Path Shifting and Path Dependence: Labor Market Policy Reforms Under German Federalism

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Abstract: Previously a laggard in labor market policy reforms, Germany has combined a fundamental change of its benefit system with a reorganization of its employment services since 2005. The reform has resulted in a hitherto unresolved constitutional dispute that calls the “joined-up” governance of employment and municipal welfare services into question. The article endeavors to explain this outcome and the reform’s uncertain destiny in terms of a dynamic version of path dependence theory.

Keywords: welfare regime, welfare culture, Bismarckianism social protection, path dependence, governance, federalism

INTRODUCTION

As of 2005, Germany merged two benefits for workless people devoid of unemployment insurance entitlements into a new flat-rate benefit financed mainly from the federal budget. The “sick man of Europe” (Sinn, 2003) who had been suffering from the proverbial “reform backlog” (Hampton & Søe, 1999) enacted a “welfare retrenching” benefit reform, an institutional reform of the delivery and governance of employment and poverty related services, and a policy reform accentuating the “activation” paradigm (Barbier, 2004a)—all this simultaneously and instantly, without any transitional roll-out period. This was particularly challenging since the reform does not easily fit into the German federal system. It also deeply disturbed what might be called the German “welfare culture” by breaking away from long-established and deeply rooted “Bismarckian” notions of social equity.

Considerations of a landslide reform are not just of a theoretical nature. The implementation of the reform divided the Social Democratic party then
commanding a parliamentary majority to such a degree that Chancellor Schröder rushed to premature elections, which he lost. A new left-wing party emerged, changing the political landscape and reducing the following of the two major parties, Social Democrats and Christian Democrats, to such an extent that two-party coalitions now can only command majorities if they are “grand” coalitions between the two principal rivals.

Furthermore, in December 2007, the Federal Constitutional Court declared the currently prevalent governance model of the new one-stop jobcenters incompatible with the German constitution. Far beyond its field-specific policy content, the reform has had repercussions on Germany’s political landscape, on popular feelings of security and citizenship, and on the country’s employment order. It may even influence the evolution of German federalism.

The paper endeavours to explain why this is so. It explores how the divergent logics of social protection regimes and their inherent path dependencies, which were largely ignored in the process of policy making, have reasserted themselves—first by frustrating the reformers’ ambition to create a uniform one-stop service for all jobseekers, then by threatening the partial solution found for jobless people not covered by unemployment insurance to falter on the cliffs of federalism.

The article is organized as follows: the first section gives an overview of the reforms, concentrating on their fourth stage as the most decisive part. The second section introduces several theoretical concepts of diverse provenance in order to analyse the benefit reform in terms of different regimes of social protection and their repercussions on the German welfare culture. The third section explains the institutional reforms in employment services and analyses their unexpected and uncertain outcomes in terms of path dependencies resulting from the interaction between regimes of social protection and German federalism. The fourth section summarizes the findings in the light of the relevant theoretical concepts.

THE “HARTZ” REFORMS OF GERMAN LABOR MARKET POLICY

Reason and Main Elements of the Reforms

Against the background of persistent high unemployment, unsatisfactory job creation even during the “New Economy” boom (1995–2002), and apparently

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1For concepts of employment orders see Heidenreich, 2004 and Pries, 2005. For implications of the reform with regard to the German employment order see Knuth, 2006.
2To some degree, mega-unemployment in Germany is an institutional delusion because people are counted as unemployed who would have a different status of social protection in countries with apparently more successful labor market policies. These differences are not sufficiently leveled out in internationally comparable unemployment measures like the European labor force survey since the status reported by people in a survey will be strongly influenced by the status officially assigned to them—cf. Erlinghagen & Knuth, 2008.
much better performance of West European neighbors, criticism by the Federal Audit Bureau of misleading and massaged placement statistics of the Federal Agency for Work (the German Public Employment Service) rapidly developed into a political scandal in the beginning of 2002. The government reacted by appointing a commission of individuals from business, consultancies, trade unions, politics, and academia headed by then Human Resource Director of Volkswagen, Peter Hartz.3

The commission’s official assignment was to draw up a master plan for reforming the Federal Agency for Work according to the principles of New Public Management in order to enable it to deliver Modern Services on the Labour Market—the title of both the Commission and its report (Hartz Commission, 2002). The Commission, however, broadened its ambitions towards making suggestions for reducing unemployment by two million within three years. After the commission had presented its proposals and the incumbent coalition had been re-elected on the promise of following them, the major part of the commission’s scheme was implemented in four consecutive legislative steps which took effect between January 2003 and January 2005.

The Hartz reforms can be categorized into four elements:

1. Modernizing the governance, controlling and customer management of the Federal Agency4 for Work (Bundesagentur für Arbeit—abbreviated FAW in the remainder of this article) traditionally responsible for administering unemployment benefits, counselling and job placement services, and implementing active labor market policies5;

2. Introducing some new instruments of active labor market policy, and fine-tuning others6;

3. Reshaping the benefit system for workless people who have exhausted their contribution-based benefit claims, or have failed to earn such, by merging two benefits previously administered by the municipalities and the FAW, respectively;

4. Thus attempting to create “unified single gateways” called Job-Centers for all unemployed and job seeking persons.

3See Dyson, 2006 for details and theoretical reflection on the use of commissions in policy making.

