Senators selected by the provinces. If this practice persists in the future, it will imply an implicit change of the Senate turning this chamber into a real representative of the provinces.

Concerning the character of the Canadian federation and the status of Quebec, constitutional development has so far not led to a definitive solution. With the acknowledgement of the first nations and Aboriginal peoples, Canada is now considered as a multinational federation. Motions adopted by the federal parliament in 1995 and 2006 as well as the "Calgary Declaration 1997" signed by all provinces and territories except Quebec confirmed Quebec's status as a distinct society. Yet, the degree of sovereignty granted to the province or to self-government of Aboriginal people is still unclear. During the last decade, this question shifted to the background and has been treated in a pragmatic manner in policy-making. Quebec did not sign important agreements, although it participated in intergovernmental negotiations and de facto implemented agreements or adjusted policies accordingly. Cooperative federalism under the premise of recognised distinctiveness, i.e. without constitutionally reinforced agreements, seems to make it easier for Quebec to remain in the Canadian federation and to maintain its established welfare system (Courchene 2005: 230).[8] Pragmatic cooperation also seems to prevail in relations between the federal government and

[8] Quebec did not sign the Social Union Framework Agreement, but supported the Interprovincial Trade Agreement, and the Council of Federation was initiated by the government of the province. The effective status of the province now comes close to what protagonists of sovereignty can realistically expect to achieve, namely political autonomy of the province in a Canadian (con)federation.

Aboriginal self-government, which evolves in an ongoing process of negotiations. Thus one can argue that, after some attempts to silence disputes by symbolic declarations, the character of the federation became what Michael Foley called a constitutional "abeyance" (Foley 1989, see also Sunstein 2001: 58-60). On this unsolvable question, participants agree not to agree, which allows them to move on in day-to-day policy-making. How to deal with the "settled unsettlements" (Thomas 2003), has to be discussed related to particular issues. Intense intergovernmental relations provide the basis for managing conflicts.

Political processes of implicit constitutional change have been supported by the Supreme Court. Scholars still disagree whether Court decisions have led to more centralisation or have supported the interests of provinces (summarized in Verrelli 2007). However, by incrementally adjusting its opinions on the allocation of powers, the Court followed the evolutionary and pragmatic mode to modify the constitution. Reviewing the role of the Canadian Supreme Court in the development of federalism between 1980 and 2000, John T. Saywell concluded: "The court continued to use the language of balance and moderation to emphasize its respect for a federalism responsive to the regional and social diversity of the country. But the decision, reasoning and *obiter* seemed to reflect the functional imperatives of the national interests and of the provincial inability to develop policies…" (Saywell 2002: 303). But although it supported federal unity against secession the Court avoided to define the directions of change. This way it has helped to maintain flexibility in the federal system (Baier 2006; Kelley 2008; Swinton 1995).

In sum, implicit change resulted from an interplay between federal government's initiatives for particular constitutional amendments, intensified intergovernmental cooperation, which includes emerging Aboriginal self-government, and a supportive role of the Supreme Court. While unilateral actions have caused disputes, but contributed to a balance of power, cooperative relations between governments proved rather effective in stabilising the Canadian federal system. One should not underestimate tensions between the federal government and the provinces. Quebec still claims its distinct status as a nation in a dual federation. However, also due to changes in society and in the international context, a breakup of the federation is no longer a realistic perspective. Quebecers support more autonomy and at the same time better collaborative federal-provincial relationships (Mendelson/Parkin/Pinard 2005: 43). All in all, disintegrative mechanisms of the Canadian federalism have been tamed by constitutional evolution. The ongoing dynamics of centripetal and centrifugal processes, the first still mainly driven by the federal spending power and economic regulation of a common market, the latter consisting in Quebec's nationalism, economic regionalism fostering intensified relations between provinces and the rise of self-government of Aboriginal peoples have been kept in a balance by a rather flexible management of conflicts. As Thomas J. Courchene put it: "Canadians and their governments have shown themselves to be masters of the art of managing a federal system in that most of the above accomplishments have been achieved without much, if any alteration in the written constitutional word" (Courchene 2008: 3).

