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Methods for comparative migration law: insights from the social sciences

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Abstract: The nascent field of comparative migration law can do more than classify different approaches to migration law; it is well-positioned to address important open questions about law's impact on migrants, migration, and citizens. It can also help us better understand how and why countries enact certain immigration laws. To do so, researchers must draw on methods from the disciplines that have long studied migration institutions both comparatively and empirically. These social sciences offer particularly fertile grounds for methodological borrowing, given the well-developed data and empirical literatures that have emerged over the past few decades to better understand the causes and effects of migration, and the causal inference 'credibility revolution'. Researchers should also consider the insights developed in comparative law generally about the appropriate objects of comparison. Such an interdisciplinary marriage of methods could allow researchers to tackle a series of new and emerging questions on the causes-and-effects of migration law.

Keywords: comparative migration law; comparative law; immigration; migration; social science; experimental methods; empirical methods.

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1 Introduction

> "Isn't the scientific approach unavoidably comparative, since to 'do science' is to formulate and attempt to verify generalizations by comparing all relevant data?" Lasswell (1968)

Migration is transnational by nature, but migration scholarship generally has devoted surprisingly little effort to comparing the legal frameworks that regulate international migration. To be sure, a longstanding and robust set of migration literatures – in, e.g., economics, political science, human geography, and sociology – compares phenomena such as how immigration admission and enforcement policies affect migrant behaviours,

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nationalities' different attitudes toward migration, and how migrant groups are treated in different contexts. But these studies generally consider law at a superficial level, often distilling complex regimes to a few binary variables; very few attempt to parse the complexities of national immigration legal regimes (Schwartz et al., 2021). Conversely, traditional immigration legal scholarship provides sophisticated theoretical analysis of laws, but typically for just one jurisdiction. And to the extent comparative analysis is undertaken, little effort is made to understand the causes-and-effects of migration law.

The nascent field of comparative migration law[1] has the potential to patch this disciplinary hole. But in the end, what is the purpose of comparing the immigration legal systems of the world? What does it add to our understanding of migration law's origins, operation, or significance? Can cross-country comparison produce information that promotes better immigration law and policy? Answering these questions requires reflecting on the purposes of comparison (see, e.g., Siems, 2018)[2]. Traditional comparative law scholarship tends to emphasise classification and taxonomies (Mattei, 1997). And no doubt, one future objective for comparative migration law will be to observe and classify different national approaches to migration law. In addition to simply promoting legal anti-parochialism, this exercise might be useful to international lawyers who must navigate foreign legal systems.

This essay argues, however, that the field of comparative migration law can and should do more than that. After observing an interesting difference in immigration rules between two regimes, a researcher will want to dig deeper, asking, first: *why* are those rules different; and, second: does the difference matter, and if so, *how*? In this sense, comparative migration law is well-positioned to address important open questions about law's impact on migrants, migration, and citizens. It can also help us better understand how and why countries enact certain immigration laws rather than others. In other words, it can move past the 'what' and delve more deeply into the 'why' and 'how' of migration law.

In doing so, the field can turn to guidance from related fields. Well-developed data and empirical literatures have emerged over the past few decades to better understand the causes and effects of migration. Moreover, the causal inference 'credibility revolution' of the 1990s and 2000s made possible new ways to identify causal effects. To illustrate, international relations research into migration has implicitly recognised that domestic regulation of immigration has transnational effects and is therefore also a form of foreign policy (Cope and Leblang, 2023). It has also attempted to capture the role of international institutions on migration behaviour (Peters, 2019). Comparative politics has likewise developed sophisticated quantitative tools and data for comparing immigration behaviours across countries (e.g., Blair et al., 2022; Hainmueller and Hiscox, 2007; Han, 2015). And political economy research, using models and theory developed to study trade and monetary policy, has recently paid more attention to how national policies affect migration and migrant economic behaviours (e.g., Fitzgerald et al., 2014).

I am hardly the first to call for incorporating methods from the comparative social sciences into comparative law (e.g., Samuel, 2007, 2008; Hirschl, 2014; Roberts et al., 2018). In the words of Geoffrey Samuel, despite 'the absence of any serious interest in method (and epistemology) by [comparative] academic lawyers' '[a]n interdisciplinary approach to methodology is essential' [Samuel, (2007), p.94]. Comparative constitutional law in particular has taken a marked interdisciplinary turn, and a growing fraction of the work in the discipline is now devoted to studying the causes-and-effects of constitutions

(Chilton and Versteeg, 2020). For comparative international law and comparative foreign relations law, a similar discussion is burgeoning (Roberts et al., 2018). My argument is specific to comparative immigration law, which, perhaps even more than constitutional law or other comparative fields, stands to gain much from adopting such interdisciplinary methods.