4Beware of misleading language: As a body of public law under tripartite governance, the FAW is far from what would be a government agency in public management terms. Like the respective bodies responsible for the other branches of German social insurance, the federal state steers mainly by legislation. Steering by objectives is just developing as part of the reform process, and it is difficult to run the FAW like an “agent” because, under corporative governance, it has several principals.

5For evaluation of this reform element see Bender, Bieber, Hielscher, Marschall, Ochs, & Vaut, 2006; Hielscher & Ochs, 2008.

6For evaluation of instruments see Bundesministerium für Arbeit und Soziales, 2006; Eichhorst & Zimmermann, 2007.
The Hartz Commission put element (4) in the forefront, utilizing it as a leverage for the organizational development in (1) and as a justification for (3). According to a notion almost universally accepted in Germany, the merging of services delivered separately by the municipalities and the local branches of the FAW required the merging of the respective benefits, i.e., social assistance and unemployment assistance.

However, for reasons that will be analyzed in the course of the article, creating unified services for all jobseekers turned out to be impossible. Quite the contrary, the merger of “municipal” social assistance and “federal” unemployment assistance resulted in a new regime of social protection of its own, thus shifting the boundary of institutional cleavage but not overcoming it. Consequently, element (1)—modernizing the services for the “insured” unemployed—developed largely independently of elements (3) and (4)—on which the remainder of this article will focus.

The Previous Benefit System

Until the end of 2004, Germany had three benefits relevant to workless claimants:

1. Contribution-based unemployment benefit (Arbeitslosengeld), defined as a percentage of former net income (60 percent or 67 percent for unemployed persons without or with dependent children respectively), without means-testing but of limited duration of normally 12 months;
2. Subsequent to the exhaustion of the eligibility period for (1), there was tax-funded unemployment assistance (Arbeitslosenhilfe) at replacement rates of 53 percent and 57 percent respectively, open-ended and means-tested;
3. The third tier was tax-funded social assistance (Sozialhilfe), flat rate, open-ended, means-tested, and available for all persons in need and unable to support themselves, irrespective of their employment status or history.

Benefits (1) and (2) were dependent on availability for work and, since 1998, on actively seeking work, and they were both administered by the FAW. Social assistance, by contrast, emerging from the older tradition of parish relief, was administered and financed by the municipalities (counties and the larger cities which are independent of counties).

Benefits are exempt from taxation; this is why replacements rates refer to standardized net income.

During the 1980s, longer durations of up to 32 months for older people with long contribution records were introduced as means of pre-retirement. These have been reduced to 18 months as part of the reform—and again increased to 24 months under the which succeeded the Schröder government conservative-led Grand Coalition.
Benefit levels of social assistance, though differing only slightly, were set by the Land in which a municipality was located, whereas the general rules of rights and responsibilities were set by federal legislation. Benefits were defined according to household composition, i.e., each individual member of a household added to the household’s entitlement. Increasing difficulties of labor market entry as well as increasing precarization and volatility of working lives led to growing caseloads of people of working age and considered able to work—which was not the kind of circumstances for which the system of social assistance had been designed when it was modernized in 1962.

The German mainstream discourse contended that unemployment assistance and social assistance, since they both were tax-funded and means-tested benefits paid predominantly to people out of work, amounted to an anachronistic duplication (Berthold, Thode, & von Berchem, 2000), and international assessments tended to follow this view (Adema, Gray, & Kahl, 2003). It was generally overlooked that these two benefits belonged to two different regimes of social protection in that the one was an individual entitlement to a wage replacement while the other was a household related income support. This is why the very meaning of means-testing differed between the two benefits.

Since the idea of a universal “basic income” based on social citizenship is alien to the German “conservative” tradition of social protection, neediness is the principal foundation of social assistance. Unemployment assistance, by contrast, was based on Bismarckian principles of social insurance: being unemployed (the risk insured) and having paid contributions (membership in a system of mutual insurance) entitled to a wage replacement calculated as a percentage of former earnings and paid at the end of the month.

Benefit entitlements were attached to the individual previous contribution payer; inactive spouses and dependent children would have to share the benefit. Only in order to exclude well-to-do people from an open-ended tax-funded benefit, neediness—or rather its limited extent or the absence of it—intervened as a limitation to the amount to be paid, possibly reducing it to zero. Not only was the assessment of means in unemployment assistance more generous than in social assistance, but the very logic of means-testing was fundamentally different—limitation (in unemployment assistance) versus foundation (in social assistance) of an entitlement which was individual in the case of unemployment assistance but familial in the case of social assistance.

