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Article

Perspectives in Immigration Policy Reform: Towards a General Typology of Labour Migration Schemes

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Holger Kolb¹ Perspectives on Immigration Policy Reform: Towards a General Typology of Labour Migration Schemes

dense framework of EU legislation. Given this context, the main aim of this article is to introduce a typology of labour market schemes, allowing for a general ‘cartography’ of the respective national approaches. This ‘cartography’ should not only serve as a starting point for an analytical framework for international comparisons, but also as a heuristic device for identifying the core areas – and future options – in the regulation of labour migration to Germany.³

HUMAN CAPITAL AND LABOUR MARKET PROSPECTS: KEY FEATURES OF LABOUR MIGRATION POLICIES WORLDWIDE

Labour migration schemes around the globe have in common that they focus on different categories of human capital. Leaving aside rare scenarios in which countries categorically refrain from any assessment of the human capital of prospective labour migrants, it is common practice to distinguish between three different categories of individual qualifications: a) Applicants can demonstrate a certain degree of work experience (on a specific level); b) individuals have an occupational qualification, which as a general rule is required to be recognised as equivalent to domestic standards; c) prospective labour migrants have an academic degree. These criteria are not mutually exclusive. Work experience in particular (criterion a) can occur in combination with either b) or c).

A second feature that is helpful for systemising and categorising the variety of labour migration schemes worldwide is the degree of their relation to the labour market in the destination country. An analytical way to differentiate schemes from this perspective is the application of three categories: a) Certain measures fully abstain from applying any control mechanism of labour market integration and thus grant a permanent residence permit right from the start regardless of whether the applicant will be successful in finding a job; b) programmes allowing for entry without an existing employment contract or an employment contract promise for a certain period of time, but that link the continuance of the stay to successful labour market integration; c) schemes allowing entry only on the condition of a pre-employment contract or a contract of employment. It follows that category b) is a hybrid category standing between a) and c). It neither insists on a work contract as a condition for entry (such as c), nor does it issue an unconditional, permanent residence permit (such as a).

A combination of these two variables results in a nine-field matrix (Table 1), in which the rows display the different types of human capital, whereas the columns list the different relations of measures to the national labour market.

INTRODUCTION

After having been disregarded by German politicians for some time, labour migration issues regained new prominence in the run-up to the 2017 election of the German Bundestag. The question of how to organise the screening and selection processes of non-nationals seeking to immigrate to Germany for the purpose of gainful employment played an important role during the election campaigns and encouraged two political parties to draft their own immigration acts. Both acts are almost exclusively focused on labour migration issues.² The sudden eagerness to reform the German rules pertaining to labour migration, however, is surprising given the fact that the last 15 years have been marked by processes that significantly reformed and liberalised the institutional framework of labour migration (Ette, Rühl and Sauer 2013; SVR 2015). In fact, Germany was praised for its policy for highly skilled migration back in 2013, which numbered “among the most open in the OECD” (OECD 2013, 15; see also SVR 2015, 32-43). Any attempts to reform the institutional status quo should thus begin by carefully assessing the set of existing rules, which is widely regarded as open and liberal (Brenning et al. 2014; SVR 2014, 72-78; Cerna 2016; Werdig 2015; SVR 2015, 34-43; Dörig 2016: 1038; Hecog and Wiesbrock 2016, 257-258). After such an assessment, it is also necessary – at least when looking at member states of the European Union – to distinguish between measures of labour migration policy that have their origin in EU legislation and those that are exclusively motivated by domestic considerations. In Germany, in particular, many reforms in recent years were the outcome of implementing EU directives. It follows that any reform of German labour migration policy faces a double challenge. Firstly, it is necessary to identify those aspects within this particular sub-field that allow for desirable changes given the fact that the German set of rules is already widely appreciated as open and liberal. Secondly, the ongoing process of the Europeanisation of migration policy requires careful consideration of the types of national reforms that are actually possible and do not collide with the increasingly



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Table 1

Analytical Matrix of a Typology of Labour Market Schemes

	Intensity of coupling		
	Low/open (no coupling)	Medium/temporary (job search option)	High/conditional (work contract as precondition)
Academic degree	7	8	9
Vocational training	4	5	6
Work experience	1	2	3

Source: Own diagram, based on Kolb (2017, 147).

