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Political reform from a constitutional economics perspective: a hurdle-race. The case of migration politics in Germany

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**Political reform from a constitutional economics perspective: a hurdle-race
The case of migration politics in Germany***

Sara Borella**

Abstract

This paper approaches the matter of political reform from the perspective of constitutional political economy with particular attention to the case of migration politics in Germany. That the process of policy-making has to be a constrained one is a central element of this approach, the identification of “desired” and “undesired” constraints its main aim. Through the metaphor of the hurdle-race it will be shown that the results of the political process depend on the rules of the game of politics on the constitutional level, but can be influenced by the contingent obstacles on the subconstitutional level. With reference to migration politics in Germany, I will argue that a separation of labour migration from other social aspects connected to migration can be useful for a more matter-of-fact discussion in this sensitive realm. The influence of subconstitutional events and factors is shown through the example of the recently approved German Immigration Act.

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1. Introduction

It is widely acknowledged that the changes and new opportunities brought about by the ‘globalisation’ process are based on technological progress and, strictly related to it, on the faster movement of capital and higher mobility, at least potentially, of individuals¹. According to the theory of competition among jurisdictions, these developments set local national governments under a positive kind of pressure². In their effort to attract resources, they are forced to take the social and economic changes into account and to develop appropriate policies in order to meet the interests of the citizens. Instead of being caught in the danger of ruinous competition, citizens can profit from the consequences of stronger competition, because it uncovers dysfunctional properties of the institutional design, e.g. of the social systems. In many industrialised democracies this process has led to a broad acknowledgment of the shortcomings of the present political settings in many fields, and consequently to a call for reforms in certain sectors of social policy, e.g. healthcare, pensions etc. Higher individual mobility is a major factor in the globalisation process since it reveals the necessity to revise some aspects in the social and labour market policies of many countries: social systems tend to get eroded and destabilised because individuals can – and actually do – move more intensely between jurisdictions with different social and labour market policies. The higher mobility causes negative but also positive externalities both in sending and receiving countries that necessitate appropriate national political frameworks and provisions for the international coordination among jurisdictions.

Concentrating on the topic of mobility of people between states from a constitutional perspective means to focus on the rules affecting mobility. Individuals try to satisfy their mobility preferences, at first, under the existing mobility rules. Considering the changes and developments in the technical restrictions of mobility, though, the citizens can ask whether the actual mobility rules are still able to guarantee the best possible framework for their mobility needs. Are they still a useful tool or could common individual interests be better fulfilled by an alternative policy design?

¹ The constitutional economics arguments that will be put forward in this paper are analytically independent from the differentiation between real migration and potential mobility of individuals. Nevertheless, for empirical data about the relevance of the issue, see, for worldwide data, the statistics of the International Organization for Migration on www.iom.int or of the Migration Policy Institute on www.migrationpolicy.org; for OECD countries, the Trends in International Migration and Migration Policies 2003 and www.oecd.org; for Germany e.g. the statistics of the Bundesamt für Migration und Flüchtlinge on www.bafg.de.

² Some authors, like H.W. Sinn, consider this pressure as negative and potentially leading to a ruinous competition. For a critique of the “race to the bottom” argument, see Vanberg, Viktor (2000), p. 98ff.

More than in other political realms, for instance trade liberalisation, nowadays free mobility of people due to economic reasons has to overcome more and more non-economic obstacles. The aim of this paper is to make a step towards a sober consideration of economically driven migration in a more economic view, (mostly) free from the burden of political correctness.

I will examine political reform in labour migration policy from the perspective of constitutional political economy. Within this approach I will look for a desirable set of rules for cross-border labour mobility that is compatible with the aim of a rational migration policy. In this first step, some aspects will be pointed out that can contribute to the identification of desirable rules. After a short introduction to the field of constitutional political economy in paragraph 2, the hurdle-race metaphor will be explained in paragraph 3. Then, I will look at the peculiarities of migration policy in general (paragraph 4) and from the viewpoint of Germany in particular (paragraph 5). Here, dysfunctional effects of some provisions will be identified and some proposals for clarification and further reform will be advanced. A brief digression in the field of trade in services will be found in paragraph 6. The concluding paragraph summarises the steps of the analysis and the reform proposals advanced.

2. Political reform from a constitutional economics perspective

Political reform from the perspective of constitutional political economy³ is a process which ought to take place on the constitutional level according to the citizens' common interests. In the constitutional approach, there are two levels at which choices can be made: the constitutional level, of rule choice or choice among constraints, and the subconstitutional level of choice within rules or within constraints. The constitutional level is central to the constitutional economics analysis, in contrast to traditional orthodox economics, as it is the 'natural' arena for political reform, i.e. for the choice of or among different sets of rules. The aim of achieving better results on the subconstitutional level is not pursued through direct interventions as part of the 'normal' subconstitutional political process but through a proper design of the rules under which it takes place. The second central element is the pursuit of the citizens' common interests: democratic society is seen

³ For the foundations of constitutional political economy see Buchanan, James M., 1987 and 1990.