The New Benefit System

As of January 1, 2005, unemployment assistance (roughly 2 million recipients at the end of 2004) as well as social assistance for people of working age and considered able to work (roughly 1.6 million) was replaced by a new benefit called “unemployment benefit II.” Since previously inactive spouses of recipients of unemployment assistance now became recipients in their own rights
and obligations, the new system started with 4.5 million recipients of working age and able to work plus 1.6 million dependents below working age or unable to work. The numbers subsequently peaked at 5.5 million adult recipients in April 2006, and they did not fall below 4.6 million even at the end of the last economic upturn.

Unlike suggested by the wording “unemployment benefit II”, the regime in which the new benefit is embedded comes much closer to social assistance than to Bismarckian, insurance-type principles of social protection. In order to characterize the new regime of “basic income support for jobseekers” (BIS), only the following points must be added to what has already been said about social assistance:

- The concept of family or household has been broadened and modernized through replacing it by the *community of needs*. Wherever partners of different or the same sex are living together with children or have been living together for more than one year even without children, they will be considered to be a community of needs where one bears responsibility for the other. In assessing own means, the whole community of needs will be taken into account, which is more extensive than means-testing in unemployment assistance was.
- On the other hand, the traditional social assistance principle of inter-generational subsidiarity was somewhat restricted so that now parents are no longer responsible for children over 25 years, and children no longer for their parents. Together, these changes make up a complex mix of “refamilialization” and “defamilialization” of social protection: The traditional concept of family subsidiarity has been broadened horizontally to include any kind of cohabitation but narrowed vertically with regard to intergenerational obligations.
- Any community of needs with *at least one member of working age and considered able to work* is now in total subsumed under the regime of BIS. Individuals unable to work yet not qualifying for a disability pension or any other contribution-based benefit have remained in a residual system of social assistance unless they belong to a community of needs with one member able to work.
- *Ability to work* is defined as “being able to work for at least three hours per day under normal conditions of the general labor market” or being expected to become able to do so in the foreseeable future. Both the temporarily ill

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9 Whereas unemployment benefit II is the technical—and misleading—term for the benefit for adults able to work, the acronym BIS (basic income support for jobseekers—the official title of the relevant legislation) will be used when referring to this regime of social protection as a whole.

10 These definitions are taken from the legal regulations for disability pensions: The medical criteria for medical criteria disqualifying from receiving a disability pension have been transformed into criteria for defining the target group of labor market oriented activation.
and those not available because of caring responsibilities (e.g., lone parents of children under 3) are considered able to work though not required to seek jobs for the time being. The same applies to pupils of working age (15 plus). Together with the growing importance of benefits paid as a supplement to insufficient earned income, this explains why more than half of the recipients of so-called unemployment benefit II are not counted as unemployed.

Certain principles that had been dormant in social assistance are now being implemented more vigorously, forming the new activation regime of BIS: Any job that a needy person is physically or mentally able to perform is acceptable even if it is paid below the collective agreement or the “going rate.” Any reduction of neediness through work is desirable even if it does not end unemployment—which would, by legal definition, require employment of at least 15 hours per week. The benefit withdrawal rate has been redesigned in order to provide better incentives for taking up work. Where other countries grant tax credits, Germany now pays in-work benefits to almost 30 percent of its needy families. Available statistics do not reveal how many of them were “working poor” before claiming the benefit and how many were receiving benefits before being activated into accepting a low-paid job.

THEORIES AND ANALYSIS

In the sections to follow, several theoretical concepts will be briefly introduced in order to analyze the reform and its consequences. Obviously, the reform was intended to follow the paradigm of joined-up government. The agenda of a purposeful organizational reform shrouded the path-breaking nature of the benefit reform and made policy makers neglect the new path dependencies they invoked by borrowing from social assistance. This path shifting through “regime borrowing” is further developed by introducing the concept of sub-regimes of social protection within one and the same national welfare regime. With such an analytical framework, the reform can be identified as a shifting away of social protection for the majority of workless people from the dominant Bismarckian regime pattern which helps to understand how the reform infringed on the German welfare culture. Finally, some consideration of German federalism is needed to explain why social protection regime shifting led into a constitutional dilemma.

Joined-Up Government

Following a contemporary fashion in public administration, one important element of the reform to be discussed was the endeavor to create “single gateways” or “one-stop services” for all German jobseekers. This legislative move
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can be seen as following the post-NPM trend of attempting to solve the cross-cutting or “wicked” issues through joined-up or “holistic” forms of government (Pollitt, 2003; Talbot & Johnson, 2007). Such an approach appears especially appropriate where large numbers of citizens or—in NPM terms—customers are called to co-produce social services that are supposed to solve syndromes of related problems hitherto fragmented among the responsibilities of various public authorities (Ling, 2002).

Whereas the joined-up rhetoric has primarily developed in centralized states as a demand for linking several services of central government, the issue becomes even more tricky in a federal system when the issues in question cut across not only professional or departmental boundaries but also across levels of government. The German attempt to join up federal labor market policy (or employment policies in standardized international terminology) with municipal social welfare is a salient example of such diagonal cross-cutting which, in a federal system, not only exacerbates questions of accountability (Considine, 2002) but also raises disputes over constitutional legitimacy unknown in central states.

