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Legal transfers of migration law: the case for an interdisciplinary approach

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Abstract: This article provides an introduction to the study of legal transfers/ transplants and its application in the context of comparative migration law. I begin by reflecting on the capacity of the methods and approaches used in the legal transfer literature to capture the nuances of the contemporary transfers of migration policies. I argue for the need for greater dialogue between the legal scholarship and work in other disciplines examining the transfer of laws and policies across jurisdictions, particularly the political science scholarship in diffusion, and the public policy work on policy transfer. I explore the relative strengths and weaknesses of these various approaches and propose transdisciplinary approaches to addressing two important methodological questions: 1) identifying whether a transfer has occurred; 2) measuring its success. I conclude with some reflections on the utility of studying legal transfers of migration policies, and why those two questions are so crucial to such inquiries.

Keywords: transplants; transfers; migration; law; policy; refugee; diffusion; interdisciplinary; success; identification; measures; measuring.

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> "The fate of comparative law will be determined by its ability to function as a connecting field between law and other social sciences." [Mattei, (1998), p.709]

1 Introduction

States around the world are increasingly monitoring an emulating migration law and policy developments in other jurisdictions. In keeping with the special issues focus on the methods and approaches of comparative migration law, this article provides an overview

of different disciplinary approaches to studying the transfer of migration law and policy, and develops transdisciplinary approaches to dealing with a number of key methodological issues which arise in the context of such studies. In doing so, the article echoes the call made in Cope's (2022) contribution to the special issue for incorporating methods from comparative social sciences into comparative migration law, with a specific focus on how this can be achieved in the context of the study of legal transfers.

I engage with the strengths and weaknesses of the methods and approaches used in the legal scholarship on legal transfer and examine whether they are fit for purpose for examining contemporary transfers of migration laws and policies. I then turn my attention to other related disciplines examining the transfer of laws, policies and ideas across jurisdictions. This includes the political science scholarship on diffusion, and the public policy work on policy transfer. I identify the strengths and weaknesses of these different approaches, and propose a transdisciplinary approach to studying two core methodological questions of particular importance in the context of the transfer of migration laws. The first is how to identify whether a transfer has occurred, and the second relates to evaluating whether a transfer was successful. I conclude with an examination of the reasons why it is important for comparative legal scholars to study legal transfers of migration policies, and the centrality of those two identified methodological questions to such inquiries.

Watson (1974, p.21) coined the term 'legal transplants' in the 1970s to refer to "the moving of a rule, from one country to another, or from one people to another." Other legal scholars have used a variety of names to describe the same or very similar phenomena – including, diffusion (Twining, 2004), reception (Wiegand, 1991), circulation (Wise, 1990), transposition (Örücü, 2000) borrowing (Friedman and Saunders, 2003), migration (Choudhry, 2006), translation (Langer, 2004) and transfer (Graziadei, 2019). It is beyond the scope of this study to engage with the subtle differences of these terms and the ongoing debate as to which metaphor best captures the characteristics of the process. I use the term 'transfer', with the latter term aligning with the language used in policy transfer and diffusion scholarship.

In his 1973 book, *Legal Transplants: An Approach to Comparative Law*, Watson claimed that legal borrowings have been the 'most fertile' source of legal change in the western world (Watson, 1974). While this claim has been the subject of much controversy (see e.g., Legrand, 1997), it does appear to ring true in the migration law making context. It makes sense to learn from experiences abroad in all areas of law. Why reinvent the wheel when there are tried and tested models available? However, there are a number of features of migration law that make it a particularly 'fertile' area for legal transfers.

The first feature is the *interdependence* of migration law. Migration law making across jurisdictions is inherently interconnected. At the most direct level, a person refused entry at a border, is pushed back into another country. At a more indirect level, stricter or more relaxed policies may have flow on affects for other jurisdictions by influencing where migrants choose to move to. This is particularly the case given the fact that states are increasingly competing to attract the same cohort of highly skilled migrants, and deter irregular migrants and asylum seekers. In this competitive environment, it makes sense to keep a close eye on what other jurisdictions are doing, and copy and adapt policies that appear to be successful (Shachar, 2006; Ghezelbash, 2014, 2018).

The second factor is that states have *shared constraints* in designing their migration laws. This is particularly true in the asylum and refugee context, where states responses are limited by their obligations under the Refugee Convention, and in particular the principle of *non-refoulement*, as well as international human rights law. Beyond the refugee space there is an expectation, both in international law, and in the eyes of the public that migration laws should not be overtly discriminatory (Ellerman, 2020). That is not to say that these constraints are always respected in practice. Migration control measures regularly push the boundaries of legality under international law (see e.g., Ghezelbash, 2020; Mann, 2018). Similarly, as Dauvergne (2016, p.175) argues, the task of migration law in selecting 'useful' or 'good' immigrants is inherently discriminatory. However, there are rhetorical and political benefits in framing policies in way that respects these constraints as far as possible. As such, when one states develops policies that meet the shared goal of control, while ostensibly abiding by the shared constraints, other states are likely to follow.