“as a cooperative venture for mutual advantage”⁴, where individuals decide to carry out their collective actions in “self-governed associations that are supposed to promote the shared interests of their members or citizens”⁵. Whether the common interests of the citizens are actually effectively promoted or not can be judged through the constitutional test: if and to what extent the measures taken respect the criterion of citizen sovereignty. This criterion is defined as the “extent to which political decision-makers are subject to constraints that induce responsiveness to citizens’ common interests”⁶. With this principle it is possible to evaluate the appropriateness of political action in a democratic polity. Proposals for political reform from a constitutional political economy perspective are channelled by and develop within these constraints, which have to be taken into account as necessary conditions to be fulfilled when advancing a proposal. General, non-discriminating rules voluntarily adopted or followed by all members of the jurisdiction are more likely to fulfil their common constitutional interests than arbitrary discriminating regulations granting some members a particular treatment.

3. *The constitutional hurdle-race*

The hurdle-race is a metaphor for the procedure that a reform proposal has to undergo in the process of becoming a new rule of the game. Not every procedure is compatible with a democratic system, and not every method is desirable: the process of rule-creation is a constrained one. Two kinds of hurdles can be analytically distinguished. First, there are hurdles that represent desirable regulations or provisions existing on the constitutional level in order to guarantee that the procedures and, as a consequence, the actual measures resulting from them satisfy certain criteria, in our context: constitutional criteria. These hurdles are the constitutional constraints. The members of the polity decide voluntarily to commit to these rules because they expect advantages from them that they would not be able to realise otherwise. Secondly, there are unintended hurdles that emerge on the subconstitutional level as an undesired result of the application of the rules and as a consequence of individual behaviour. In this last case, obstacles emerge from the fact that the common agreement on the general validity of a rule on the constitutional level is not sufficient to its individual implementation: the interest in introducing a rule does not necessarily imply the willingness to follow the precepts in particular situations on the level

⁴ Rawls, John (1971), p. 84.

⁵ Vanberg, Viktor (2001a), p. 35.

⁶ Vanberg, Viktor (2004b), p.51.

of actions. The undesired consequences of both rule following and rule breaking on the subconstitutional level can indirectly influence the process of rule creation at the constitutional level. Prisoners' dilemma situations can distort the dynamics of the national political process. Moreover, there can be events and incidents causing relevant shifts in the common interests of the jurisdiction members, as observable in the reaction to the recent wave of terrorism. These are subconstitutional obstacles as well. The concept of political reform within this metaphor can be represented as the race of one or more proposals to reach the approval in a jurisdiction. The length of the track and the height of the hurdles can make the race more successful and efficient⁷ for the individuals concerned according to the constitutional criteria. Yet the result also depends on the contingent obstacles on the subconstitutional level, so that there is scope for questioning the characteristics of the hurdle on both levels.

One last general aspect has to be considered. Although nation states represent the constitutional level jurisdiction for the domestic political process, they are not separate and independent identities at the international level. There are levels of jurisdiction above the national level and, therefore, it is important to keep in mind that the distinction of the two orders of rules is only a relative one: "What is a matter of constitutional choice at one level of jurisdiction can be viewed as subconstitutional choice in relation to a more inclusive level of jurisdiction"⁸. This aspect is relevant for migration politics; both in the field of asylum and refugee politics and of economic migration, national political actors are constrained by well established and broadly enforceable international rules. As far as politically motivated migration is concerned, there are strict provisions at the international level since the Geneva Convention in 1949. Labour migration, too, is no longer a matter of exclusive national competence. Nation states give up part of their sovereignty in this field through binding commitments at the international level: European Union members at the moment of their joining the Union, and because of membership in international organisations, e.g. the WTO. These kinds of supra-national constraints will be briefly discussed below in relation to trade in services, as far as the supply of services implies movement of individuals across borders⁹.

⁷ In this context efficiency is always meant in relation to the criterion of citizens' sovereignty. A rule is more efficient than another if it guarantees a better fulfilment of the common constitutional interests of the individuals affected by it.

⁸ Vanberg, Viktor (2001a), p. 34.

⁹ Currently, negotiations concerning the General Agreement on Trade in Services are under way in the context of the Doha Round.

3.1 Constitutional constraints

From the perspective of constitutional economics, constitutional constraints are viewed as rules on the constitutional level supposed to lead political actions in a direction compatible with the citizens' sovereignty. They result from commitments among the citizens on characteristics of the jurisdiction; citizens bind themselves under these commitments in order to achieve aims and produce advantages that they would not be able to achieve or produce individually. They hope to realise gains from joint commitment¹⁰. There are two kinds of rules at this level: rules of substance, or substantive rules, and procedural rules. Substantive rules define the content of individual rights and duties: for instance constitutional rights such as freedom and property rights, formal equality, or the principle of social justice and the welfare state. The citizenship rules belong to this category as well; they define who is member of the jurisdiction, which rights and duties are linked to this status, and what conditions determine its acquisition and loss. Procedural rules define the procedures under which rules can be changed or collective action can take place. They set the characteristics of the decision-making process, like the principle of government under the law, or rule of law, and the different electoral systems: in a democratic polity with a representative government this could include the possibility of referenda. With a proportional electoral system, for instance, the process of political reform has to overcome obstacles different from those in a jurisdiction with direct democracy and a majoritarian electoral system.