THE THIRD DIMENSION: INSTITUTIONAL SOURCE OF LABOUR MIGRATION SCHEMES

When determining the types of reforms that are possible and desirable in the context of debating a (new) national immigration law in particular, it is also necessary (at least when analysing EU member states) to complement the analytical matrix shown above with a third dimension that focuses on the competent jurisdiction. For quite a long time the European Union was not very successful in obtaining new responsibilities in the field of labour migration (van Riemsdijk 2012, 353; Laubenthal 2014; Thym 2016, 272). At the beginning of this century in particular attempts by the European Commission to implement a proactive labour migration policy were thwarted by the EU member states. The passing of the directive on the conditions of entry and residence of third-country nationals for the purposes of highly-qualified employment (directive 2009/50/EC) in 2009, better known as the EU Blue Card directive, must therefore be regarded as an institutional icebreaker for the EU’s attempts to gain importance as norm setter. For the first time in its history, the member states of the EU allocated significant responsibilities for legislation in the field of labour migration from the national to the supranational EU level. In addition to the Blue Card directive, five other directives exist in the field of labour migration that define an increasingly dense framework for EU-countries and constrain the scope of action of all member states.⁴ The set of rules of all EU countries in the field of labour migration are therefore combinations of regulations, which are based on the transposition of EU directives into national law on the one hand and, on the other, merely nationally motivated schemes, which are not linked to or influenced by any EU legislation. This differentiation between different ‘sources’ of legislation is particularly relevant from the perspective of public pol-

⁴ In addition to the Blue Card-directive, it is directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a member state and on a common set of rights for third-country workers legally residing in a member state, directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, the directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer and the directive 2016/801/EU on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing.

icy, since all schemes which have their foundations in EU legislation are to some degree immune to any national reform attempts; and thus must be regarded as static (at least from the perspective of domestic political actors). In addition to identifying desirable changes to the given set of rules, it is therefore also necessary to determine whether such changes are legally possible, given the increasingly strong role of the EU.

THE LEGAL STATUS QUO OF LABOUR MIGRATION POLICY IN GERMANY

Germany’s history of labour migration policy has developed very dynamically throughout the last 15 years. Whereas at the beginning of this century barely any options to immigrate to Germany for the purpose of work existed, nowadays a huge variety of specific labour migration schemes are available (see also Schönwälder 2013, 273-286). Unlike many other EU-member states Germany decided to use the mandatory transposition of the Blue Card-directive into its national law to fundamentally realign its labour migration system (Strunden and Schubert 2012; Brinkmann 2013, 11-35; Kolb 2014, 71-91). Since 2012, the year of the transposition, the Blue Card has emerged as the institutional backbone of the German system of labour migration regulation (SVR 2018, 41-42). This also reveals the fact that the general measures located in field nine of the analytical matrix introduced above play a prominent role within the German set of rules. In addition to the Blue Card, a number of other options (such as section 18 (4) AufenthG in conjunction with section 2 (4) BeschV or section 20 AufenthG) address third-country nationals with an academic degree and a work contract. The measures of field nine can therefore be regarded as the institutional core of German labour migration policy. In recent years, however, additional measures that are located in other fields have been introduced. In this context, it is worth mentioning section 18c of the Residence Act (AufenthG), which grants every individual with an academic qualification the right to come to Germany for a maximum period of 6 months for the purpose of looking for a job that matches his/her qualification. In case of a successful job search, the permit is extended. Related to the typology introduced above, this measure belongs to field eight. In

¹ The views in this article are my own and should not be regarded as those representing the views of the Expert Council. I thank Timo Tonassi for his comments on an earlier draft of this paper.

² See Bundestag printed papers 19/44 and 18/11854.

³ Section 2) draws upon the preliminary considerations outlined in Kolb (2017, 145-148).

combination with the programmes of field nine, this option leads to “an almost full liberalisation of the immigration of persons with academic qualifications” (Langenfeld 2013, 10, own translation). It would be a mistake, however, to restrict the dynamic developments within German labour migration policy to the field of persons with academic degrees. Briefly after the transposition of the Blue Card directive, new options were integrated into national law that, for the first time, also paved the way for persons with vocational training to come to Germany (section 6 (2) BeschV), ended a period of “academic arrogance” (SVR 2015, 36) and thus filled field six of the matrix. In addition, it is likely that field three, which is vacant so far in Germany, will also be filled in the near future as the proposal for a reform of the Blue Card-directive would broaden its scope of applicants by granting Blue Cards not only to those with academic qualifications, but also to those with “at least three years of professional experience of a level comparable to higher education qualifications” (Art. 2 lit. h COM(2016378) (Langenfeld and Kolb 2016, 529; Klaus 2017, 66-67).