Table 4: Explicit and implicit Change in Canada

agenda	*Charlottetown Accord 1992*	*explicit change after 1992*	*implicit change*
unity vs. diversity	✓	-	practice
amendment rules	✓	law	-
representation House	✓	(law?)	-
Senate	✓	(law?)	practice
Supreme Court	✓	-	practice
competences	✓	decentralisation of labour market policy	agreement
Econonomic and social union	✓	-	agreements (ITA, SUFA)
intergov. agreements	✓		(dispute resolution)
spending power	✓		agreement
Aboriginal rights	✓		law, agreem.

b) Germany: Interplay between politics and Constitutional Court

In Germany, the two major constitutional reforms passed both houses of the federal legislature by the required two thirds majorities. But the amendments of the constitution resulting from intergovernmental bargaining did not result in the necessary adjustment of the federal system to the challenges of European integration or German unification. Consequentially, constitutional policy has remained on the agenda. In 2006, with the decision on the constitutional amendment, the federal parliament initiated a further step of constitutional reform, and the *Länder* governments agreed. Since March 2007 a new committee of the *Bundestag* and the *Bundesrat* is working on an agenda focussed on fiscal relations and administrative issues (Margedant 2008). Still, the structure of constitutional negotiations makes intergovernmental bargaining more likely than deliberation on basic norms, in particular since now members of the federal government have a vote in the committee and independent experts participated only in two public hearings, but have no access to committee meetings. The detailed lists with questions addressed to the experts – which included more than 200 questions on fiscal federalism in

the first hearing and more than 300 questions on administrative issues in the second – revealed that the influence of special administrations has increased. It would be a big surprise if under these conditions German fiscal federalism would be changed to a significant extent.

Given this situation, adjustment of the federal constitution should be achieved by implicit change. In fact, until German unification, the functional division of powers and the sharing of tax resources contributed to flexibility. Decentralisation was possible by deregulation giving the *Länder* governments more leeway in implementing the law, and fiscal imbalances could be corrected by modifying the shares of the Value Added Tax or by federal grants. But these mechanisms for adjustment required agreements among the federal and *Länder* governments on the direction of change, with unilateral action constrained to administrative reforms. After German unification, increasing divergence of interests among the *Länder* governments reduced the potentials of flexibility. And with discussions on federalism more on more focusing on demands to separate powers, adjustments in cooperative federalism were no longer considered as a relevant option.

Implicit constitutional change influencing the negotiations on constitutional reform has been induced by decisions of the Constitutional Court (Blair and Cullen, 1999; Kister 1989). Until German unification, these decisions were guided by the concept of unitary federalism. In matters of the application of the right for equal treatment in social policy and taxation, the Court has requested harmonised public policies in all territories. The demand for uniform solutions stated reasons for federal legislation in matters of concurrent competences. Against all attempts of rich *Länder* governments, the Court affirmed fiscal equalisation regulations. However, during the 1990s, it changed its opinion on federalism and supported those *Länder* governments arguing for decentralisation. Interestingly, the constitutional change by Court decision resulted not only from unilateral action of governments going to the Court, but also from interplay between constitutional policy and dispute settlement by the Court. It transformed implicit into explicit change.

This dynamics affected the evolution of legislative powers. According to the Basic Law, the conditions for using concurrent and framework competences allowed the federal government to make laws in order to achieve or preserve equivalent living conditions in all regions, a clause which was open to diverse interpretation, even after it was specified in 1994. Until the 1990s, the federal government had made extensive use of this clause and had left the *Länder* hardly any room for legislation. The Court had accepted this because it considered the allocation of legislative powers as a matter of politics and not of legal reasoning. In 1994, the constitution was amended and since then the Court has been obliged to decide on this matter. Following this change, some *Länder* governments and the CDU, when it was the opposition party in the federal parliament, denied federal competence for a number of laws and instituted legal proceedings. In all cases, the Court, by revising its former opinion on this issue, interpreted the conditions allowing a federal law very restrictively. As a consequence, the *Länder* governments gained power to prevent legislation but they could achieve decentralisation only in a complicated procedure. On the other hand, the federal government had to realise that even its power to change existing federal law can be constrained. This being an extremely problematic situation, it had all reason to foster a constitutional amendment. But as the Court had

altered the status quo to the benefit of the *Länder* governments, the balance of power in constitutional policy shifted as well (Scharpf 2006).