These dynamics have fuelled the transfer of migration law and policy around the globe. States have been emulating migration policies from abroad for as long as they have been trying to regulate the entry of foreign nationals to their territory. For example, elsewhere, I have documented the diffusion of landing taxes and literacy testing as a tool for controlling non-white migration across English speaking settler states in the late 19th and early 20th century (Ghezelbash, 2017). Fitzgerald and Cook-Martin (2014) look even further back in history, documenting the spread of racially based migration exclusion policies across twenty-two countries between 1790 and 2010. More recently, we have seen the diffusion of a wide range of policies, including, for example, the points test for selecting highly skilled migrants (Shachar, 2006; Triadafilopoulos, 2013), immigration detention (Flynn, 2014; Ghezelbash, 2018), boat push-backs and extraterritorial processing of asylum claims (Ghezelbash, 2018), temporary foreign worker programs [Boucher and Gest, (2018), pp.114–134], and in relation to the regulation of conjugal immigration (Sztigeti, 2021).

In what follows, I examine the degree to which the methods and approaches in the legal transfers scholarship are capable of capturing the complexity of contemporary transfers of migration law, and the degree to which the scholarship can draw on developments in other related disciplines to address any existing gaps.

2 The study of legal transfers

Recent years have seen a wealth of legal scholarship produced on the topic of legal transfers. The sheer volume of work has led some to ask whether study of the phenomenon has reached 'saturation point' [Cohn, (2010), p.584]. My view is that recent scholarly inquiries have increased the potential for innovative research, particularly in the context of the transfer of migration law and policy. For present purposes, I distinguish between what I label as the 'traditional' approach to legal transfers and the 'contemporary' approach, which challenges many of the simplistic assumptions that underpinned the earlier scholarship – making it more suitable for understanding the nuances of the way governments are currently learning from one another. This distinction is of course somewhat of an oversimplification – but the purpose is to identify the various ways in which the new wave of scholarship in this area is breaking free from the limitations and assumptions of earlier approaches.

The early or 'traditional' literature dealt with a very narrow set of legal transfers, mainly examining the transfer of entire legal systems in colonial and post-colonial environments. Labelling it the 'naïve' model of receptions, Twining (2011, pp.51–52) describes this early approach as concerned with a paradigm case involving:

> "[A] bipolar relationship between two countries involving a direct one-way transfer of legal rules or institutions through the agency of governments involving formal enactment or adoption at a particular moment of time (a reception date) without major change… [I]t is commonly assumed that the standard case involves transfer from an advanced (parent) civil or common law system to a less developed one."

The new wave of contemporary literature on legal transfers challenges all these assumptions and better reflects the reality of the way law and policy are travelling across jurisdictions, including in the migration space.

Rather than focusing on the transfer of entire legal codes or systems, there is increasing awareness that transfers are often of discrete legal rules or fragments of rules [Cohn, (2010), p.584]. This development is significant for the study of transfers in the migration context, where we have rarely seen wholesale copying of statutes or entire migration management regimes. Rather transfers have generally focused on specific discrete policies or mechanisms, say for example, the points test for selecting economic migrants. The contemporary legal transfer literature also recognises that laws may be transferred in varying degrees of abstraction. For example, a general idea may be borrowed and implemented using a completely different mechanism (Fedtke, 2006). Moreover, rather than formal enactment of statutes or constitutions, there is growing recognition that transfers can occur through implementation as policy, programmes, executive orders or judicial decisions. This tendency for states to take a policy idea and implement it in a different manner is illustrated by Australia's adoption of extraterritorial processing for asylum claims. The original policy was carried out in the US pursuant to an executive order. When transferred to Australia, it was set out in legislation (Ghezelbash, 2018).

Change and adaptation of an imported rule can also add an additional layer of complexity. There is growing recognition of the fact that transfers are very rarely verbatim copies of the original rules. Law makers in the receiving country may deliberately tweak the imported legal rule to meet local needs and conditions. Again, the points test provides an illustrative example, with countries changing the criteria for awarding points based on their labour market needs. Changes may also be made inadvertently during the transfer process. For example, law makers may misunderstand the content or operation of the original rule, or meaning may be lost through cross-cultural communication or translation (Langer, 2004).

The contemporary legal transfer scholarship has also moved beyond earlier conception of transfers as standalone or once-only phenomena. It is now recognised that legal transfers are often multi-event interactions with the original and transplanted rules continuing to interact after the initial transfers have taken place (e.g., Cohn, 2010). Scholars have drawn on autopoietic theory, with its notion of law as a largely 'closed and self-referential' system, to distinguish between ad hoc contacts, systematic linkages and co-evolution (Paterson and Tuebner, 1998). In a multi-event context, old assumptions about the mono-directional flow of legal transfers no longer always hold true. The direction of the transfer often shifts, with the original exporting country drawing lessons

and implementing developments from the original importing country [Twining, (2004), p.20]. Again, the spread of the points test illustrates this, with Canada, the original source state, adopting some of the innovations introduced to the policy by Australia and New Zealand (Ghezelbash, 2014).