Both kinds of constitutional constraints or rules originate from political decision, institutional design, legal provision, or historical and cultural development. These are the hurdles on the constitutional level; they have to be overcome as a test of the constitutional appropriateness of the new rule. The compositions of these elements "describe the constitution of any organized polity, and this constitution will, in its turn, influence the pattern of collective outcomes that may be observed"¹¹. On the constitutional level the rules can be seen as useful instruments¹² that define the private sphere of individuals and the leeway for their actions. This leeway is mostly defined *ex negativo*, i.e. it is specified through exclusion of strategies not desired by the actors; hence constraints. In the Hayekian tradition, the rules of the game have two central characteristics: they are negatively formulated and universalisable, i.e. generally applicable in a non-discriminatory

¹⁰ Vanberg, Viktor (2004a), p. 154.

¹¹ Buchanan, James (2003), p. 3.

¹² On the function of rules as tools see Hayek, Friedrich A. (1976), vol. 2, p. 21.

way to all individuals concerned¹³. If constitutional rules have such universalisable characteristics and if they establish binding constraints on subconstitutional choices of rules, the latter can be argued to be responsive to the common interests of the citizens.

3.2 Subconstitutional constraints

The subconstitutional level is the level where individual action takes place; individuals try to fulfil their preferences under the restrictions they are confronted with. The whole complex of the constitutional provisions represents for the actors a higher-level institutional framework of constraints to their actions. The effects of a political measure introduced at the constitutional level become evident on the subconstitutional level. The impact of rule implementation can turn out differently from what was intended, particularly when the rules are not perfectly resistant to opportunistic behaviour. Generally, it is always possible that the application of a new measure causes unpredicted failures, but what is referred to here in particular is that the new provision may have to deal with elements in the system that pose unforeseen implementation obstacles. These imperfections do not concern the measure itself, they are independent from it, but they can influence its outcome on the level of actions. These are not desired rules or regulations, but the result of market and policy failure. These hurdles at the subconstitutional level will be referred to as obstacles; the hurdle-race will be more efficient¹⁴ if these can be lowered. Current political processes show a variety of examples for these imperfections: rent-seeking and lobbying activities, protectionism and subsidies-granting politics. In matters of labour migration, national prisoners' dilemma situations and an emotional bias like fear of dominating foreign influences are, among others, high obstacles on the subconstitutional level. Some of these aspects will be considered in the next paragraph.

4. *The peculiarity of migration politics*

Labour mobility of individuals is a matter of national migration policy, a realm that is strongly subject to 'globalisation pressure', as mentioned above. Migration policy is a relevant instrument for governments in international competition and therefore an important item on the reform-agenda. The mobility rules can be used instrumentally to

¹³ See also Buchanan, James and Congleton, Roger (1998) on the 'generality norm'.

¹⁴ See footnote n.7.

attract resources or, from the opposite viewpoint, to restrict the free inflow into particular sectors of the labour market. In this sense, the hurdles can be intentionally set higher or lower in order to achieve specific results. The appropriateness of these rules becomes increasingly relevant in a system where other traditional barriers to mobility fall. Moreover, migration is a sensitive field of economic policy for the citizenry of a polity. The debate on immigration, in particular, has often been dominated by current political issues, for instance the discussion on asylum rights in the past, and on security and protection from terrorism recently.

4.1 The definition of migration

I will focus on voluntary economic migration, by contrast to migration forced by political or ecological reasons. There are of course countries where the economic situation is of such extreme poverty that a factual distinction between voluntary and forced migration seems to be impossible. The analytical distinction, though, remains possible and, empirically, those are not the countries which show relevant emigration flows¹⁵. Bimal Ghosh distinguishes between ‘opportunity-seeking migrants’ and ‘survival migrants, due to poverty’¹⁶. According to the distinction proposed in this contribution, these two categories are part of the economically motivated migration, representing different intensity degrees within the same group. As opposed to them, people forced to migrate for political reasons could be defined as ‘survival migrants, due to persecution’. It can be argued that the two kinds of ‘survival migration’ often occur together; nevertheless, the analytical distinction still remains possible. Asylum seekers and political refugees are not the subject of this analysis. The individuals considered are motivated most often by economic incentives, but it is not necessary to know whether this is the final cause of migration for them or not; relevant is their decision to stay and work in a foreign country. This will be referred to as economic or labour migration. As one aspect of the general analysis of the economic policy measures adopted in a democratic state in order to deal with legal economic migration, I will concentrate on the recent experiences in the German political process.

¹⁵ According to the empirical evidence and theory of the ‘migration hump’, the extreme economic conditions and the political situation in the least developed countries are often such as to make mobility impossible, see Martin, Philip (2002) and, for the ‘migration hump’ in particular, Martin, Philip (2003), p. 10.

¹⁶ Ghosh, Bimal (2000), p. 241.

