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**The Law and Economics of
Migration Policy**

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Migration law is not just a matter of national law. Instead, various types of bilateral and multilateral agreements come into play. It is the result of State bargaining and thus potentially linked to other issues at stake. Considering a framework of different levels of decision-making, the main focus of this project is on two questions: where should regulation take place? And how should decisions concerning different rights be allocated to individuals and to actors at several levels of government? This project uses input and concepts from economics to assess legal rules and analyze policy-making.

Messages for Decision-Makers

- **Large-scale developments such as new technologies, climate change, trade liberalization, or civil war bring about changes in the institutional regulation of migration.**
- **Efficiency analysis must take into account that decisions on immigration rules may affect the well-being of people in other countries.**
- **Spouses should be able to choose the most advantageous law governing their marriage, regardless of whether or not the couple has a close connection with the legal system that has been chosen.**

Traditionally, immigration is a policy field for the national level of government, which sees itself as being in control over its borders. Nowadays, however, the situation is more complex. From the local to the supranational and multilateral level, many governing entities shape migration

policy. Also, the law affecting contracts that involve migrants is of increasing importance in a globalized world. In this context, the structure of private law and the question of how it relates to individuals' mobilities is a relevant subject of analysis: individuals who may or may not be on the move are entangled in a web of legal relationships with other mobile or immobile individuals and institutions.

Migration Law as a Series of Collective Decisions at Many Levels

Governments at different levels of federal structures, agencies, and other bodies such as NGOs and private companies are all involved in migration policy. Often, different policy areas are connected. Rules of admission can, for instance, be linked to areas such as market access regulation and trade (as can be seen in modern Free Trade Agreements). 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. This is particularly relevant as the world is undergoing many fundamental transformations. Climate change creates new types of migration. Trade liberalization

increasingly facilitates the mobility of service providers across borders. Civil war and political turmoil create large migration flows, triggering different responses from states and highlighting the shortcomings of the asylum system in Europe. Furthermore, disruptive technological change creates new legal problems, like those concerning human rights; but it also provides new opportunities for migrants.

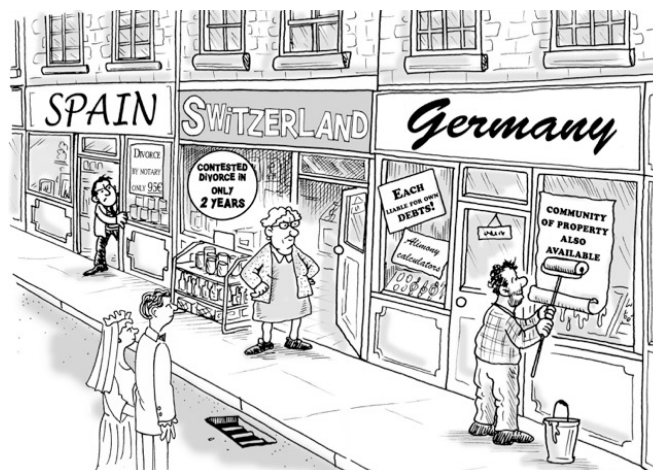
Which Law Should Apply to Married Couples?

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 in the world. It requires paying attention to the rules deciding which legal order is applicable to contracts performed by people in a context of repeated migration throughout their lives. As a specific example, the project looked 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. Comparative legal analysis was conducted to discuss the plurality of legal regimes. In order to assess the suitability of the different rules identified, insights could be gained from the economic analysis of law. It is then argued that couples should have a greater degree of flexibility in their choice of law, and also be able to choose a legal system to which they have no connection. This is arguably preferable over a harmonization of private legal orders (e.g. at the EU level), as it would allow couples to better suit their preferences while still assuring legal certainty; for instance, if they were to choose to migrate again in the future.

Who Should Decide What Migration Law Looks Like?

"Control over migration" is a valuable asset of which – theoretically – either the country of destination or migrants themselves can dispose. It is not evident why the power to decide over a person's right to migrate should only lie in the hands of national governments. Therefore, the project discussed to whom among competing potential rights-holders the right to migrate or the right to refuse immigration should be allocated. It did so by applying the economic theory of property rights to immigration law. In particular, it analyzed in depth how such rights are assigned in Swiss migration law. Public law is understood primarily as the allocation of property rights to either the State or to private actors. The starting point of the project was the idea that international migration is 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 available and its distribution in a society. However, there are potentially many ways in which property rights over the

movements of people across national borders could be allocated. The project concluded that current immigration law does not allocate this asset optimally. The "pie" is thus much smaller than it could be, as people are prevented from moving and fulfilling their potential. One country's decision on immigration rules has potentially adverse effects on the well-being of people in other countries, and any efficiency analysis should take this fact into account.



Key Publications

- Hanke, Philip. "Do Stock Prices React to Immigration Restrictions? Evidence from an Event Study in Switzerland." *Applied Economics Letters* 24, no.17 (2017), 1251-54.
- Hanke, Philip. "Climate Change, Environmental Damage and Migration: A Law and Economics Perspective." In *Environmental Law and Economics*, edited by Klaus Mathis and Bruce Huber, 437–56. Economic Analysis of Law in European Legal Scholarship 4. Cham: Springer International Publishing, 2017.
- Hanke, Philip, and Daniela Vitiello. "High-Tech Migration Control in the EU and beyond: The Legal Challenges of 'Enhanced Interoperability.'" In *New Technologies as Legal Challenges for International and European Law*, edited by Elena Carpanelli and Nicole Lazzarini. Springer, 2018.
- Hanke, Philip, Marek Wieruszewski, and Marion Panizzon. "The 'Spirit of the Schengen Rules', the Humanitarian Visa, and Contested Asylum Governance in Europe – The Swiss Case." *Journal of Ethnic and Migration Studies*, 2018 (online version).
- Schlegel, Stefan. *Der Entscheid über Migration als Verfügungsrecht*. Studien und Beiträge zum Öffentlichen Recht 31. Tübingen: Mohr Siebeck, 2017.