The old view of legal transfers as involving only two jurisdictions (usually a single exporting country imposing legal rules on a single importer) has given way to recognition that transfers can often be the product of interactions between several players [Cohn, (2010), p.585]. In an era of globalisation, importers may choose fragments of rules from various legal systems and integrate them into a single law (Lin, 2009). Örücü's (1995) culinary metaphors of a mixing bowl, salad bowl, salad plate, and purée are devised to capture the various forms of eclectic multi-source transfers. Returning again to the points test, New Zealand's version of the policy drew and innovated upon both the Canadian and Australian approaches (Ghezelbash, 2014).

It is now also acknowledged that government officials are not the only agents involved in the transfer process. Transfers can be carried out or facilitated by international institutions, such as those that promote legal change on a global scale, international companies, global law firms, and other private actors (Lin, 2009). In the migration space, key non-government players include the UNHCR, International Organisation for Migration, advocacy organisations such as Amnesty International and large corporations which lobby for increased labour mobility.

Finally, the contemporary scholarship is moving on from the somewhat stagnant theoretical debate around the proper construction of the relationship between law and society, and the ramifications of this question, to the viability (or even possibility) of legal transfers (see the discussion in Section 5). This theoretical debate was rooted in colonial and post-colonial politics and the context of attempts to transfer entire statutes or legal systems. The recognition of more nuanced forms of transfers adapted to meet local conditions both during and after the transfer process has reduced the relevance of this debate.

While the contemporary legal transfer literature has recognised the diversity of the transfer phenomena, it is still grappling to update its approaches and methods to deal with this increased complexity. These shortcomings became apparent in my own research into the transfer of restrictive asylum policies around the globe (Ghezelbash, 2018). In particular, two methodological challenges presented themselves, which I was unable to address with reference to the legal literature. The first relates to how to go about establishing whether a transfer has in fact taken place. It was easy to observe that states had adopted similar policies, such as mandatory detention, maritime interdiction and extraterritorial processing – but these policies were not identical, having been adapted for local conditions. Moreover, it was necessary to rule out the possibility they were developed independently. The second relates to measuring the success of the transferred policies. What does success look like in the context of legal transfers?, is it implementation alone?, the effectiveness of the policies?, political gain?, or something else entirely?

3 Interdisciplinary perspectives

Fortunately, there are other disciplines examining the spread of laws and policies across jurisdictions that legal scholars can draw on when devising approaches to addressing

these questions. These include political science work on diffusion and public policy work on policy transfer. Political science research on diffusion focuses on how innovations, policies and programs spread from one government entity to another. This work is carried out across a number of subfields, including comparative politics, international relations and public policy. Simmons et al. (2006, p.787) observe, "[I]nternational policy diffusion occurs when government policy decisions in a given country are systematically conditioned by prior policy choices made in other countries." Diffusion scholarship has its roots in comparative policy analysis in the USA, which focused on the spread of policy innovations within and between particular federal states and cities (e.g., Walker, 1969). It also builds on sociological studies on cultural diffusion. The contemporary diffusion literature is primarily focused on the "chronological and geographic patterns of the adoption of a policy innovation across government units" [Mossberger and Wolman, (2003), p.429]. A central objective of the research is explaining why some states either adopt or adapt policies and practices more readily than others. Examples of relevant factors identified include geographic proximity [Berry and Berry, (1990), p.396]; the role of policy networks (Rogers, 2003); and political, economic and social characteristics (Walker, 1969).

The public policy work on policy transfer developed in response to the diffusion literature, and a view that the diffusion scholarship was not paying adequate attention to the *process* underlying diffusion. Dolowitz and Marsh (1996, p.344) define policy transfer as the "process by which knowledge of policies, administrative arrangements, institutions and ideas in one political system (past or present) is used in the development of policies, administrative arrangements, institutions and ideas in another political system." The policy transfer approach acknowledges that diffusion will not always be the result of deliberate and rational policy choices. As such, policy transfer scholars recognise that transfers encompass both 'voluntary' and 'coercive' forms of practice. The latter can occur when "one government or supra-national institution [is] pushing, or even forcing another" to adopt policy innovations [Dolowitz and Marsh, (1996), p.344].

While the diffusion and policy transfer literature study the same broad phenomenon, they adopt very different methodological approaches and interrogate distinct elements of the transfer process. The diffusion literature focuses primarily on policy outcomes, while generally neglecting the processes by which diffusion/transfer occurs. The focus is on whether a policy was transferred/diffused and what structural elements facilitated or inhibited such diffusion. In contrast, the literature on policy transfer tends to be more process-oriented, focusing on how, when, and why adopters use diffused information, rather than on networks or patterns of diffusion [Mossberger and Wolman, (2003), p.429].

In terms of the methodologies adopted, each approach has its own benefits and drawbacks. The strength of the diffusion literature is that the large quantitative studies allow for generalisations about the causes and consequences of the diffusion process. However, this sometimes results in oversimplifications that fail to capture the nuances of the process through which the laws and policies are transferred. For example, diffusion is generally presented in a binary way – with states being viewed as adopters or non-adopters, failing to capture the many degrees of transfer and the way states may adapt policies to local conditions. The policy transfer approach recognises that there can be many degrees of transfer, with complete transfer being very rare. The small-sample qualitative studies, employed in the policy transfer approach, allows for a far more

nuanced examination of reasons for and outcomes of the process. However, findings made utilising such an approach are less generalisable.