In this situation, the implicit constitutional change was turned into an explicit change. In November 2004, after the fourth decision of the Constitutional Court on legislative competences, the federal government became aware of the consequences and made a significant move in the committee for the modernisation of federalism. It delivered a catalogue of legislative competences which should be transferred to the *Länder* level. With only two meetings scheduled, the committee was not able to deal with all aspects of this proposal, not the least since the concession of the federal government divided the *Länder* representatives. Therefore the negotiations ended as described above. But the changed status quo compelled the federal government to continue efforts to revise the constitution and the *Länder* governments supporting decentralisation exploited this situation, accepted the offer and compensated the East German *Länder* by a constitutional guarantee to maintain existing fiscal equalisation agreements.

A similar interplay between governments and the Court influenced the agenda of the current reform committee. It was prompted when the government of Berlin tried to compel the federal government to bail out the debt-ridden city-state. Deviating from an earlier judgment, the Constitutional Court decided against Berlin and emphasised the responsibility of governments for their fiscal policy. In its reasoning it very clearly confirmed the constitutional principles of fiscal equalisation and the existing law. However, it called for an improved constitutional regulation to prevent excessive public dept. The committee working on a reform of fiscal federalism reacted to this by making such a regulation a matter of high priority.

In contrast to decisions of the Constitutional Court, implicit constitutional change by intergovernmental agreements is not an effective option to revise the increasing fusion of powers in the German federal system. This is clearly illustrated by the fact that federal and Länder governments achieved no agreement on the decentralisation of concurrent competences as expected after the 1994 constitutional amendment. The structural conditions for negotiations are the same as in formal constitutional change: As a rule, the federal government is confronted by a front of the *Länder* governments, and agreements require either de facto or according to rules unanimity of all governments. In economic, social, environmental or tax policies, the different party complexion of governments often reinforces confrontation. Thus the integrated party system reduces the effectiveness of intergovernmental negotiations, which therefore do not open escape routes when constitutional reforms fail. On the contrary, a shift of policy-making to the constitutional level is often used to evade the dilemma of cooperation under the condition of party competition. To redefine policy issues at stake as constitutional problems enables governments to depoliticise the issue and turn from a matter of winning or loosing in party competition into a matter requiring consensus.

Implicit change in political processes deviating from the path of a concentration of powers in structures of joint decision-making has become less likely after the constitutional amendments in 2006. With the detailed definition of competences and the altered regulations of federal grants, the federal government cannot autonomously extend its powers. The abolition of the competence for framework laws makes creeping

centralisation even more difficult. Aside from the legislative competences assigned to them, the constitutional amendment hardly changed the opportunities of the *Länder* governments to expand their powers. The trend of power shifts from parliaments to the executive was not corrected by constitutional reform. Efforts of parliaments to gain early information about intergovernmental relations had only limited effect. In areas of regional development, technology and innovation, and agriculture, the federal government introduced new modes of governance by arranging competition for best practice. But so far, these innovative elements in intergovernmental relations have not gone beyond experiments, with hardly any sustainable effects being visible (Benz 2007).

The consequences of the new constitutional constraints on policy-making in the federal system are not yet utterly evident. In research policy and education, we observe a tendency towards more competition between the *Länder*. However, to a certain degree this has been stimulated by a federal-*Länder* agreement on grants. At the same time, the new power of the *Länder* to decide on payments of civil servants increased inequalities with negative impact on the competitiveness of universities in poor *Länder*. Another example shows the quandaries the reform of the federal constitution has caused. When the federal government decided to support day care for children under the age of three years, it was confronted with the fact that it had lost its competence to provide grants to local governments. The reaction to this problem was telling. As in this case the influential governments of the South German *Länder* had a strong interest in federal money, the federal government with the support of *Länder* governments searched for a way to circumvent constitutional law. They established a special fund, which not only can be regarded as an infringement of the constitution, but also contradicts rules of a transparent public budgeting. With less detailed regulations of federal spending power, a flexible and more effective solution would have been possible. But given the detailed regulations introduced with the recent reform, such a decision now transgresses legal rules. If such a handling of the constitution unfolds, its recognition is put at risk.