Institutional Path Dependence

Building on neo-institutional economic theory and on studies of the history of welfare states, Pierson (2000, 2004) has greatly contributed to popularising the concept of path dependence as a tool for analyzing welfare state trajectories. He demarcates his position against very loose allegations to the concept like “history somehow matters” by referring to a metaphoric description of path dependence suggested by Levi (1997): When climbing a tree with several branches stemming from the same trunk, it is in principle possible to clamber from one branch to the other, but it gets more costly in terms of effort and “sunk costs” the further one has departed from the origin (Pierson, 2004, p. 20, quoting Levi). So here we have not only the concept of path dependence and of its relativity, but also of path shifting. It might even be feasible, though more risky, to swing over to a branch stemming from a neighboring tree, metaphorically representing a different sub-regime of social protection co-existing on the same territory of a national welfare regime. However, one does not fly freely in the air for long; path shifters will be subjected to the path logic of the newly attained foothold, or they might fall down on the ground.

This is the core of the argument put forward here with regard to the abolishment of Bismarckian unemployment assistance in favor of a generalization of poverty-relief type income support: By decoupling the benefit that follows after the exhaustion of the contribution-based entitlements from the logic of a wage-replacing insurance, the path of Bismarckianism is broken but alternatively the path of social welfare is invoked—and the latter is inevitably linked to the tradition of municipalities. Whereas parliamentary resistance
against the benefit cuts implied for previous recipients of unemployment assistance was weak, resistance against full federalization of a previous municipal prerogative proved insurmountable.

**National Welfare Regimes and Their Sub-Regimes of Social Protection**

Howsoever, useful typologies of national welfare regimes in the mold of Esping-Anderson’s (1990) influential paradigm may be for a broad orientation, nevertheless “...welfare states should not be treated as a coherent unity in cross-national comparisons and classification. Instead it should be considered that welfare state policies are often related to different, and in part overlapping, welfare arrangements—and welfare cultures on which these are based—in different policy fields which can vary across countries.” (Pfau-Effinger, 2005, p. 7) In other words, national welfare regimes—and notably those of the continental or conservative type—are composed of different elements stemming from different historical origins and operating according to distinctly different logics. Following the French use of the word régime where a “regime of social insurance,” a “regime of solidarity” (with those who have exhausted their insurance-based claims) and a “regime of minimum income support” co-exist in one hybrid conservative context (Barbier, 2004b), the author suggests to distinguish (sub-)regimes of social protection within a given national welfare regime.

In order to make up not merely a scheme or program but a regime of social protection with its own path-dependent trajectory, one would have

1. a relatively stable constituency of relevant size,
2. a specialized bureaucracy with its own staff, career patterns and professional ideologies expressed in a jargon of its own,
3. a unique definition of the social problem that would qualify individuals and groups for the benefits or in-kind services that make up the core of the regime, implying rules of entitlement, discourses of deservingness, and culturally rooted notions of equity,
4. a set of rights and obligations governing the relationship between (potential) benefit recipients and the bureaucracy,
5. possibly, in corporatist settings, a group of governors involved in running a given regime, adding to its credibility and normally regarding it as an organizational as well as personal source of power, and
6. again possibly, where in-kind services play a major role, an industry of professional, for-profit or third sector service providers interested in the continuation of the services they are providing.

Applying this conceptual framework to Germany, the major branches of compulsory social insurance—pensions, unemployment, health care, long-term
care—are regimes likewise constructed according to Bismarckian principles but clearly distinct in terms of constituency, bureaucracy, entitlements, citizenship, governance, and associated service industries. Erstwhile social assistance, by contrast, while qualifying as a sub-regime of its own in all the above dimensions except (5)—no corporatist governors—was a non-Bismarckian regime of poverty relief with roots in parish charities, not in social insurance.

Meanwhile, the benefit system of Basic Income Support, the services that come with it and the hybrid and contested forms of governance and organization in which both are administered have developed into a sub-regime of social protection of its own, clearly distinct from both unemployment insurance plus the services for the “insured” unemployed and from the residue of social assistance that remains for those beyond working age or unable to work and not qualifying for a disability or old-age benefit.

The new regime’s constituency is overwhelmingly large and regrettably stable, the focal definition of the social problem has shifted from unemployment to “neediness because of insufficient access to employment,” rights and responsibilities differ from those in unemployment insurance, and corporatist participation in steering the new regime has been watered down into a purely local, voluntary and advisory role which trade unions and employers’ associations now have to share with other stakeholders. The reactions from street-level organizations, from their numerous staff and from providers of outsourced services to the current threat of having the whole new system taken apart again because of its constitutional dilemma in particular clearly demonstrate the “regime quality” of Basic Income Support for Jobseekers.