The focus of the traditional legal transfers literature was on the transfer of formal laws and their reception by the receiving countries legal culture and institutions. However, the expansion of the subject matter examined in contemporary transfer literature has resulted in a situation where it now looks at essentially the same subject matter as policy transfer and diffusion scholarship. In particular, the acknowledgement that the content of transfers is not just formal law, but a variety of ideas, policies, programs, approaches or innovations has brought the legal transfer approach in line with the policy transfer and diffusion approaches. Contemporary scholars examining legal transfers are asking the same questions that are being examined by diffusion and policy transfer scholars. What follows is an in-depth interdisciplinary examination of two such questions: how do you demonstrate that a transfer has taken place; what are the factors that lead to the success or failure of transferred law or policy?

4 Identifying legal transfers

The recent changes in the focus of the legal transfer literature examined in Section 2 have made it better equipped to capture the complexity and richness of the transfer phenomenon than the earlier scholarship. However, the acknowledgement of this complexity has given rise to new challenges that the legal scholarship is yet to grapple with. One such challenge relates to identifying whether a transfer has in fact taken place. Transfers that fit the old paradigm 'naïve' model of legal transfer are easy to identity. A framework for identifying legal transfers was not necessary in the context of verbatim transfers of entire legal systems (or large parts thereof). As Spamann (2009, p.1823) has observed "[one] cannot but see diffusion in identical statutes." Yet this form of verbatim transfers very rare in the migration context. The identification of the more subtle forms of transfers that are going on in that space gives rise to evidentiary issues that cannot be overcome by a simple comparison of formal legal instruments and institutions.

Table 1 Framework for identifying legal transfers

1	Identify a common policy problem (or *motive*).
2	Undertake a detailed comparative analysis of the suspected transferred law or policy in both the source and receiving country.
3	Search for physical evidence that a transfer has occurred (evidence of *opportunity*, and the *direct transfer* of information).
4	If necessary, identify and carry out interviews with key agents involved in the transfer process.

The problem of determining whether a transfer has taken place has been identified in contemporary legal transfer literature [Spamann, (2009), p.1852; Fedtke, (2006), p.436; Graziadei, (2019), p.454], however, there have been few attempts to design a framework to address this issue. This is where the focus of the policy transfer literature on the *process* and *agents* of transfer is of great utility. This framework in Table 1, from my book *Refuge Lost* (Ghezelbash, 2018), combines the sources referred to in approaches to identifying policy transfer (Dolowitz and Marsh, (2000), p.9; Evans and Davies, (1999),

pp.381–382; Bennett, 1997], with the traditional sources relied on by comparative legal scholars.

The first step involves identifying the *motive* for law makers in the receiving country to engage in legal transfer. The key factor to look for here is the existence of a similar policy problem in the suspected source and importing country.

The second step involves a detailed comparative analysis of the suspected source and imported laws or policies. Key documents examined at this stage include legislation, regulations, policy documents and governmental statements. This requires two distinct levels of analysis. The first is a doctrinal comparison of the sources outlined above to ascertain the degree of similarity in drafting and design. The second is a functional analysis, where the focus is on examining whether, in practice, the suspected source and imported laws serve the same function in both legal systems. Laws or policies drafted in similar terms, or the existence functionally equivalent laws or polices raise a presumption that a transfer has taken place. However, the existence of doctrinal or functional similarities does not provide conclusive evidence that a transfer has occurred. Two jurisdictions may come up with similar innovations independently as a response to similar domestic pressures (Bennett, 1997; Evans and Davies, 1999). Moreover, as documented by Hinterberger (2022) in his contribution to this special issue, the functional approach has a tendency to over-play similarities, and find false equivalences.

The third step involves examining sources in the receiving state for evidence that direct policy learning of some form has taken place. Two types of evidence are relevant in this context. The first relates to whether law makers from the suspected source and importing country had an *opportunity* to transfer information relating to the suspected imported law. Relevant evidence includes the existence of forums, meetings or avenues of communication which could be used to share information relating to the suspected imported rule. The second is *direct evidence* demonstrating that the source law was consulted, or formed the basis of the suspected imported law. Examples include government statements acknowledging the role the source law played in the development of the imported rule; government press releases or reports acknowledging discussions between the source and receiving country relating the relevant policy area; or references to the source law in the parliamentary debates, parliamentary hearings, explanatory memorandum, or policy material relating to the suspected imported law.

The fourth step involves interviewing policy makers suspected of being the agents of transfer. The absence of physical evidence does not always mean that a transfer has not taken place. Interactions between policy makers often occur behind closed doors and are not always publicly acknowledged. Further, in this digital age, law makers can instantly access a wealth of material about the detail and operation of foreign law and practice. Lessons drawn from such materials may not be documented. This final stage of analysis goes beyond publicly available sources and involves identifying and interviewing key agents involved in the transfer process. Identifying and interviewing these agents provides the richest source of evidence about the existence and degree of the transfer which has occurred. Of course, much will depend on the nature of the study being undertaken. Identifying and interviewing the agents of transfer may not be practical, but where it is feasible, it can be a very rich source of data. That final step was crucial in my own research – it was not until I spoke with policy makers that the full extent to which Australia and the USA were learning from one another in relation to their border control policies became apparent (see Ghezelbash, 2018).

