



**Alberto Achermann (Project Leader),
Philip Hanke (PostDoc),
Rorick Tovar (doctoral student)**

—
**The Law and Economics of Migration
Policy**

University of Bern
Institute of Public Law
Schanzeneckstrasse 1, P.O. Box 8573, 3012 Bern, Switzerland

Contact: Philip Hanke, philip.hanke@oefre.unibe.ch, T +41 31 631 45 57

How should the law pertaining to migrants best be structured? Considering a framework of different levels of decision-making, the main focus is on where regulation should take place and how rights should be allocated to the various actors. This project uses input and concepts from economics to assess legal rules and analyze policy-making.

Traditionally, immigration is a policy field for the national level of government, which can be described as a system of central planning (Trebilcock 2003). However, migration law is increasingly the result of the interaction of several layers of governance, which are strongly intertwined and thus require a coordinated and structured analysis. In addition, the structure of private law and how it relates to mobilities of individuals is a relevant subject of analysis as well: Individuals who may or may not be on the move are entangled in a web of legal relationships with other mobile or immobile individuals or institutions.

Allocating the Right to Migrate (Stefan Schlegel)

This subproject discusses to whom among competing potential rights-holders the right to migrate or the right to refuse immigration should be allocated by applying the economic theory of property rights to immigration law. Public law is understood primarily as the allocation of property rights, to either the State or to private actors (Alchain and Demsetz 1973). The starting point of the project is the idea that international migration is basically the transaction of labor from one country to another and that the right to transact labor (or to block transactions) is a property right of great value. Its allocation to different potential owners by the legal order is a crucial factor for the

amount of wealth and its distribution in a society.

- How could property rights over the movements of people across national borders be allocated?
- What forms of allocation of these property rights can be observed in Swiss immigration law and in other legal orders?

Methodology

This project applies the economic theory of property rights, a sub-field of new institutional economics, to migration law.

Legal Pluralism and its Implications for Married Couples in Europe (Rorick Tovar)

This subproject will focus on the rules relating to the conclusion of contracts amongst migrants, that is, the rules of private international law. It focuses specifically on the question how the existence of several legal systems affects the movement of people from one country to another and vice versa.

The increase of people's mobility across countries has caused a further growth in the number of private agreements connected to two or more jurisdictions. This situation is coupled with the plurality of legal systems in Europe and the world. It requires paying attention to the

rules, which decide on the legal order that is applicable to contracts performed by people in a context of repeated migration throughout their lives. As a specific example, the project looks at the case of a special legal relationship, which, due to its ubiquity in people's daily lives, is of utmost importance: Marriage. It highlights the legal problems that married couples face when moving from one country to another in Europe and puts forward the choice of law by the parties as a reliable option to overcome the challenges generated by legal pluralism (see for example O'Hara and Ribstein 2009). Thus, the following research questions will be addressed:

- How does the plurality of legal systems affect the mobility of people?
- Is it recommendable to harmonize the private legal orders in a context where people can move freely from one country to another?

Methodology

This project uses primarily two methodologies. Focusing on the plurality of legal regimes, it is deeply rooted in comparative legal analysis. In order to assess the suitability of the different rules identified, it applies theories and concepts from law and economics.

Migration Policy and Multi-Layered Governance (Philip Hanke)

This subproject focuses on bilateral and multilateral agreements involving migration clauses. In this view, migration policy is the result of State bargaining and thus potentially linked to other issues at stake. Rules of admission can then, for instance, be linked to non-migration fields such as market access and trade. They can also be linked to other migration-related questions such as border security or readmission. The resulting normative question revolves around the optimal structure of international agreements with regard to migration. It focuses on the available instruments, such as Free Trade Agreements, Bilateral Migration Agreements, Economic Partnership Agreements and others, as tools to structure international migration law (Panizzon 2010; 2011; 2012). Migration policy is then interpreted as an intricate system of decentralized rule-making and multi-layered governance, and economic theory can help answer the following questions:

- Which functions of the public sector relevant to migration policy and appropriate instruments to carry them out are best centralized, and which are best allocated to decentralized levels of government?
- What are potential efficiency problems with the current allocation of competences in the field of migration policy?

Methodology

This subproject combines theoretical and empirical input from various fields of economics, international relations and political science.

Publications

- Achermann, Alberto, and Stefan Schlegel. "Internationale Entwicklungen mit Bedeutung für die Schweiz." In *Jahrbuch für Migrationsrecht 2013/2014* edited by Alberto Achermann et al. 509–56. Bern: Stämpfli, 2014.
- Achermann, Alberto, and Stefan Schlegel. "Internationale Entwicklungen mit Bedeutung für die Schweiz." In *Jahrbuch für Migrationsrecht 2014/2015* edited by Alberto Achermann et al. 509–56. Bern: Stämpfli, 2015.
- Hanke, Philip, and Klaus Heine. "Migration and Systems Competition – a Constitutional Economics Perspective." *University of St Thomas Law Journal* (2015 forthcoming).
- Hanke, Philip. *Free Trade Agreements and Migration* GIFTA Project Briefings Series, No. 2. GIFTA 2015.
- Hanke, Philip. "Intergenerational justice and international migration." Paper presented at the Intergenerational Justice Conference, the World Trade Institute, Bern, 9 October 2015.
- Schlegel, Stefan, and Gabriela Medici. "Partnerschaftliche Instrumente in der Migrationsausserpolitik der Schweiz." *Zeitschrift für Ausländerrecht ZAR* 9/2014.

References

- Alchian, Armen A., and Harold Demsetz. "The Property Right Paradigm." *The Journal of Economic History* 33, no. 1 (1973): 18.
- O'Hara, Erin A., and Larry E. Ribstein. *The Law Market*. Oxford: Oxford University Press, 2009.
- Panizzon, Marion. "International Law of Economic Migration – A Ménage à Trois? Gats Mode 4, Epas and Bilateral Migration Agreements." *Journal of World Trade* 44, no. 6 (2010): 8–10.
- ———. "Migration and Trade: Prospects for Bilateralism in the Face of Skill-Selective Mobility Laws." *Melbourne Journal of International Law* 11, no. 2 (2011).
- ———. "Readmission Agreements of EU Member States: A Case for EU Subsidiarity or Dualism?" *Refugee Survey Quarterly* 31, no. 4 (2012): 101–33.
- Trebilcock, Michael J. "The Law and Economics of Immigration Policy." *American Law and Economics Review* 5, no. 2 (2003): 271–317.