Cultural Path Dependence

There are also path dependencies resulting from what has been termed “welfare cultures” defined as “the relevant ideas in a given society surrounding the welfare state and the way it is embedded in society” (Pfau-Effinger, 2005, p. 4). The coupling between a given national welfare culture and welfare policies is less stringent than the relationship between institutions and policies since the individuals in whose minds and social practice a welfare culture is embedded cannot directly intervene in the making of a policy.

However, when implementing policy changes which are at odds with the prevailing welfare culture, policy makers would need to launch a political discourse appropriate to change the welfare culture in accordance with the new policy. If they fail to do so, acceptance of the reform will be low (cf., for the reform in question, Eichhorst & Sesselmeier, 2006), and the welfare culture will rebound in the next elections or through non-compliance of those whom the new policy is targeting.

Barbier (2008) terms this “political culture” and stresses its national and linguistic embeddedness.
By framing the benefit reform not as an end but as a means of facilitating modern services on the labor market, the actual benefit cuts implied for many were kept in vague until the Social Democratic Chancellor Schröder’s memorable “Agenda 2010” speech in March 2003, six months after his re-election. The price for this tactical approach was that no discourse on potential merits of the new regime could be started. The reform lacked a focal concept or selling idea (cf. Knuth, 2006), and the reformers failed to establish a concise wording or brand name for it, like the various New Deals in Britain or flere i arbeid in Denmark and Norway. Basic income support for jobseekers carries no promise and sounds awkward for a regime in which the majority of recipients are not required to seek a job. In the absence of a proper name, “Hartz IV,” originally the technical term for the fourth step of the legislative implementation of the Hartz reforms, has thus become synonymous for the new regime, for the benefit it provides, for a condition of poverty necessitating the benefit, and for a policy that still divides the polity.

Even though some positive arguments for the benefit reform could have been put forward—e.g., its more universal and gender-neutral nature in comparison to unemployment assistance, or the reduction of intergenerational subsidiarity and better access to active measures in comparison to social assistance—the reform has been perceived by the public mostly as a loss, and the very word reform has become synonymous with welfare retrenchment. Contrary to the reformers’ pretension as “modernisers” they have failed to renew the German welfare culture but only infringed it. They were not aware of the crucial importance of language in which a welfare culture tradition is inscribed and in which it must make sense to be accepted.

Whereas the promise of reform had helped the Social Democratic / Green Party coalition to win its second term in 2002, its implementation turned out to be the coalition’s demise. A new left-wing party emerged in West Germany and later united with the successor of what had once been the ruling party of the German Democratic Republic. The Social Democrats lost considerably in prematurely called elections in 2005 and had to enter a Grand Coalition as junior partners of the Christian Democrats. The neo-liberal surprise attack on Bismarckianism was successful in effecting a regime shift but made the German welfare culture “kick back” soon afterwards because it was neglected in the reform process. In the fifth year after the reform, the German discourse on social protection is inherently Bismarckian even though insurance principles have been marginalized in the field of the labor market.

Theories of Federalism—and Some Institutional Background

The path dependency which prevented the creation of a uniform system of “Modern Services on the Labor Market” for all jobseekers took effect through the intricate mechanisms of German federalism. The particularity of
the German governance system, which distinguishes it from U.S. federalism, lies in that the second house of parliament, the Bundesrat, does not consist of regionally elected representatives but directly represents the Länder governments.¹²

Through the Bundesrat, the Länder participate in federal legislation by means of institutional votes allotted to them on the grounds of the relative sizes of their populations. In the Bundesrat, these votes are exerted en bloc in accordance with previous decisions of Länder cabinets. As a consequence, there is no individual political accountability for voting decisions in the Bundesrat.

Politics in the Bundesrat reflect party majorities in Länder parliaments as well as institutional self-interests of Länder administrations, which results in often unpredictable coalitions. The federal state is further restricted through the constitutional primacy of the Länder in running public administration.¹³ As a consequence, constitutional legitimization (and thus a two-thirds majority in both houses) is required for each and every federal authority or agency to be established.

Party majorities in the two houses have differed during considerable periods of time throughout the history of the German Federal Republic.¹⁴ Under such circumstances, the party in a minority position in the Bundestag enjoys a veto position through its majority in the Bundesrat. Political scientists have analyzed these characteristics of German governance as a stifling of competition between the major political parties which are forced to find a consensus even when there are clear majorities in the Bundestag (Lehmbruch, 1976). Whereas this view implies “only” a weakness of the democratic process inherited from pre-republican, corporative forms of inter-territorial federation, a more pessimistic assessment pictures the German state in a joint-decision trap which makes it unable to tackle fundamental challenges to a degree labeled “pathology of public policy” (Scharpf, 1988).