5 Evaluating success

There is also a great deal to be learnt from other disciplines when it comes to the question of measuring the success of legal transfers. This has been one of the thorniest issues in the legal transfer literature, with the identification of competing dimensions of success reflecting different approaches to conceptualising law [Cotterrell, (2001), pp.78–80]. For those who view law as 'culture', a transfer will be successful when it proves consistent with the legal culture of the receiving country. For scholars who view law as positive rules, the simple promulgation of a borrowed law can be viewed as a success, regardless of how it operates in practice. Those who view law as an instrument will only regard a transfer as successful when the law has its intended effect.

The legal scholarship has been disproportionately fixated on the long-standing debate between proponents of 'law as culture' versus advocates of 'law as positive rules'. At one extreme, you have Legrand (1997) arguing that law is a culturally determined construct that can never be transferred fully into another culture – making legal transplants impossible. At the other extreme, Watson (1974) views law as a set of positive rules, operating separate to other social systems, making transfers easy.

This debate is unhelpful to measuring the success of contemporary legal transfers. It is centred on the semantics of what we understand as 'success', rather than on any profound disagreement about the underlying processes which are occurring. If, like Legrand, we take the *strong* 'law as culture' approach, and limit our view of success to situations where the imported laws reproduce identical meanings and effects to what they produced in the source jurisdiction, then the prospects of success do indeed look grim. If we accept Watson's view of 'law as positive rules' approach, and define success as mere introduction of promulgation of a transferred law, then success is easy to achieve.

The recent scholarship dealing with success in the context of legal transfers appears to take a more pragmatic approach. Scholars now recognise that legal transfers are occurring in almost every area of law. They acknowledge that the close connection between law and society means transferred laws will never operate in exactly the same way in source and receiving systems [Siems, (2014), pp.195–200]. This has made the old 'law as positive rules' versus 'law as culture' debate less relevant. Contemporary legal transfer scholars recognise that law makers generally do not want imported law to operate in exactly the same way as it did in the source country. Rather they are interested in more nuanced transfers, where foreign rules are adapted to meet local needs and conditions. This reflects the instrumental view of law, where transfers are judged by whether or not they had their intended effects.

The legal scholarship is yet to develop appropriate approaches and methods to measure instrumental success. Again, however, it is possible to glean lessons from public policy scholars who have developed robust approaches to measuring policy success. The public policy literature identifies three different dimensions of success. The first is the *programmatic* mode of assessment that focuses on "on the effectiveness, efficiency and resilience of the specific policies being evaluated" [Bovens et al., (2001), p.20]. In other words, did the law or policy meet the programmatic goals that it was aimed at achieving? The second is the *political* dimension of assessment and "refers to the way policies and policy-makers become evaluated in the political arena" [Bovens et al., (2001), p.20]. Was the policy well-received by the electorate? Did it result in political upheaval or push-back? The third dimension focuses on *process*, examining the legitimacy and

quality of the policy making process and policy implementation (Marsh and McConnell, 2010).

I propose a fourth dimension to measuring the success of transfers, that captures the legal transfer literatures focus on the reception of the imported law in the receiving state. What I label as *legal success*, occurs when an imported law or policy survives judicial challenges in domestic courts (Ghezelbash, 2018). A transfer will be a failure where there is a judicial finding that an imported law or policy is unlawful; or where the judiciary adopts an interpretation of the imported provisions, which frustrates the original intention of the drafters of the law or policy. This outcome could be reached with reference to domestic law, or supra-national or international law, in legal systems where those can be enforced at domestic level.

This measure of success captures elements of both the 'law as an instrument' and 'law as culture' approaches (Cotterrell, 2001). From a 'law as an instrument' perspective, laws will only be a success if they achieve the purpose for which they were introduced. A finding by a court that a law or policy is unlawful will preclude the law or policy from having such an effect. From a 'law as culture' perspective, the judiciary's response to an imported law sheds light on the degree to which the imported law is successfully integrated into the legal culture of the receiving country. A finding by a court that an imported law or policy is unlawful represents perhaps the most clear and explicit indication of cultural incompatibility.

Table 2 Framework for measuring instrumental success

1	Programmatic – Effectiveness, efficiency and resilience of the policy in meeting it goals.
2	Political – The way policies are evaluated in the political arena.
3	Process – The quality and legitimacy of the process through which a policy or law was developed.
4	Legal – Whether the law or policy survives judicial challenge in the courts of the receiving state.