4.2 Constraints in the realm of migration politics

As far as *exit* barriers are concerned, citizens share two kinds of interests. On the one hand, assuming that there are relevant alternatives, the possibility of exercising an exit-option represents a protection for individuals from collective actions taken against their interests. The lower the mobility barriers are, the higher is this protection. On the other hand, as mentioned above, the members of a jurisdiction commit to rules about collective action in order to realise projects which would be impossible through individual action. Since all jurisdiction members have a common interest in the implementation of long term projects, they can have a common interest in some kind of barriers to exit, at least for a limited time. A trade-off exists between their preference for mobility and their preference for boundaries, that is between the possibility of an exit-option and a continuity-guarantee. This topic will not be discussed further in this context, focusing on the barriers to entry. In fact, some long term common goals can be influenced by the *entry* mobility barriers as well or, more precisely by the level and composition of the immigration movements resulting from them. As a positive factor, for example, immigration is needed if a country faces a demographical development such Western Europe at present, even if this is not a solution of the problem posed by the demographic development in the long run. And still, the population in the receiving countries rather perceives the negative consequences of immigration than the positive aspects. These consequences are connected with the existence of a social security system and are aggravated by failures in the economic system: as far as labour migration is concerned, for instance, the inflexibility of the labour market and the high costs of the local labour force can affect the attitude towards migration politics. Moreover, immigrants are individuals with different cultures and different languages. This could cause externalities on the ‘sense of community’ of the nationals. Even if it is deemed possible to isolate economically motivated migration, the immigrants use some non-excludable common pool resources more intensely¹⁷ or challenge the “spiritual public goods”¹⁸ of the receiving country. In the following I will maintain the focus on mobility of labour and try to identify which constitutional and subconstitutional constraints are relevant in this respect.

On the constitutional level, different kinds of rules and commitments limit the leeway of political actors in the design of mobility measures; they define the race-track in this

¹⁷ Foreign immigrants benefit systematically more from certain public goods and less from others. See Thum, Marcel (2004), p. 426.

¹⁸ Bernholz, Peter (1994), p. 283.

discipline. National politicians have to consider several constitutional constraints on the political process and, at the same time, they are limited by international commitments at the supra-national level. With respect to the multilevel characteristics of the system discussed above, in the field of migration policy, European Union regulations represent for national politicians a higher-level framework of rules of the game, which limit the scope of permissible strategies. The European Union itself, as an autonomous political actor, is bound by higher-level international organisations. The WTO General Agreement on Trade in Services, for instance, includes binding provisions for the supply of services through international movement of natural persons. Choices taken by national politicians cannot ignore these higher level frameworks of rules; rather, such choices are to be considered as subconstitutional in this perspective.

4.3 On values and emotional concerns

At the level of actions, migration policy measures are confronted with general and specific obstacles. Similar to other sectors of social policy, the presence of broad welfare-state provisions causes interdependences among the economic and the social systems. A large part of the externalities emerging from individual movements is caused by their effects on services or public goods provided by the government. The social consequences of economic politics affect the implementation of a rational labour migration policy. Further problems are caused by the possibility for those entrepreneurs who fear the pressure of international competition to exert influence on political actors through privilege-seeking activities. If the employers recognise the possibility to ally with the employees fearing to lose their jobs to less expensive or better qualified labour force from abroad, they can strategically put together the two different issues and achieve an even stronger influence. This issue can be seen as a prisoners' dilemma situation in analogy to the description of the protectionism dynamics in international trade. Similar to the constitutional economics interpretation of the trade-liberalisation dilemma¹⁹, it is central to point out that these dynamics are not caused by conflicts of interests among nations but occur within the different countries on the national level. Moreover, these dilemma situations take place on the subconstitutional level. These are *Verdrängungsängste*: the fear of economic crowding out and of labour displacement. The validity of these hurdles can be countered with

¹⁹ Vanberg, Viktor (2001b), p. 116f.

economic arguments, as has been done since the emergence of classical liberalism. This allows the distinction between these concerns and the labour migration issue.

Another aspect influencing individual behaviour in this respect is the *Überfremdungssangst*, the fear of being dominated by foreign influences, up to the possibility of becoming a minority. These concerns cannot be so easily swept away with economic arguments and represent a significant obstacle for an objective discussion of the problem. One could argue that the conception of democratic polity as a joint enterprise with the aim of pursuing common interests should secure protection from developments inimical to the members' preferences. The conception of states as clubs supports this view, since only the members of the club can decide which changes have to take place; moreover foreigners do not normally become full members of the club at once²⁰. At the same time, though, these fears on the subconstitutional level, caused by increasing foreign presence, should not be played down. They are a spontaneous reaction of the members of a community facing the necessity to deal with different cultures and values. The dilemma of impersonal exchange in the traditional trade situation acquires a new dimension; instead of the absence of a common juridical basis to secure transactions as a third party enforcer, the problem at stake here is the absence of common fundamental values, habits and customs. Even if foreign values, cultures and religions do not become effective through the constitutional channel, i.e. through rule change, because the individuals representing them are not (yet) entitled to participate in collective decisions, they will become noticeable for individuals on the level of actions if changes in their environment take place. Many members of a community have a spontaneous preference for similar values and cultures, and this might even be a rational preference, if 'heterogeneity' has some influence on the conditions for the realisation of cooperation gains. Hayek would recognise in these feelings of uneasiness the emergence of "the emotions of the tribal society"²¹ but as a matter of fact, although these emotions concern the subconstitutional level, they can indirectly influence the order of rules. This can happen if political actors find the way to exploit them in the pursuit of their electoral strategy.