By using an interdisciplinary approach, the field can start tackling some of the most pressing immigration questions. These include, but are not limited to, questions such as: What prompts countries to enact restrictive immigration policies toward certain nationalities, ethnicities, religions, or other groups? How do national refugee legal regimes affect refugee flows – specifically, do one state's restrictive refugee policies prompt those fleeing persecution to seek protection in countries with less restrictive laws? How do liberal resident-visa or citizenship policies draw would-be immigrants from their home countries, creating a brain/skilled-labour drain? And how are non-immigrant visa policies used as a tool of foreign relations, to incentivise states to adopt favourable policies on immigration or unrelated issues?

These questions are empirical ones, which require both comparative and empirical methods to investigate most productively. The social science research above made great strides over the last few decades in adopting and developing rigorous statistical techniques for causal inference. Many of those advances can be applied to comparative migration law. But in turning to the social sciences, comparative immigration law should also stay attuned to the methodological insights from comparative law, such as the debate over the appropriate objects of comparison (Siems, 2018). I acknowledge that incorporating social science methods may be daunting to comparative immigration lawyers and that expertise in social science methods is not easily developed (Husa, 2014). Conversely, social scientists embarking on comparative immigration law may lack expertise on the legal nuances of different immigration regimes. Perhaps the best solution to this problem is more interdisciplinary collaborations between legal scholars and social scientists.

I argue that such a fulsome interdisciplinary mingling of methods through interdisciplinary collaborations will empower researchers to tackle a series of new and lingering questions related to the causes and effects of migration law. In the rest of this essay, I elaborate on this claim and explain several ways in which this project might be accomplished.

2 An interdisciplinary approach to comparative migration law

Perhaps the greatest advantage of an interdisciplinary approach to comparative migration law is that it would allow researchers to tackle a series of new and longstanding questions related to the causes and effects of migration law. Below I describe two such broad categories of projects:

1 explaining migration law's content and origins

2 explaining migration law's impact.

I then explain the set of methods that comparative migration legal researchers might use to address such questions.

2.1 Comparative migration law questions

2.1.1 Migration law's content and origins

One obvious starting point for comparative migration legal research is to explore and explain the creation and content of national immigration laws. The social sciences have shown relatively little interest in explaining the substantive content of formal laws (as opposed to the processes by which they are made) (but see, e.g., Koremenos, 2016 on treaties), or why two countries' equivalent laws are similar or different. Conversely, a large body of comparative legal research has meticulously documented the similarities and differences in national laws. But traditional comparative law scholarship is typically less interested in attempting to explain why laws emerge as they do, and instead focuses on taxonomies (but see, e.g., Bradford et al., 2021; Cope et al., 2021). A key exception is comparative constitutional law, which has recently used empirical methods from the social sciences to explore why countries adopt certain constitutional provisions, and how the constitutional design choices of different countries are interdependent (Ahmed and Ginsburg, 2013; Ginsburg et al., 2014; Law and Versteeg 2012, 2013; Imhof et al., 2016).

For comparative immigration law, there are important payoffs to taking up this enterprise. For example, countries' immigration laws vary significantly in the qualities they value in short-term and long-term migrants. Some prioritise marketable job skills, others prioritise family reunification, and others value (or devalue) particular nationalities (like the USA in the first half of the 20th century), religions (like Israel and Judaism), or ethnicities. What explains these differences? If policymakers better understand the genesis of foreign immigration laws that are, say, irrational, inefficient, or that are generally welfare-reducing or equality-decreasing – or which promote social ills like xenophobia or racism – then they will be better-positioned to take steps to avoid repeating those others' errors.

Global immigration law databases can facilitate a global mapping exercise of this kind. Important data collection initiatives do exist or are in progress. But, as I will elaborate in the next section, existing efforts are not usually attuned to important legal nuances. The creation of more and better global immigration law data is therefore a core future goal for an interdisciplinary comparative immigration law agenda, similar to research in comparative constitutional law from the last decade. Treating law as the dependent variable entails capturing entire bodies of law with a series of codes. To do so accurately requires a sophisticated and nuanced understanding of law – especially the interaction between the constitution, legislature, executive, bureaucracy, and courts – and how law is executed and enforced. Social scientists with no legal background rarely have either the training or the interest needed for this type of analysis. Comparative migration jurists and teams are likely better equipped to take up this task.

2.1.2 Explaining migration law's impact

Comparative migration law can also explore immigration laws' effects. By implementing different policies and allowing others to observe their effects, governments are unwittingly conducting a series of legal experiments (cf. Posner and Sunstein, 2006). If we think of national legal systems as data-generating legal laboratories – albeit methodologically imperfect ones – then we can study them and learn from the data they provide.