Beyond identifying which dimension of success we wish to measure, there are a number of further impediments to measuring success identified in both the legal transfer and public policy literature that warrant further exploration. One of the primary hurdles to developing criteria for measuring success is that success inevitably lies in the eye of the beholder. In other words, when we talk about success, it is important to define *success for whom* (Marsh and McConnell, 2010). We should expect a divergence of views between various stakeholders as to whether or not any aspect of a particular policy is successful [Nelken, (2001), p.48]. This is particularly the case for migration law and policy which has been described as "one of the most contested issues on the public agenda" [Hampshire, (2013), p.1]. For example, the perspective of the migrants impacted by a policy is likely to diverge from that of policy makers or that of members of the public. Moreover, we are likely to see significant variation with each of these groups. For example, individual members of the public may assess success of migration differently based on their personal moral or political convictions. As such, it is essential to be clear about which perspective is being assessed.

There are also difficulties around measuring whether a law or policy has succeeded in fulfilling its objectives. The first challenge is to establish the objective of the law or policy. This can be a difficult task given that laws and policies often have multiple

objectives and that some may be unstated. Even where a law's objectives are clear, there is the problem of attempting to identify the causal effect, compared to other independent variables. In order to say that successful outcomes are the product of a particular policy initiative or law, it must be possible to ascertain that the law or policy actually produced the outcomes in question [Marsh and McConnell, (2010), pp.580–581]. The situation is made more difficult by the fact that often the relevant outcome data may not be available. This may be the result of the fact that the data does not exist or is difficult to quantify, or due to the refusal of official sources to release relevant data. Timing also matters. It is important to be clear as to the timeframe over which success is being measure. Short term failures may turn into success over the long term (or vice versa).

One final issue to note is that there can be varying degrees of success. While it is attractive to conceptualise outcomes in binary terms as either a success or failure, in reality such black and white outcomes are extremely rare. Where a law or policy has multiple objectives, it may be successful in meeting one, but fail to meet others. Problems also arise when outcomes are compared across the various dimensions of policy success [Bovens et al., (2001), p.20; Marsh and McConnell, (2010), p.578]. Process, programmatic, political and legal success do not always go hand-in-hand. It is possible for a policy to be successful on one of these levels, but to fail on another. This limitation was evident in *Refuge Lost* (Ghezelbash, 2018). The focus there was solely on legal success. The findings that the policies of mandatory detention, maritime interdiction and offshore processing survived judicial scrutiny in the courts in both Australia and the USA, indicated that the policy had been a legal success. This was an unsatisfying result that did not take into account the impact of these policies in the real world – and underscores need for more empirical research evaluating transferred policies across the other dimensions of success.

This is precisely the task I have taken up in my ongoing research into the diffusion of fast-track and accelerated asylum procedures around the globe.[1] In terms of measuring success, I am combining analysis of legal success, with empirical research into the programmatic dimension of success. The focus is primarily on measuring programmatic success from the point of view of governments. The publicly stated goal of such procedures is to speed up asylum processing times. However, anecdotal evidence indicates that they may be doing the exact opposite, with the lack of procedural safeguards resulting in decisions being overturned at review, which in turn lead to delays. The project aims to measure if this is in fact the case, with a focus on procedures in Australia, the USA, Switzerland and the UK.[2] This will be achieved by drawing on a variety of empirical data points that compare processing times in fast-track and regular procedures, including published statistics on processing times, data obtained through freedom of information requests, as well as computational methods which automatically process published judicial review decisions to identify the time taken to finalise cases. In addition to the government's perspective, I am also interested in evaluating the fairness of the policies. This includes doctrinal analyses evaluating procedures against principles of due process and procedural fairness under relevant domestic, supra national and international law, as well as qualitative interviews with both decision-makers and asylum seekers involved in the procedures as to their subjective experience of fairness. The goal is to contextualise the finding in relation to the success of the policies in terms of increasing efficiency, with data on the impact of the policies in terms of the fairness of the procedures.

Ideally, this would be further reinforced with assessments of the political and process dimensions of success in future research. However, as this example illustrates a comprehensive assessment of success across all four dimensions and from a variety of perspectives is a very complex and resource intensive task. As such, scholars interested in measuring success must prioritise specific dimensions most relevant to their research aims. The risk is that such selective approaches may be verge on cherry-picking, with researchers selecting dimensions and perspectives which best demonstrate their arguments or objectives. This can somewhat be mitigated with clear justifications as to the selections made. For example, the goal of the fast-track research project is to contribute to law reform and the development of fast-track procedures that balance between fairness and efficiency. The decision to focus on the efficiency from the government's perspective, and the triangulated data on fairness from a legal, asylum seeker, and decision-maker perspective was based on a view that these would be the most persuasive data points for effective law reform advocacy in this space.

6 Conclusions: the utility of studying legal transfers of migration policies

Why do these two questions relating to identifying and evaluating the success of legal transfers matter? So what if countries are copying one another? In this concluding section I make the case for the importance of studying the legal transfers of migration policies and the relevance of the two methodological questions set out in this article to such inquiries.