²⁰ For instance, it is quite improbable that the All England Croquet and Lawn Tennis Club will be transformed in a football club unless fundamental changes in the membership rule occur.

²¹ Hayek, Friedrich A. (1976), vol. 2, p. 133ff.

In the constitutional perspective, the role of political economists requires impartiality and a judgement-free approach to economic topics²². The constitutional political economist formulates proposals in the form of hypothetical imperatives²³, which include a conditional component: If you want X, you should do Y, because Y is a suitable means to achieve X. Y is an instrument or a measure that the economist suggests to apply, given that the individuals concerned want to achieve the result X. Hence, for the constitutional economist, the conditions posed in the “if-component” of the imperative are to a certain extent given. Some revision of traditional values and beliefs can of course take place, and one can ask whether X is in the interest of all individuals involved, but at first this condition has to be considered as fixed²⁴.

Most of the problems in dealing with immigrants, as far as values are concerned, arise from the very fact of dealing with foreign influences, which is a delicate subject, particularly in Germany. A great part of the burden in the discussion of the treatment of foreigners would disappear, if the above mentioned isolation of the economic motives of mobility took place. This would lead to a more neutral conception of labour movement. I am not suggesting to apply a neoclassical approach and consider workers as factors that are pushed or pulled in any direction, since this is not compatible with the assumptions of the constitutional perspective. Free movement of people evidently causes externalities that other factors do not cause. Nevertheless, an economic approach is more effective in matters of labour migration: it allows to refer strictly to the factors determining economically driven mobility and to ignore pure humanitarian aspects, which are not at stake here. The crowding-out fears mentioned above, concerning the economic consequences of immigration in general, could be discussed separately from other concerns, and they could be addressed with economic arguments.

The distinction between economic and political matters is not always clear-cut, not even for the analytical purposes of an argument. Among the possible examples of this problem is the fact that immigrant workers have the right to bring family members with them under certain circumstances. This possibility does not fit, at first sight, in the scope of economic

²² According to Hans Albert's differentiation between 'Objektbereich', 'Inhaltsbereich' und 'Basisbereich' a scientist should avoid value-judgments in the 'Inhaltsbereich'. Albert, Hans (1972), p. 189f.

²³ Vanberg, Viktor (1997), p. 709.

²⁴ The second test for the hypothetical imperative is whether Y is an appropriate instrument to achieve the desired results. Hypothetical imperatives are employed in the disciplines of applied sciences. Vanberg, Viktor (1997), p. 709ff.

analysis. Admittedly, the right to family reunification is a delicate matter in relation to the economic analysis of the immigration of labour force. This right has been established at the constitutional level for other than economic reasons, but it influences the decision process on the amount of labour migration. The aim of allowing the entrance of labour force could result in the commitment to a package-deal including more than one person. However, from a different perspective, the possibility of family reunification can be seen as an incentive to attract labour in a situation of international competition, so that desired immigrants who could have the choice among different countries would prefer one with this kind of provisions. If the mobility rules are adequately set and if qualified immigrants are needed in the receiving community, the immigrants work and contribute to the welfare state with their taxes. Family reunification can actually cause externalities on the labour market or on the level of utilisation of public goods. To face this problem, it might be worth examining whether these effects are due to inadequate rules in the system involved, i.e. mainly the rules of the social security systems. If this case can be excluded, or not solved without fully renouncing the right to family reunification, it will still be unnecessary to revise the rule's general application: alternative compensation measures for particular and objectively proven external effects can be applied on the subconstitutional level.

To recapitulate, concerns about changes in the dominant traditional and cultural environment of the native community escape pure economics-based reasoning. However, they do not escape rationality considerations. Warnings of a threat to democracy posed by an excessive opening of national boundaries to foreigners should not be ignored. They form an important part of the *Überfremdungsängste* mentioned above. This threat is supposed to be caused by the destabilisation of the democratic system as it is generally feared by the opponents of globalisation. In the case of persistent entry of individuals who do not share democratic principles, of course, the problem seems to be evident. Appropriate rules are those which can guarantee that no decision is taken that is inimical to the interests of the individuals concerned. If a destabilisation of democracy is possible to the extent that its very foundations are at risk, the rules are not defined in an appropriate way.

4.4 On cross-border externalities

Critics of labour migration liberalisation point at the danger of international externalities, not limited to the national social security systems or related to the consumption of public goods or, more precisely, common pool resources. They support a similar free-riding argument as in the case of provisions of public goods with positive externalities across the borders of the jurisdiction. According to this argument, the option of opening a country's boundaries to more migration could have positive external effects on other jurisdictions unwilling to open as well, particularly the immediate neighbours, which could profit from a lower immigration pressure. It is possible that they are not interested in cooperation, similarly to countries which have a favourable geographical position protecting them from strong migration pressures. In any case, these neighbours or protected political entities could have incentives to exploit their favourable position; this free-rider behaviour can be anticipated from the liberalisation-oriented country, leading to the conclusion that, so the argument, it is advisable for this country not to move first in this direction. These free-riding fears do not consider two aspects. First, the decision of neighbours to adopt a free-rider strategy is not relevant for the jurisdiction opening its borders for labour migration, because the movements across borders will still be controlled by national migration politics, as it would be in any case. If the opening jurisdiction proves to be negatively affected by the free-rider behaviour of the others, then the problem is caused by its inappropriate migration policy rules. Secondly, even if there are inter-jurisdictional externalities that affect the movements of people, the solution is not to be found in a restrictive policy; rather, it would be worth looking for "appropriate international (inter-jurisdictional) agreements on rules directly addressing the externality issue"²⁵, rather than renounce liberalisation at all.