6. Comparison: Rigid and flexible constitutional contracts

The comparative study of Canada and Germany provides empirical evidence that challenges existing assumptions on the conditions for the stabilisation of federalism. Without a unifying federal culture and despite an increasing disintegrating party system, Canadian federalism became more stable during the last two decades. German federalism is not in a crisis. But confronted with the challenges of German unification and European integration, the unitary culture, the integrated party system and the duality between federal-*Länder* conflicts appeared more a problem for the effectiveness of governance than a mechanism guaranteeing stability. In general, if power politics in the framework of incomplete constitutional contracts causes instability, it is unlikely that a federal culture or institutional linkages between levels prevent actors from pursuing their individual interests to expand power. Therefore, in order to understand what makes a federal system robust or instable, other factors have to be taken into consideration.

As this study has shown, instability in a democratic federation brings the constitution on the political agenda. It is the particular constitutional dynamics that maintains or

restores the federal balance in face of external or internal challenges. Certainly constitutions per se cannot guarantee stability of federalism, as the tensions between unity and diversity, between centralisation and decentralisation, between competition and cooperation or between federalism and democracy never can be definitively eliminated by law (Benz 2003; Treisman 2007). What constitutions can do is to provide institutions and procedures to cope with these tensions in politics and policy-making in a peaceful way. Therefore, constitutional policy should be regarded as the decisive mechanism leading to stability or intensifying disintegrative development.

But which kind of constitutional policy mechanism can successfully counteract the dynamics of power politics? In view of the apparent difficulties of constitutional reform, is explicit change necessary or is implicit change sufficient or to be preferred? If explicit change is necessary, what causes failure or success of constitutional negotiations and ratification and what are the adequate institutions and rules? How do explicit and implicit modes of constitutional change interact and how does this affect stability and flexibility of federations? A comparative analysis of constitutional change in two countries does not allow us to answer these questions in a comprehensive manner, but justifies some preliminary conclusions:

As to the relevance of explicit change, the Canadian experience may suggest the conclusion, that constitutional reforms cause more conflict than stability, and that in view of the risk of failure they should better be avoided. However, the following reasons have to be considered:

- First, in situation of crisis, constitutional reform is often the only way to evade deadlock or to stop disruptive conflicts. At the outset, there was a deep conflict in Canada, typical for a multinational federation, whereas German reforms have been motivated by a common interest in a change and a widely shared frustration with cooperative federalism. In Canada as in Germany, constitutional reform was set on the agenda by powerful actors, and governments or parliaments had neither the power nor good reasons to avoid this. The risk of failure appeared higher in Canada than in Germany, but considering the intensity of instability in relation to the prospect of success, governments initiated reform in both countries.
- Second, at a certain level of instability implicit constitutional change comes to its limits. Whether this is the case or not depends on issues, but also on the perceptions of political actors. In Canada conflicts concerned problems of integration, i.e. basic values and norms guiding the relations between the federation, the provinces and the different peoples, which went well beyond never-ending quarrels of competence and resources. In Germany, policy-making in the existing constitutional framework caused increasing discontent among the actors involved and public debates on the state of the federation. In both cases, the normative framework of the federal system was under discussion.
- Third, if constitutional change requires reforms and not only minor amendments, negotiations mostly end with at least partial agreements if there is no consensus in all respect. In ratification processes, usually those issues matter which still are disputed. Therefore, failed constitutional reforms allow identifying the scope of

agreement and disagreement. Moreover, they may define a common understanding of basic principles guiding a federal system. In this regard, the Charlottetown Accord is a case in point. It not only included agreements between governments, but defined also a concept of a multinational and cooperative federalism. On this basis issues agreed upon in constitutional negotiations could be implemented through implicit change.