First, the study of legal transfers of migration policies provides an opportunity to compare similarities and differences in legal cultures and institutions. As discussed in the introduction to this special issue, such inquiries lie at the heart of many mainstream comparative law studies, and the migration space can provide an opportunity to test and refine many of the hypotheses put forward by comparative law scholars. Given the contentious nature of migration law, and in particular refugee law, in many polities around the world, policy changes are often subject to challenges in the courts. Comparing how the courts in the source and receiving state have responded to the same policy can provide valuable insights into the similarities and differences in legal cultures and systems. Moreover, examining the different dimensions of success, and in particular, how the different cultures and institutional structures have influenced such success can provide valuable broader insights into the nature and impact of those different cultures and structures.

Second, identifying and assessing the success of transfers is central to achieving the goal of many comparative migration law scholars to advocate for fairer or improved migration and refugee law policies. Byrne and Gammeltoft-Hansen (2020) have described refugee law scholarship as having a 'dual imperative' to simultaneously advance scholarly knowledge and effect protection-orientated policy change. A similar dual imperative can be ascribed to the comparative migration law scholarship – with the vast majority of studies having the aim of identifying and/or advocating for best practice approaches, or calling out bad policies and making the case for reform. Identifying the role that legal transfers play in policy changes greatly aids in this task. If legal transfers are playing a significant role in the policy development process, then researchers and advocates interested in affecting policy change need to engage with and study that

process. This will allow them to contribute to engineering the transfer of best practice models, while resisting bad policies. This of course begs the question of what criteria we use to identify good vs. bad policies. That is where the approach to measuring the success of policies identified in this paper comes into play, by providing a framework for identifying and measuring the various dimensions of success that may be the subject of inquiry. This will in turn bolster any calls for adopting particular models, with clear and transparent criteria of success, as well as clear measures of success across those identified criteria.

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References

Bennett, C.J. (1997) 'Understanding ripple effects: the cross-national adoption of policy instruments for bureaucratic accountability', *Governance*, Vol. 10, No. 3, pp.213–233.

Berry, F.S. and Berry, W.D. (1990) 'State lottery adoptions as policy innovations: an event history analysis', *American Political Science Review*, Vol. 84, No. 2, pp.395–415.

Boucher, A. and Gest, J. (2018) *Crossroads: Comparative Immigration Regimes in a World of Demographic Change*, Cambridge University Press, Cambridge.

Bovens, M., t'Hart, P. and Peters, B.G. (2001) 'Analysing governance success and failure in six European states', in Bovens, M., t'Hart, P. and Peters, B.G. (Eds.): *Success and Failure in Public Governance: A Comparative Analysis*, pp.641–663, Edward Elgar, Cheltenham.

Byrne, R. and Gammeltoft-Hansen, T. (2020) 'International refugee law between scholarship and practice', *International Journal of Refugee Law*, Vol. 32, No. 2, pp.181–199.

Choudhry, S. (2006) *The Migration of Constitutional Ideas*, Cambridge University Press, Cambridge.

Cohn, M. (2010) 'Legal transplant chronicles: the evolution of unreasonableness and proportionality review of the administration in the United Kingdom', *American Journal of Comparative Law*, Vol. 58, No. 3, pp.583–629.

Cope, K. (2022) 'Methods for comparative migration law: insights from the social sciences', *International Journal of Migration and Border Studies*, forthcoming.

Cotterrell, R. (2001) 'Is there a logic of legal transplants', in Nelken, D. and Feest, J. (Eds.): *Adapting Legal Cultures*, pp.70–92, Hart, Oxford and Portland.

Dauvergne, C. (2016) *The New Politics of Immigration and the End of Settler Societies*, Cambridge University Press, Cambridge.

Dolowitz, D. and Marsh, D. (1996) 'Who learns what from whom: a review of the policy transfer literature', *Political Studies*, Vol. 44, No. 2, pp.343–357.

Dolowitz, D. and Marsh, D. (2000) 'Learning from abroad: the role of policy transfer in contemporary policy-making', *Governance*, Vol. 13, No. 1, pp.5–23.

Ellerman, A. (2020) 'Discrimination in migration and citizenship', *Journal of Ethnic and Migration Studies*, Vol. 46, No. 2, pp.2463–2479.

Evans, M. and Davies, J. (1999) 'Understanding policy transfer: a multi-level, multi-disciplinary perspective', *Public Administration*, Vol. 77, No. 2, pp.361–385.

Fedtke, J. (2006) 'Legal transplants', in Smits, J. (Ed.): *Elgar Encyclopedia of Comparative Law*, pp.550–554, Elgar, Cheltenham.

Fitzgerald, D.S. and Cook-Martin, D. (2014) *Culling the Masses: The Democratic Origins of Racist Immigration Policy in the Americas*, Harvard University Press, Cambridge, MA.

Flynn, M. (2014) 'There and back again: on the diffusion of immigration detention', *Journal on Migration and Human Security*, Vol. 2, No. 3, pp.165–197.

Friedman, B. and Saunders, C. (2003) 'Symposium: constitutional borrowing', *International Journal of Constitutional Law*, Vol. 1, No. 2, pp.177–180.

Ghezelbash, D. (2014) 'Forces of diffusion: what drives the transfer of immigration policy and law across jurisdictions?', *International Journal of Migration and Border Studies*, Vol. 1, No. 2, pp.139–153.