5. The hurdle-race in German migration policy

A striking illustration of the metaphor of the hurdle-race is Germany's immigration law passed last June, taking effect in January 2005²⁶. The independent commission chaired by the former President of the German *Bundestag* Rita Süßmuth was appointed in mid-2000, the law passed for the first time in June 2002 and definitively in June 2004, after the

²⁵ Vanberg, Viktor (2000), p. 98.

²⁶ The complete text of the "Immigration Act" in English can be downloaded on the website of the Federal Ministry of the Interior, see Bundesministerium des Innern (2004).

Constitutional Court had overturned the first Parliament decision and new negotiations had taken place. The mediation process was strongly influenced by the necessity for the government coalition to reach a broader support, i.e. more votes than the government coalition had in both houses of parliament. The comparison between the 2002-law and the definitive 'Immigration Act' passed in 2004 shows interesting changes, basically subsumable under the concept of a general shift from the labour to the security focus as a reaction to the Iraq war and as a result of the investigations on the terror attacks in several parts of the world²⁷. Conservative parties calling for even tougher anti-extremist measures could negotiate their approval posing conditions on other issues, mainly on those concerning the regulation of work force inflow.

In general, the Immigration Act provides for new structures in labour migration as well as in humanitarian immigration issues. The Act is strictly related to the new 'Residence Act', which will substitute the old 'Foreigners' Act', starting from January 2005. The residence titles are reduced to two: the (limited) residence permit and the (unlimited) settlement permit. The important role of integration is acknowledged and supported through the introduction of compulsory integration courses. Foreigners will have to participate in language courses and integration courses on German law, culture and history. As far as labour migration in particular is concerned, moreover, some relevant changes will take place. The Act provides for highly qualified employees such as engineers, computer technicians, researchers and business leaders to be granted permanent residence by means of the settlement permit from the outset²⁸, and German firms will be allowed to recruit highly qualified workers. Less qualified workers can apply for a limited residence permit if they can prove that they have been offered a job that could not have been given to any applicant from within Germany or the EU. Self-employed persons are to receive a residence permit if they invest at least 1 million Euro and create at least 10 new jobs. Students have now the possibility to stay in Germany and seek employment for up to one year after completing their degree. Some bureaucratic procedures have been simplified; work permit and residence permit, for instance, will be issued in a single act. Differently from the first version of the law, approved in 2002, the ban on recruitment (*Anwerbestopp*) of unqualified, low qualified and qualified persons has been maintained. Recruitment is

²⁷ Stefan Theil (2004) states provocatively that, „[a]s if a German John Ashcroft had taken over, the law has turned into a long list of anti-terrorist and anti-extremist measures“.

²⁸ The permanent settlement for highly qualified persons is regulated in § 19 of the new 'Residence Act'. It was originally meant to be substituted from a point system, but this was abolished in the second version of the law; this point will be discussed in paragraph 5.2.

free only for the high qualified employees. Qualified persons are exempted from the limitations of the *Anwerbestopp* in justified instances and when there is a public interest.

The main emphasis of the 2004 Immigration Act, compared to the preceding formulations of 2002, is undoubtedly on security aspects. Before foreigners are given a permanent residency permit or allowed to become German citizens, they will have to undergo a compulsory procedure of control by the Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*). Although the procedure is already possible under existing legislation, it has been rarely used till now; in the future, it will become obligatory. As far as integration is concerned, the right to take courses has actually to be considered a duty, because the foreigners who do not take part in the courses will face sanctions, such as rejection of applications to extend their residence permit or reduction in benefits. However, the most relevant provisions of the new law concern the introduction of a deportation order. A repatriation of potential terrorists can be ordered on the basis of a threat “prognosis based on facts” (§ 58, a, 1). The individual need not have committed a crime in Germany for the deportation order to come into effect: the expulsion is possible when “facts justifiably lead to the conclusion that a foreigner belongs to or has belonged to an organisation which supports terrorism or supports or has supported such an organisation” (§ 54, 5). In cases where expulsion is not possible, because the individual faces the danger of torture or death penalty in the home country, the suspect can remain in Germany under tight restrictions limiting freedom of movement and communication. The new law introduces a regular expulsion for leaders of banned organisations and a discretionary expulsion of religious extremists and agitators such as radical preachers. It will be possible to deport people involved in human trafficking if they have been imprisoned for such crime.

After this short overview of the law, I will concentrate on a few aspects concerning in particular the arguments presented in this paper.