Regarding the conditions for success or failure of explicit constitutional change, many factors have an impact. The most important concern the structures and rules for negotiation and ratification which can be manipulated by political decisions. From the study presented in this paper the following can be concluded:

In general constitutional negotiations in federal systems must include representatives of the federation and the constituent states. Therefore, there is a tendency for intergovernmental negotiations to dominate. In Germany, reform proposals have been elaborated by bi-cameral committees of the federal legislature including members of the federal parliament and members of the *Länder* governments. As federalism has been not a matter of party politics, the logic of intergovernmental politics has prevailed in this setting, while parties or interest groups have played a marginal role. The same applies for Canada, but with the process leading to Charlottetown a quite different structure of constitutional negotiations was set up. The impact of intergovernmental bargaining was moderated by societal participation, consultation with interest groups and negotiations in parliamentary committees. In this process, executives hardly could control the agenda, and new interests, perspectives and alternatives have to be taken into account. Moreover, package deals between governments were not possible in these structures as non-governmental actors and the public asked for reasons (Elster 1998). Those who, after the referendum, blamed citizens' participation for the failure (for a critical review: Mendelson 2000) failed to distinguish between the processes of constitutional negotiation and ratification. Nonetheless, as Michael Stein rightly observed, integrative bargaining in public forums does not easily come to results. The combination of parliamentary commissions, participation of citizens, associations and experts in different committees and intergovernmental negotiations used in the Charlottetown process seems promising, but the links between these arenas require appropriate political management (Stein 1993, 1997).

In contrast, exclusive intergovernmental bargaining likely ends with package deals or compromises at the lowest common denominator. Given the conflicts of institutional interests of actors involved, this is much more likely in constitutional policy than in other policies. And it is even more likely if governments from the lower level form a coalition against the federal government as occurred in Germany. Such a coalition may strengthen the bargaining power of decentralised governments against the centre (De Figueiredo and Weingast 2005), but it also tends to cause a bilateral confrontation turning conflicts into a zero sum situation. In addition, governments forming a coalition have to exclude divergent interests and this reduces the comprehensiveness and innovativeness of proposals right from the beginning of constitutional negotiations. This is the reason why such processes likely end in the joint-decision trap (Scharpf 1988).

Hence, the cases considered here speak for a structure of constitutional negotiations which combines different arenas of parliamentary, "consociational" and intergovernmental negotiations. As the only case coming near to such a structure, the constitutional negotiations leading to the Charlottetown Accord, suffered from a number of deficits, we lack empirical evidence about adequate linkages between these arenas. Furthermore, questions like who should participate, how should arenas be organised, in which arenas and at which stages of the process should participants meet in public or in private, what should be the role of leaders etc. require further comparative research.

Concerning ratification rules, no definitive conclusion can be drawn either. In a multinational federation, referenda seem to cause a high risk of turning complex matters into a confrontation of interests or unsolvable identity conflicts. But that depends on circumstances and public communication. In the German case, a constitutional referendum probably could contribute to breaking up ingrained frames of references emerging from intergovernmental negotiations. However, we have no empirical evidence supporting this assumption. Ratification rules have to conform to general normative standards of democracy, but they should also be adjusted to the particular conditions of a political system. As important as they are, they should not be regarded as the principal factor determining the outcome of constitutional amendment (Rasch 2008). So far, the structure and processes of constitutional negotiations have been underestimated in theory and in practical politics.

The limits and difficulties of explicit constitutional change explain why stability in federal systems results from the interplay between reform and implicit change. This leads us to the question how both processes interact. As the constitutional change in Canada and Germany reveals, explicit change can support or constraint implicit change. Constitutional reform is embedded in ongoing evolution, with positive and negative consequences for change. But implicit change detached from constitutional policy is doomed cause legitimacy deficits.