Ghezelbash, D. (2017) 'Legal transfers of restrictive immigration laws: a historical perspective', *International & Comparative Law Quarterly*, Vol. 66, No. 1, pp.235–255.

Ghezelbash, D. (2018) *Refuge Lost: Asylum Law in an Interdependent World*, Cambridge University Press, Cambridge.

Ghezelbash, D. (2020) 'Hyper-legalism and obfuscation: how states evade their international obligations towards refugees', *The American Journal of Comparative Law*, Vol. 68, No. 3, pp.479–516.

Graziadei, M. (2019) 'Comparative law as the study of transplants and receptions', in Reimann, M. and Zimmermann, R. (Eds.): *The Oxford Handbook of Comparative Law*, Oxford University Press, Oxford.

Hampshire, J. (2013) *The Politics of Immigration: Contradictions of the Liberal State*, Polity Press, Cambridge.

Hinterberger, K.F. (2022) 'A critical-contextual approach to comparative migration law', *International Journal of Migration and Border Studies*, forthcoming.

Langer, M. (2004) 'From legal transplants to legal translations: the globalization of plea bargaining and the Americanization thesis in criminal procedure', *Harvard International Law Journal*, Vol. 45, No. 1, pp.1–64.

Legrand, P. (1997) 'The impossibility of 'legal transplants'', *Maastricht Journal of European & Comparative Law*, Vol. 4, No. 2, pp.111–124.

Lin, L. (2009) 'Legal transplants through private contracting: codes of vendor conduct in global supply chains as an example', *American Journal of Comparative Law*, Vol. 57, No. 3, pp.711–744.

Mann, I. (2018) 'Maritime legal black holes: migration and rightlessness in international law', *European Journal of International Law*, Vol. 29, No. 2, pp.347–372.

Marsh, D. and McConnell, A. (2010) 'Towards a framework for establishing policy success', *Public Administration*, Vol. 88, No. 2, pp.564–583.

Mattei, U. (1998) 'An opportunity not to be missed: the future of comparative law in the United States', *American Journal of Comparative Law*, Vol. 46, No. 4, pp.709–718.

Mossberger, K. and Wolman, W. (2003) 'Policy transfer as a form of prospective policy evaluation: challenges and recommendations', *Public Administration Review*, Vol. 63, No. 4, pp.428–440.

Nelken, D. (2001) 'Towards a sociology of legal adaptation', in Nelken, D. and Feest, J. (Eds.): *Adapting Legal Cultures*, pp.7–54, Hart, Oxford and Portland.

Örücü, E. (1995) 'A theoretical framework for transfrontier mobility of law', in Jagtenberg, R., Örücü, E. and de Roo, A.J. (Eds.): *Transfrontier Mobility of Law*, pp.5–18, Kluwer Law International, Boston.

Örücü, E. (2000) 'Law as transposition', *International & Comparative Law Quarterly*, Vol. 51, No. 2, pp.205–223.

Paterson, J. and Tuebner, G. (1998) 'Changing maps: empirical legal autopoiesis', *Social & Legal Studies*, Vol. 7, No. 4, pp.451–486.

Rogers, E.M. (2003) *Diffusion of Innovations*, 5th ed., Free Press, New York.

Shachar, A. (2006) 'The race for talent: highly skilled migrants and competitive immigration regimes', *New York University Law Review*, Vol. 81, No. 1, pp.148–206.

Siems, M. (2014) *Comparative Law*, Cambridge University Press, Cambridge.

Simmons, B., Dobbin, F. and Garrett, G. (2006) 'Introduction: the international diffusion of liberalism', *International Organization*, Vol. 60, No. 4, pp.781–810.

Spamann, H. (2009) 'Contemporary legal transplants: legal families and the diffusion of (corporate) law', *Brigham Young University Law Review*, Vol. 2009, No. 6, pp.1813–1878.

Sztigeti, P.D. (2021) 'Comparative law at the heart of immigration law: criminal inadmissibility and conjugal immigration in Canada and the United States', *International Journal of Constitutional Law*, Vol. 19, No. 5, pp.1642–1663.

Triadafilopoulos, T. (2013) *Wanted and Welcome? Policies for Highly Skilled Immigrants in Comparative Perspective*, Springer, New York.

Twining, W. (2004) 'Diffusion of law: a global perspective', *Journal of Legal Pluralism*, Vol. 36, No. 49, pp.1–45.

Twining, W. (2011) *Globalisation and Legal Scholarship*, Wolf Legal Publishers, Oisterwijk.

Walker, J.L. (1969) 'The diffusion of innovations among the American states', *American Political Science Review*, Vol. 63, No. 3, pp.880–899.

Watson, A. (1974) *Legal Transplants: An Approach to Comparative Law*, Scottish Academic Press, Edinburgh.

Wiegand, W. (1991) 'The reception of American law in Europe', *American Journal of Comparative Law*, Vol. 39, No. 2, pp.229–248.

Wise, E. (1990) 'The transplant of legal patterns', *American Journal of Comparative Law*, Vol. 38, pp.1–22.

Notes

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