The field's most pressing questions are about the impact of immigration law decisions. For instance, how do national refugee legal regimes affect refugee flows – specifically, do one state's restrictive refugee policies prompt those fleeing persecution to seek protection in countries with less restrictive laws? How do liberal resident-visa or citizenship policies draw would-be immigrants from their home countries, creating a brain/skilled-labour drain? These are the kind of questions that can be studied with comparative data. The answers that emerge would assist policymakers in designing laws that better serve migrants, would-be migrants, and exiting residents alike.

Consider, as an example of this type of research, the question of immigration enforcement's effect on migration decisions. Despite some recent research on the effect of US border enforcement policy on unlawful migration, (e.g., Massey et al., 2016), still little is known about how national-immigration-enforcement law and policy affects would-be migrants' decisions to unlawfully enter or remain in the country without authorisation. One reason for this gap is the lack of comprehensive cross-country information on such policies. For instance, in the USA during the period 2001–2021, the formal statutory and regulatory criteria for obtaining a visa changed little, but successive presidential administrations implemented very different policies for removing non-citizens without lawful status. The Obama administration officially prioritised removing those with criminal histories and those who entered the country recently, whereas the Trump administration's removal strategy was more sweeping and indiscriminate, even if the number of removals was not much different. One might speculate that migrants and would-be migrants, assuming they are aware of these policies, would be less likely to enter or remain without lawful status where removal was more likely because their particular group was being targeted. Yet there is little existing comparative research on this issue.[3] A lack of analytical tools is not to blame for the lack of progress on this issue; rather the hang-up is likely a lack of sophisticated data on removal policy in different countries.

Comparative migration law is well-positioned to remedy this deficit. To give another example, countries in the interior of Europe's Schengen Area generally have open land borders. They nonetheless have visiting, residency, and work rules that limit how long non-EU citizens can travel and reside in each country. Countries enforce these rules differently, prioritising the identification and removal of some groups over others. A comparativist might use comprehensive comparative data on these policies to attempt to measure their effects on unlawful residencies.

2.2 Available research designs

Over the past several decades, many fields of social science, including political behaviour, microeconomics, and social psychology have undergone a so-called 'credibility revolution' (Angrist and Piscke, 2010), that is, a major advance in the ability to credibly identify the causal effects of laws, policies, and other human interventions. At the heart of this revolution lies research design. The 'gold standard' in causal inference research is an 'experiment', in which the researcher randomly manipulates some policy mechanism or other intervention and observes any effect on some outcome of interest. One field that has led the way in the credibility revolution is microeconomics; there, scholars routinely conduct field experiments using random assignment. For example, in one pioneering study exploring how governments can improve child welfare, researchers offered cash transfers to randomly selected mothers, but conditioned the payments on

things like their children's school attendance (see Angrist and Pishke, 2010; Banarjee and Duflo, 2009). The random assignment allowed these researchers to credibly evaluate the impact of this policy intervention on child outcomes. These types of random assignment studies are now a prominent part of development economics, among other fields.

For logistical, legal, financial, and/or ethical reasons, these sorts of random interventions are possible only rarely. In many other fields, scholars have therefore turned to 'natural experiments', that is, cases where some policy intervention occurs (not controlled by the researcher) in one place but not another place, for reasons that are effectively random (Diamond and Robinson, 2010). Other empirical methods in this new wave of research likewise attempt to capture some of the qualities of random treatment assignment but based on existing, real-world data. These research strategies have been widely applied to study the effects of laws, under the broad heading of 'empirical legal studies' (Eisenberg, 2011).

Some of these data and analytical approaches can be applied to information about migration law and policies that comparative migration legal researchers will develop. I note that immigration laws cannot be randomised by researchers. Perhaps more so than other laws, immigration laws are the product of social and political forces and involve contested political debate and can hardly be said to emerge exogenously. My overview of available methods is therefore a pragmatic one: it considers methods that can likely be used for comparative immigration law. I set aside the finer points of empirical modelling, providing a bird's-eye overview of these research designs and how they might be applied to the information generated by comparative migration legal scholars.

2.2.1 Observational data, or legal policy labs

Researchers in comparative immigration law seeking to take up the questions outlined above will often find themselves working with observational data, derived from different countries. Countries can serve as legal policy 'laborator[ies] of democracy[4]', for immigration rules. Well-designed case studies are one mode of studying these laboratories of immigration law. Qualitative case studies are relatively familiar to legal scholars. But there is a longstanding tendency in comparative law to engage in 'convenience sampling', that is, to focus on already familiar or more accessible cases (Linos, 2015; Hirschl, 2005). To answer the types of questions highlighted above, sample selection must be theoretically informed. A common approach is to select countries that are as similar as possible in many dimensions, except for the trait in which the researcher is interested (the 'most-similar' case selection method) (Linos, 2015). To illustrate, one can observe how the neighbouring countries of Greece and Italy deal with refugees and other migrants arriving by sea. If the two had enacted different laws for processing and tracking migrants, we could say something about how these laws affect refugee flows. Another approach is to select countries that are different as possible. The 'most-different' method is often used to establish commonalities. If very different countries have the same legal regimes, then we can probably conclude that these represent universal principles (Levmore, 1986).