The Canadian constitutional development since the 1960s could be regarded as an alternation between implicit change and mega-constitutional reform, whereby failure of one mode has been replaced by the other. However, such an interpretation would ignore the interconnection between both processes. Of course, the turn to reform after decades of implicit adjustment was caused by the accumulation of conflicts not settled in this way. But all processes of constitutional reform build upon emergent rules. On the other hand, the results of constitutional negotiations provided the agenda and guideline for legislation and intergovernmental agreements after the failure of reforms. Rules on which an agreement was achieved in negotiations and consultations with citizens and interest groups could be implemented in practice justified by a kind of legitimacy spill-over from these processes and the negotiated consensus, at least as these changes implicitly did not openly contradict the written constitution and as they did not increase conflicts. Implicit constitutional change after Charlottetown focussed mainly on those issues which gave no reasons for the negative referendum on the accord, while the others where left open for future reform.

The German federal constitution was amended on several occasions, usually by introducing more detailed and extended rules. Major reforms ended with explicit changes

which incrementally modified structures and procedures. Implicit change by agreement rarely occurred after German unification, while during the last decade decisions of the Constitutional Court, initiated mostly by *Länder* governments, influenced the constitutional status quo. Governments reacted to these developments by adjusting the constitution. This cycle of Court decisions and constitutional amendments did not change the federal system significantly, but it extended the legal framework binding politics and increased rigidity of German federalism.

This way, developments in both countries revealed two different types of constitutional change. Canadian constitutional policy conforms to a "negotiated constitutionalism". Changes of the constitution result mainly from ongoing negotiations, either those aiming at amendments according to formal rules or those in day-to-day policy-making referring implicitly to the constitution. Legislatures and the Supreme Court are players in this ongoing process; but they mostly support negotiations of federal and provincial governments and adjust their decisions. Essentially, constitutional change arises out of intergovernmental agreements, which incrementally implement results of constitutional negotiations. Comprehensive reforms are nearly impossible since they require a consensus among the federal and all or at least most provincial parliaments, but adjustment of constitutional rules by agreements of governments is likely. Intergovernmental relations are fairly effective as leaders of the federal government, the provinces, the territories and the Aboriginal self-governments represent the concerns of their community following the preferences defined in their parliaments or parties, but are not committed to coalitions determined by party politics, institutional interests or regional groups (Simeon and Nugent 2008). In these fluid and pluralistic structures of conflict, negotiations are rarely blocked by confrontation, and if no compromise is achieved, decisions can be made with individual governments opting-out. The flexible structures of intergovernmental cooperation have turned constitutional change into an ongoing process, with intergovernmental agreements serving as "an alternative to constitutional reform but also a pretext to avoiding them" (Poirier 2004: 452). This mode of constitutional change works, as long as decisions remain in the "permissive consensus" of citizens expressed in the negative referenda and in parliamentary resolutions on constitutional issues. Overall, constitutional policy in Canada "has been characterized by pragmatism more that by principle" (Swinton 1995: 303).

In German federalism, a "regulatory constitutionalism" prevails, i.e. a process oriented towards guiding and limiting political negotiations by constitutional law. It results from a political practice tending to frame problems as matters of constitutional law and to solve them either by constitutional amendments or by calling decisions of the Constitutional Court. This legalistic approach is caused by the ineffective structures of joint decision-making between federal and *Länder* governments in the double confrontation between levels and party politics. Intergovernmental negotiations often end with agreements required by constitutional rules which express the lowest common denominator of conflicting interests and allow only incremental change of the status quo (Scharpf 1988, 2006). As long as constitutional policy is controlled by governments, the logic of joint decision-making applies here as well with the same consequences. Even if party politics is of minor importance, a trend towards a dualistic structure of conflicts exists since the *Länder* act as a cartel against the federal government in order to defend or extend their

domain. Such constitutional bargaining does not allow far-reaching innovations and concentrates on limited changes in details. Real changes often react to decisions of the Constitutional Court. Implicit change in an ongoing process of political negotiations is hardly a realistic alternative, as the process is dominated by executives interacting in multilateral intergovernmental relations with no option to come to partial agreements in the face of divergence of interests on redistributive policies. In contrast to Canada, the dense structures of intergovernmental relations in Germany cause stagnation. And in contrast to the U.S. where an interplay between the legislature, the executive and the Court leads to an ongoing political dialogue driving implicit constitutional change (Devins and Fisher 2003), in Germany it ends in mutual adjustments of constitutional law and Court decisions. Politics is thus constrained by juridicial dogmatism.