5.1 General distinctions

The field of labour migration politics seems to be linked with other realms of social policy through interdependences and externalities. Therefore, it will be necessary to unbind the topic of migration politics from its ties with other fields. Traditionally, migration politics is

conceived as the bundle of instruments regulating entry and exit of individuals, whether they are seeking work, asylum, or political protection. In this connotation, migration measures end up as a list of procedural and administrative regulations, which is not much more than a visa policy. This is not compatible with the concept of migration adopted in this contribution. If the emphasis is shifted to the immigrant's willingness to stay and work²⁹, some more leeway is given to a constitutional economics approach to the matter.

The following general distinctions can help lower the hurdles on the race-track. First of all, the topic of political migration has to be separated from the economic mobility of people. The former could be handled from a domestic and foreign policy perspective, while questions concerning the latter would be better taken care of in the economic affairs department. Similarly, mobility matters should be separated from security claims³⁰. Understandably, after "9/11", people feel a higher need for security and protection from international terrorism, and this social issue pervades every political field. Nevertheless, it is a matter of discipline for the economists to resist this trend and preserve the analytical focus in the search for alternative solutions to be proposed to the individuals. Finally, labour migration has to be treated separately from development economics topics. The efforts of western industrialised countries in the promotion of progress and development in the Third World constitute an autonomous political issue that can certainly be analysed and discussed from economic viewpoints. The aim of managing the labour migration flows through direct intervention in emigration countries is not compatible with the constitutional approach and the key requirements for a legitimate and efficient political action described above.

5.2 On the point system in the German Immigration Law

As far as labour migration is concerned, the most evident change in the definitive law is the absence of the point system. It was originally planned that applicants who meet certain criteria in categories like age, education, family status, country of origin etc. would be included in a ranking list. According to yearly quota, high-level immigration candidates would have been granted an unlimited settlement permit. This provision did not reach the end of the hurdle-race. As a result of the negotiations about the immigration law the central element of the provisions on labour migration was dropped along the way: There will be

²⁹ Straubhaar, Thomas (2000, 2001).

³⁰ Tomei, Verónica (2001), p. 49.

no selection of economically attractive migrants, because the point system was not substituted by any other means of active selection. The particular design of the point system proposed was not faultless, but the instrument as such is compatible with the general reflections underlying this paper: the consideration of economically driven migration from a more economic perspective, relieved from the burden of political correctness. That the receiving jurisdiction should be allowed to set criteria for the admission of foreigners who obtain an unlimited settlement permit immediately after crossing the border is as such politically correct in a constitutional economics perspective: correct towards the citizens of the relevant jurisdiction, according to whose interests national political representatives ought to act.

Hence, the introduction of the point system should be reconsidered, reformulated and proposed to debate in the political process as a desirable hurdle in order to make the race-track more efficient and rewarding for both, insiders and newcomers. This would also allow for some improvements. The criteria according to which points are assigned are very important and deserve more than an abstract listing – for instance, what was the requirement of a ‘particular relationship to Germany’ supposed to mean? But still more relevant is the possibility to eliminate any quantitative restriction from the system, whether or not they are explicitly called quota. Instead of fixing a maximum of permits per year for the best ranked candidates, it would be more compatible with the approach supported here that there should be a minimum level of points that a potential resident has to reach. Whether ten or ten thousand candidates achieved this minimum, the result would then have to be accepted. These are the characteristics of non-discriminating procedures.

Improvements of the criteria could be necessary and should therefore be possible. If the amount of immigrants allowed to enter is permanently too low, the jurisdiction will perceive the consequences on the labour market and revise the criteria, which are on the rule level. This is more compatible with the constitutional approach than a yearly revision of the quota. If too many immigrants meet the requirements, similarly, there should be the possibility of revision as well. The candidates to immigration through this channel, in fact, do not need to have a proof of employment beforehand, but this could be left to the market, and the legal effectiveness of the settlement permit could be combined, at least as far as some consequences of it are concerned, with the actual employment. In both cases, though, if the criteria prove to be set according to the common preferences of the citizens, the aim

of an active qualitative selection would be inconsistently applied if quantitative elements are included *ex post*.

With the new immigration law, German migration politics has been designed in a positive and comprehensive way for the first time³¹, establishing the new constitutional rules of the game of individual mobility into the country. In making use of this competence, however, the political agents were also bound by the provision of international commitments, which constitute a higher level constraint in the decision-making process. Multilateral agreements and other international contracts do not only represent a framework of constraints limiting the leeway of national politicians, but also a chance for the member states. Apart from the protection granted by international enforcing parties, cooperation gains and knowledge improvements can be realised. On the international level, the single members have the possibility of reciprocal action and of overcoming national hindering factors, e.g. prisoners' dilemma situations. Nevertheless, in the field of migration policy, an attitude of caution and hesitation prevails on the national as well as on the international level: even if a polity aims at a liberalisation, takes on political reforms in this direction, and even binds itself through international agreements made for this reason, a trace of reluctance remains. As I mentioned at the beginning, the economic mobility of people has to overcome high non-economic obstacles. Liberalisation in this realm seems to be connected with loss of power or control over some crucial elements of the community itself. The example of trade in services supplied by persons across borders is striking in this context. Although a negotiations round is under way with the aim of opening the boundaries to more service-related movement, the European Union as a negotiating partner and the single EU-member states within it still hesitate to make concessions. These concessions seem to be seen as an expensive indulgence. In the next paragraph the chance for Germany in this field will be briefly addressed as a further example of the obstacles that can exist in the hurdle-race.