Other writers, by contrast, have highlighted the adaptive capacities of dynamic federalism (Benz, 1985; Hesse & Benz, 1990). A detailed analysis of a number of major reform projects during the 1990s resulted in a mixed picture: The system is more likely to produce solutions than not; sometimes, ¹²This principle dates back to the representation of the territories established in 1666 at Regensburg (immerwährender Reichstag — cf. Lehmbruch, 1997).
¹³“Except as otherwise provided or permitted by this Basic Law, the exercise of state powers and the discharge of state functions is a matter for the Länder.” (art. 30, Basic Law for the Federal Republic of Germany). The historical reason for this is that in Germany the “bureaucratic state” in Max Weber’s terms emerged at the level of the territories before a nation state came into existence (cf. Lehmbruch, 1997).
¹⁴This is facilitated by the fact that the timing and periodicities of federal and of Länder elections are independent of each other.
these solutions are time-consuming, and they are always costly (Wachendorfer-Schmidt, 1999).

The reform under discussion provides another example of a major reform of which it is already certain that it is time-consuming and costly, whereas it is yet uncertain whether a lasting solution will be found. Compulsory social insurance, since Bismarck’s days, is a prerogative of the central state, and it once was Bismarck’s key argument for selling the newly created German national state to the masses (Abelshauser, 1996; Lehmbruch, 1997). Social assistance, by contrast, in its secular form emancipated from charitable arbitrariness, is a prerogative of the municipalities. Germany has a strong tradition of municipal self-government in “free cities.”

Furthermore, when the Second World War ended, both the national state and the old Ländere ceased to exist, whereas the municipalities enjoyed legal continuity under Allied supervision. When the Western Allies allowed the re-establishment of Ländere in a new and consolidated geographical pattern, these new Ländere assumed legislation and supervision over the proceedings of municipalities. The federation formed later by the Western Ländere has no legislation or supervision over the municipalities. This gives a first impression of the implications of merging a “federal” with a “municipal” benefit—the intricacies of which will now have to be explored in more detail.

INSTITUTIONAL REFORM OF EMPLOYMENT SERVICES

An Unintended Outcome

The fundamental justification for the far-reaching benefit reform had been that only by “merging” unemployment assistance and social assistance, municipal services and services of the Federal Employment Agency could be joined up, thus creating universal jobcentres that would serve all jobseekers, with or without insurance-based benefit entitlements.

The Hartz Commission, as well as the government in its first draft legislation, had envisaged that the Federal Agency for Work should be in charge of basic income support for jobseekers in parallel to its traditional task of administering unemployment insurance. The municipalities were envisaged as assisting the Agency with social and other concomitant services only until the end of 2006. Further development from 2007 on would be left to the market: The local Agencies for Work would be free to buy such services from the municipalities or from other non-profit or for-profit providers.

However, the outcome of two controversial rounds of legislation each involving the arbitration procedure between the two chambers, the Bundestag and the Bundesrat, was quite different:
1. In fiscal terms, the federal government is now responsible for income support, while the municipalities are responsible for the larger part of housing and heating costs.\(^{15}\)

2. In institutional terms, the original responsibility (the guarantor role) for administering income support and labor market related services (like job placement, active measures) lies with the 176 regional district organizations of the FAW, while the 439 municipalities are responsible for administering housing costs and concomitant social services (e.g., psycho-social, drug abuse, and indebtedness counseling plus childcare provision).

3. However, at the operational level (the service provider role), regional Agencies for Work and municipalities are obliged to form consortia (Arbeitsgemeinschaften) in order to pool their efforts and jointly administer the aforementioned benefits and services. This togetherness means more than co-location or coordination: The two organizations are forming a unitary legal authority displaying “one face to the customer” and issuing uniform legal notifications regarding the two benefits concerned.

4. For a period declared as experimental and extending until 2010, 69 municipalities\(^ {16}\) have been licensed to administer the new benefit and activation regime alone. The experiment has been scientifically evaluated with regard to which type of organization is delivering more effective services.\(^ {17}\)

5. For 23 territories for which neither license for full municipal responsibility was applied for and granted nor an agreement on the formation of a consortium was reached, responsibilities according to 2 are now fulfilled separately. This number has a tendency to grow as consortia break up.

Since the regional compounds of the district organizations of the FAW and the 439 German municipalities do not match and even occasionally overlap, this makes for complex regional structures. The consortia, being the predominant model, are operating in 80 percent of the territorial units serving 85 percent of the customers.\(^ {18}\) Though the regional Agencies for Work are partners of the consortia, there is a clear tendency within the consortia to develop into organizations of their own which use staff and facilities of the partners forming them.

\(^{15}\)In order to let the municipalities enjoy the alleviation from costs that had been promised to them, the Federal Government shares roughly one third of the housing and heating costs. The assessment and distribution of this federal refund to the municipalities—inevitably via the treasuries of the Länder—is an issue of continuous quarrel.

\(^{16}\)Sixty-Nine is the number of delegates of the Länder in the Bundesrat, which reflects the relative weight of the Länder in the German population. Therefore, the number of 69 appeared to offer an a priori solution for the allotment of options to the Länder.

\(^{17}\)For results see Bundesregierung, 2008.

\(^{18}\)Almost all large cities are being served by consortia, which explains why the latter are even more predominant in terms of customers than in terms of territorial units.
So, instead of the desired single gateway or the uniform jobcentre, Germany now has two separate regimes of social protection and employment services for workless people as before, but the second tier has become much larger\textsuperscript{19} and comes in three variants. In the 23 territories with separate fulfilment not only two gateways exist, but the majority of workless people actually have to visit both of them in order to collect their means of subsistence.