EUROPEANISATION AND LIBERALISATION OF MIGRATION POLICY: WHY A POINT SYSTEM NO LONGER FITS INTO THE GERMAN REGIME OF LABOUR MIGRATION POLICY

Field nine and (in the foreseeable future) field three are, and will be, heavily affected by EU-law. National attempts to change the set of rules for these groups are thus only possible to a limited extent. This pertains first and foremost to the group of third country nationals with academic qualifications and (pre-)arranged employment. For this segment – at least in Germany – the Blue Card is now in place as the center of all options to immigrate. This has significant repercussions on the general options to complement the German system with a point system, an idea still popular among some political parties as well as a number of migration experts.⁵ This instrument, which can be described as a “scorecard combining several observable criteria such as age, education, and language skills” (Tani 2014, 2; Sumption 2015, 1), would also target the individuals located in fields 9 and 3. Due to the Blue Card, however, it would almost automatically be reduced to a second-choice-option, which – given the superiority of EU law over national legislation – would only be made use of if the conditions for obtaining a Blue Card cannot be met. The general incompatibility of the idea of a point system with the central instrument of EU labour migration policy (the Blue Card) is also expressed by the fact that the European Commission made clear in the explanatory memorandum of the proposal for a reform

of the Blue Card, that in “the preparation of the proposal a broad range of policy options were examined, some of which – repealing the EU Blue Card Directive, introducing a point-based expression of interest system, extending the scope to international service providers – were discarded in the first stage of assessment” (COM(2016) 378, 8).

In addition to the increasing relevance of the EU as a player in the field of labour migration policy, recent developments at a national level have also contributed to the shrinking applicability of a point system in Germany. Special attention in this regard must be paid to the introduction of section 18c of the Residence Act, which grants a job search visa to all individuals with academic qualifications. The complementation of the Residence Act through this new option occurred simultaneously to the transposition of the Blue Card directive. It was, however, not prescribed by EU law. As a result, this new option provided very liberal and extensive options for academically-trained foreigners – even if they had not managed to find a job in Germany from abroad – to (temporarily) immigrate to Germany. The legal status quo for field eight in Germany thus represents a maximum of openness.

The combination of the Blue Card, which is based on EU law and covers field nine, on the one hand and section 18c, which fills field eight (in the most liberal way possible), on the other hand leads to a situation, whereby academically trained individuals, who are still at the centre of any attempts to recruit foreign nationals for the purpose of work, must stand outside of the scope of a point system. The instrument of a point system in Germany is therefore reduced to regulate labour migration of only minor relevance for the particular German context. This applies to the fields one, two, and four which in Germany and other countries with rather comprehensive welfare systems and formalized labour markets (must) remain vacant (see also Offer 2017, 31). The actual scope of application for a point system is therefore field five, which comprises only a rather small number of individuals.

The idea of a point system for Germany, which came up as early as 2002 in Germany, thus first and foremost seems outdated (see also Thym 2017, 369). Back in 2002, when the first draft of the immigration act,⁶ which did not come into force in a revised version until 2005, included a point system, such a system easily would have been able to emerge as the core of the legal infrastructure to regulate labour migration to Germany. Over one and a half decades later, however, developments at the European and national level have resulted in a new institutional environment, which makes a full integration of a point system into the German set of rules neither easily feasible nor desirable.

⁵ The drafts for a new immigration act by both the Social Democratic as well as the Green Party (see Fn. 1) included such a point system. A fierce supporter of the introduction of a point system in Germany is also the Institute of Labor Economics (Hinte, Rinne and Zimmermann 2011), which, however, tends to disregard the increasing significance of EU lawmaking in the field of labour migration and its implications for national policy-making.

⁶ The first version of the immigration act, which included a point system in article 20, was declared invalid by the Federal Constitutional Court for formal reasons concerning its adoption in 2002. A new version, which was adopted on 30 July 2004 and represents a compromise between the then socialist-green government and the conservative opposition, waived this idea.

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