6. The chance in the service sector

The General Agreement on Trade in Services (GATS) was signed by the WTO member states to regulate and liberalise the trade in services in analogy to the GATT provisions regarding the trade of goods. The supply of services is classified in four categories: cross-border supply, consumption abroad, commercial presence, and presence of natural persons.

³¹ The guest worker programmes of the period between 1955 and 1973 cannot be considered as comprehensive policy.

This last mode is relevant in our context, being the form of supply through temporary movement of natural persons into the territory of another member state³². It seems quite obvious that people have to move temporarily to supply those kinds of services that cannot be otherwise provided, but the WTO member states were quite reluctant to liberalise this sector during the first round of negotiations about services (Uruguay round from 1986 to 1994). The liberalisation does not apply to persons aiming at obtaining citizenship, residence or employment on a permanent basis in a member state. Nevertheless, the member countries are concerned about the effects of large mobility. These fears are reflected in the formulations of the WTO about the application of measures affecting the mobility of persons:

The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment³³.

Currently, the movement of natural persons for service supply is being discussed in the context of the negotiations started in 2000 as part of the Doha round³⁴. The negotiation offer submitted by the European Union in April 2003 testifies to a moderate intention to liberalise the supply of services through movement of natural persons: the offers concern only the movement of the highly qualified service suppliers; quantitative restrictions according to the protection clause quoted above are maintained as well as those for the protection of the national labour markets³⁵. Germany has supported mainly concessions in the first three modes of supply and fails to put pressure on the liberalisation of the fourth.

The ongoing negotiation activity on the mobility of persons³⁶ is a chance for the member states to improve the possibilities for gains from trade – in services – according to the common interests of the citizens they represent. If this market enlargement is desirable, the

³² The “Presence of natural persons consists of persons of one Member entering the territory of another Member to supply a service (e.g. accountants, doctors or teachers)”, WTO (2004a). The Annex on Movement of Natural Persons specifies, however, that Members remain free to operate measures regarding citizenship, residence or access to the employment market on a permanent basis.” WTO (2004b) for the modes and (2004c) for the Annex.

³³ Paragraph 2 of the ‘Annex on movement of natural persons supplying services under the agreement’, WTO (2004c).

³⁴ The negotiations are carried out under the ‘request-offer’ method: participants in the services negotiations exchange bilateral initial requests and offers, the deadline is January 1 2005, such as scheduled for the overall negotiation round. More information on www.wto.org.

³⁵ Bundesministerium für Wirtschaft und Arbeit (2004).

³⁶ For a detailed analysis see Mattoo, Aaditya and Antonia Carzaniga, ed. (2003).

European Union should commit itself to a broader liberalisation than the one planned in the actual proposal. Possible aims are for instance the expansion of market access and a better coordination of the visa procedures, a wider application of the mutual recognition principle to education titles and qualifications, as well as provisions for the acknowledgment of contributions to the foreign social security systems. The introduction of a specific permission for the supply of services within the GATS countries, the so-called 'GATS visa', can further improve the conditions for temporary movements of persons, since both long waiting times and complex bureaucratic regulations usually represent a relevant hurdle for the fast and flexible world of service-supply. All these aspects should be seized because they can be used as discriminating instruments with the same function as entry barriers. Each measure intended to overcome the arbitrariness of the different procedures applied in the member states in these numerous fields is desirable from the point of view of constitutional economics, because it contributes to the generalisation of non-discriminating rules that satisfy the common constitutional interests of the citizens. In conclusion, it is advisable for the European Union to reconsider the advantages of the liberalisation of the service sector and to dare a more comprehensive approach to the issue. Measures for opening the market in the field of service supply could introduce more favourable conditions for trade in services and would reflect the aim and purpose of the Agreement, and ultimately of the membership in the WTO. As mentioned in the paragraph above, caution and hesitation are nonetheless the dominant attitudes in this field.

7. Conclusion

Higher mobility is a consequence of the fall of technical and institutional barriers because of the globalisation process. At the same time, mobility is the cause of a faster and more efficient discovery of problems and dysfunctional characteristics in the social systems of the jurisdictions involved. Among other fields, this discovery procedure has pointed out shortcomings in the current rules on labour migration in most of the industrialised democracies, particularly in Europe. In this paper, some undesired hurdles have been examined from a constitutional economics perspective. Some proposals could be made as to how these hurdles can be lowered or eliminated. The strict separation of labour migration from other social aspects of the cross border mobility of individuals is an example. Moreover, starting from very recent legislation such as the German Immigration Act or the ongoing negotiations on trade in services, some possibilities for amelioration

have been proposed. As a general maxim, in conclusion, it is possible to say that changes and reforms, whether piecemeal or all at once, can be welcomed from the perspective of constitutional political economy if they make a contribution to the generalisation of the rules, so that they can be applied in a non-discriminating manner. These characteristics of rules are desirable and do not cause problems themselves; on the contrary they help to discover failures in the system. The distinctions and revisions proposed can be seen as a contribution in this direction, with the purpose to improve the rules on the constitutional level in a way that can produce the desired results on the subconstitutional level in spite of the obstacles that are to be met there.

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