So then, why was the institutional outcome so different from the reformers’ intentions? On the level of the legislative mechanism, the answer is simple and largely follows from what has been said about German federalism: Party majorities in the two legislative chambers were different at the time. The Christian Democrats wanted to demonstrate their strength, and some Christian Democratic leaders had a preference for municipal workfare-type policies. They had introduced a bill that would have given the municipalities alone full responsibility for administering income support and services on the labor market for workless people without contribution-based benefit claims.

Incidentally, the 16 Länder would have gained far-reaching legislative powers regarding the details of discharging this responsibility. This gives an impression how the reform, beyond party rivalry, became deeply enmeshed in the power struggle between the Federal State and the Länder. The scattered outcome was the result of two consecutive parliamentary compromises and did not follow any coherent policy logic.

But then, why did the fourth step of the Hartz reforms so fully become a matter of concurrent legislation between the two chambers, thus giving the Bundesrat veto power over key elements of the government’s proposals? The crucial reason for falling into the traps of German federalism was the government’s endeavor to merge unemployment assistance with social assistance. Borrowing so massively from the regime of municipal welfare infringed on municipal prerogatives and thus called for the legislative powers of the Länder.

For comparison, if the government would have contented itself with simply transforming unemployment assistance from a wage replacing into a flat-rate benefit (like, for example, ASS in France) and maybe extending its family component in such a way as to render supplementary social assistance unnecessary, it appears unconceivable how—and why!—the Bundesrat should have opposed that. So it may be concluded that it was the 2\textsuperscript{nd} Schröder administration’s preference for certain regime elements of municipal welfare as a template for activating labor market policies that made it miss its purported target of creating a single gateway for all jobseekers.

Finally, carrying the analysis on to the level of vested interests potentially affected by the draft legislation, it must be observed that the government’s plans had thrust both municipalities and their professional staff in social assistance administration into deep uncertainty. For if the local Agency for Work,\textsuperscript{19}In July 2008, there were more than 5 times more working-age claimants in BIS than in unemployment insurance.
from 2007 on, would have decided not to continue buying social services from
the municipalities, then professional careers would have been at stake, and the
municipalities affected would have had severe redundancy problems—under
the legal framework and collective agreements of the German public service
without proper means to solve such a problem. By letting this threat evolve, the
red-green coalition estranged its own followers which it had in the administra-
tions and social service departments of large cities. But even the fragmented
outcome with three different forms of governance is only provisional because
the shaky compromise had been declared a temporary experiment, and it is
fragile because it does not conform to Germany’s constitutional order.

**Joined up Government in Constitutional Deadlock**

Soon after the reform, five counties led by the association of county adminis-
trations appealed against the new regulation at the Federal Constitutional
Court. Whereas the fiscal aspects of their complaint were rejected, they were
successful in challenging the constitutional basis for the consortia, thus throwing
the preponderant mode of governance of the predominating regime of working-age
benefits into an apparently inescapable dilemma:

1. The *consortial jobcentres* may not continue to operate beyond the experi-
mental period ending 2010, according to the Federal Constitutional Court
ruling of December 2007. Key justifications for this ruling are that

   (a) the constitution does not foresee joint administrations between the Federal
   State or its agencies on the one side and municipalities on the other,
   (b) the obligation for municipalities to enter such a joint venture is violat-
   ing their right of local self-government, and
   (c) administrative responsibilities of the Federal State and the Länder
   (municipalities here understood to be part of the Länder) must be kept
   separate and fulfilled with own organization and staff of either level.

2. A generalization of the competing model of *comprehensive municipal
   responsibility* for delivering BIS is no more possible since the constitution
   was amended in the course of the reform of federalism in 2006. This
   reform, aimed at disentangling responsibilities of the different levels of
government and thus solving some of the problems previously described,
introduced a clause precluding any federal legislation that would delegate
new responsibilities to the municipalities.

3. A return to the original plans of the Hartz Commission and the previous
federal government to have BIS delivered through a *purely federal admin-
istration* (which in practice would be the FAW) would not only meet with
the same resistance as before but also again entail a constitutional risk. The
German constitution foresees federal bodies of public law to be responsible only for institutions of social insurance. Whereas it was never contested that unemployment assistance was part of unemployment insurance, it is questionable whether the new regime of BIS would qualify as such, and the explication of the different regimes of social protection explains why. Threatened by a loss of financial resources and local political visibility and by redundancy problems, some municipalities might be motivated to challenge full federalization of BIS in yet another action before the Federal Constitutional Court.

4. Delegation of responsibilities for BIS to the Länder would be the key to involvement of the municipalities on constitutionally unquestionable grounds. However, the federal state would not be prepared to remain directly financially responsible for a system in whose controlling and steering it would have no say. Furthermore, such a shift of responsibilities would result in massive redundancies in the FAW which would be left with only one sixth of its present adult customers. The Länder, in turn, even if initially compensated for the financial burden by higher shares in VAT, resent assuming the financial risk of future increases of their respective caseloads and therefore do not accept such a new responsibility.