7. Conclusion

As result of this comparative analysis, Canada appears as a rather stable multinational federal system which at the same time provides conditions for flexible adjustment of the constitutional contract. By implicit change, the contract remains incomplete and open for evolutionary developments of the federal system. In contrast, German federalism has become "over-stable", due to decision structures causing stagnation under the pressure for redistributive decisions and due to a constitutional policy which tends to make the constitutional contract more and more complete. These findings deviate from what theories on stability of federal systems tell us so far. It is true that the party system is an important factor to explain the dynamics of federalism. However, in contrast to arguments by Riker (1965) and Filippov, Ordeshook and Shvetsova (2004), the German case proves that under particular conditions, an integrated party system becomes a burden for federalism (Lehmbruch 2000). Its stabilising effects can turn into a cause for inflexibility. In the same way, a unifying culture or a coherent coalition of sub-national governments against the centre tend to cause more stagnation than stability.

While so far, theories on stability and instability of federalism is influenced by experiences with failed federations, established democratic federal systems require a more differentiated analytical perspective. To be true, they are, like every federal system, jeopardized by instability in the sense that inherent dynamics of their structures can end in a breakup of the federal state or a concentration of power at the centre so that de facto a unitary state emerges. However, there is another dimension of dynamics which has to be taken into account. If refers to the need of federal systems to continuously adjust their balance of power to changing political, economic and social conditions in the national, regional or international context. In this regard, federal systems should remain flexible and avoid rigidity. Stability and instability refer to basic principles and structures of power, while flexibility and rigidity concern patterns of interaction. Although both dimensions of dynamics are linked, they should be distinguished in analysis which combines two perspectives on federalism, one focusing on institutions and the other on interaction and processes. In such a framework, we can conclude, that Canadian federalism managed to avoid instability by modes of constitutional change which contributed to maintain flexibility. German federalism remained stable despite the

challenges of Europeanisation and unification, but due to constitutional reforms in structures of joint decision-making it is doomed to loose its flexibility.

Stability/instability and flexibility/rigidity of federal systems are relative categories and we hardly can say which degree is optimal or necessary. Therefore, normative conclusions from this characterisation of Canadian and German federalism are debatable. Rigidity and flexibility have their positive and negative aspects, and whether the balance is adequate or not depends on normative criteria and particular situations. This consideration should keep us from jumping into general conclusions. What we might learn from the two cases is that under particular conditions, different modes of constitutional change should be applied and that in general, explicit change must be linked with implicit change. But again, a caveat is necessary.

The two modes of constitutional change identified in Canada and Germany are caused by institutional incentives and constraints existing in each federal system. In so far one may be inclined to regard them as appropriate under the particular conditions. However, as I made explicit above, regulated constitutionalism in Germany causes inflexibility. The only way this can be avoided is to change the mode of constitutional policy, in particular by reducing the impact of intergovernmentalism in constitutional negotiations. In the Canadian case, the problem is not rigidity but the risk of over-flexibility. Intergovernmental agreements are negotiated in processes which lack rules necessary for transparent proceedings and legitimate results. Moreover, commitments of governments to intergovernmental agreements are not sufficiently credible. Whereas the German federal constitution becomes increasingly burdened with detailed regulations, Canadian federalism has a deficit in procedural regulations.

So we finally have to conclude that both federal systems and their ways of coping with the double dilemma of stability-instability and flexibility-rigidity are far from being perfect. Although we never find perfect solutions in politics and a transfer of policies and institutions between different contexts is problematic, a comparative perspective may clarify deficits and deliver ideas for remedies.

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