Attempting to make the best of an impossible situation, the Federal Ministry for Labor has advertised the Co-operative Jobcentre as the model of the future. Like in the 23 regional units that neither applied for the municipal option nor entered a consortium, the system would fall back to its original division of responsibilities with income support and labor market related services being delivered by the regional district organizations of the FAW and housing costs and concomitant social services provided by municipalities. At their cooperative best, the two providers would continue to operate in common premises but claimants would receive two separate notifications for the two parts of the benefit, which in case of objection would have to be challenged in two separate actions before the social court.

The initial promise of the reform to create one face to the customer would be broken whereas its ostensible price, the abolition of unemployment assistance, would not be restituted. Whereas only 210,000 recipients had to simultaneously deal with the two previous bureaucracies, 3.6 million families would now find themselves in this situation if the merging of the bureaucracies could not be sustained.

This disturbing prospect called forth a surprising coalition in July 2008. The Conference of the 16 Länder Ministers responsible for Labor and Social Affairs unanimously came out in favor of changing the constitution once again in order to pave the way for maintaining both the consortia and the option for municipal responsibility. After some quarrels on whether the fully municipalized model should be frozen at the current 69 units or expanded, the Federal Ministry for Labor and the 16 Länder governments finally achieved
consensus in February 2009 to amend the constitution in such a way as to allow a joint federal-municipal administration specifically in the field of Basic Income Support.

However, with a federal election coming up in September 2009, the Christian Democratic parliamentary group would not allow their current Social Democratic coalition partner holding the office of Labor Minister to claim the success of paving the way out of deadlock as theirs. So now the solution, if there is ever to be one, has to wait until after the elections, and its implementation will therefore be as hasty as the original reform.

**SUMMARY AND CONCLUSIONS**

The German example of a fundamental and simultaneous benefit and institutional reform demonstrates that path dependence is not absolute—path shifting is possible. However, breaking away from one path does not result in full discretion to design something new out of the blue but will result in slipping into another already existing path. In the case under consideration, key elements were borrowed from the regime of municipal welfare in order to design the new joined-up regime of Basic Income Support for Jobseekers. As a consequence, policy makers found it politically impossible to keep municipalities out of delivering the new benefits and services. Neither have they hitherto found a consistent mode of participation for the municipalities that would be compatible with the constitution.

Why path breaking tends to lead to path shifting instead of creating something completely new is not theoretically well developed. From path dependence theorems we may infer that institutions yet to be invented normally would not have a strong lobby, so that the pull from institutions already existing would be stronger. Knowledge theory will highlight that it might be difficult for policy makers to debate consensus on matters for which concepts and standardized arguments do not yet exist. Theorists of nationally bound political cultures will point out that such debates have to be conducted in a given national language which, by carrying all kinds of past meanings and connotations, is in itself path-dependent.

Discourse analysis will reveal how the meaning of key wordings and the framing of the underlying concepts can be changed over time. Theorists of path dependence have been preoccupied with explaining continuity in environments replete with the rhetoric of change (cf. Pierson, 1994). How the mechanisms identified in path dependence theory impact on changes that actually do take place has therefore remained under-researched. A theory of path shifting or path diversion would teach us more about societies’ possibilities to tackle secular challenges, and it would overcome the implicit conservatism of the path dependence paradigm that has been justly criticized (Beyer, 2005; Borchert, 1998).
The German experience of the Hartz reforms confirms the contention that path shifting is costly both in financial and in political terms. The architects of Hartz IV did the incredible trick of giving a broad public the feeling that something valuable had been taken away from them—i.e., the expectancy of status-maintaining wage replacements in case of unemployment for indefinite periods of time—while actually spending more than before. While it is obvious already now that the reform does not pay off in political terms, evidence that it will deliver its promise in the technical sense of achieving its purported objectives—more effective services, more rapid re-employment—is not overwhelming. On the other hand, if the not so explicit agenda has been to give the German welfare regime a more liberal twist, then this move has been partially successful. As a result of the regime shift in labor market policy affecting the majority of workless people, the German welfare mix has changed.

The governance structure of the nation state has emerged, in the analysis, as an important element of path dependence as far as institutional reforms of public services are concerned. However, new institutions once set up will soon develop their own path-dependent momentum. The consortia made up of parts of two different organizations—with separate bodies of employee representation, different collective agreements, different job grading and pay, different working time patterns, etc.—appeared impossible to manage at first (Czommer, Knuth, & Schweer, 2005; Wiechmann, Greifenstein, & Kissler, 2005). However, after four years of struggling to get them working, actors on the ground do not want to see their efforts being frustrated and to rebuild their organizations all over again. They are the strongest lobby for a pragmatic solution that would adapt the constitution to organizational reality rather than disrupting the organizational structure once again by adhering to a fundamentalist interpretation of the constitution.

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