But one can also distill information from observational data through global statistical studies (sometimes referred to as large-*n* studies). For such a laboratory to work effectively, a researcher must:

1 have comprehensive information on different systems, organised in logical ways, such as the problem it is meant to address

2 use statistical techniques that control for confounding variables, thereby permitting the researcher to infer any effects of the policy in question.[5]

Thus, well-designed cross-country comparison allows us to start taking up the questions above. In these designs, immigration law can be either the dependent variable or the dependent variable. When using immigration law as the dependent variable, researchers might look at the predictor of a single provision, such as the right to asylum. But they could also explore information from multiple variables reduced to one index using data-reduction techniques such as factor analysis (e.g., Cope et al., 2021). Another avenue for research is to explore the impact of particular provisions, that is, using immigration law as the predictor. Such studies might be possible, for example, where two states are similarly situated in many ways, and a court (particularly a super-national one) imposes a new rule on one state but not the other.

One major obstacle for all large-*n* global studies is that it is nearly impossible to find exogenous sources of legal variation when engaging in cross-national analyses. Some have argued that this makes the challenges to finding causality insurmountable. For instance, Spamann (2015, p.138) cautions against 'empirical comparative law' and argues that 'comparative evidence alone will hardly ever be sufficient to establish a causal claim' and that 'statistical methods that purport to do so are likely to do more harm than good in comparative settings'. Likewise, Klick (2013, p.908) argues that cross-sectional comparisons 'are close to worthless in terms of having confidence in causality'.

The main challenge is what is often described as 'omitted variable bias' or 'endogeneity'. Specifically, when merely observing two correlated variables, we cannot infer that one variable influenced the other. Instead, the correlation could result because both variables are caused by a third variable that was omitted from the analysis. For example, in an analysis that considers the impact of immigration laws on refugee flows, it might be the case that both immigration laws and refugee flows are affected by the level of democracy in the country. Failure to account for democracy could cause researchers to conclude that immigration laws affect refugee flows, while it is really democracy that is doing the work.

Several techniques have been developed to address this challenge; none is perfect, and each has different limitations. The key objective of well-designed cross-national research is to ensure that no relevant variables are omitted from the analysis. The problem here is that cross-national differences nearly always exist that are virtually impossible to quantify, such as a country's 'culture'. One technique that researchers have used to control for unobservables is the use of country 'fixed effects', which allows researchers to control for all non-time varying country characteristics. Thus, to the extent 'culture' does not change over time, fixed effects accounts for it. Another method is the use of 'matching', which pairs countries along observable dimensions and removes those that do not have close matches [Rosenbaum and Rubin, 1983; Angrist and Pischke, (2008), pp.69–91; Lupu, 2013 (human rights treaties); Chilton and Versteeg, 2019 (constitutions)]. Yet another method used to facilitate causal inference with cross-national data is the use of instrumental variables, which seek to identify an exogenous source of variation in the variables of interest and use it to create unbiased estimates, though these phenomena are usually hard to find.[6] When the number of countries that have a certain law or policy are small, researchers have used the 'synthetic

control' method to create a counterfactual based on all the countries that do not have the same law or policy (Dixon and Holden, 2021; Abadie and Gardeazabal, 2003). This short essay is not the place to discuss these methods in detail. But the main takeaway is that, while numerous methods are available, none are bullet-proof solutions to solve the omitted-variable bias problems.

The fact that these research designs do not fully address endogeneity problems does not imply that they are not worth attempting. When working with cross-country data, migration researchers should use the best-available methods to address threats to valid inference, while also acknowledging that possibility that the analysis reveals a mere correlation rather than a causal effect. In these cases, it is useful to attempt to validate findings with additional techniques, such as case studies or survey experiments (see below).

Another challenge to estimating migration law's causes and effects is to develop functional comparative datasets. In recent decades, researchers, policy institutes, and non-governmental organisations have developed an enormous trove of data covering numerous aspects of global migration. The data cover items like migration flows (Vezzoli et al., 2014), migrant perceptions and beliefs (Carlson et al., 2018; Hemmerechts et al., 2014); social and political conditions for migration (Fitzgerald et al., 2014; IMI, 2015); citizenship and naturalisation requirements (Schmid, 2021), and attitudes toward migrants (Hainmueller and Hiscox, 2010), among others.

If there is one collective weak point in these data, it is a lack of sophisticated cross-country information about national migration law and policy. Recently, efforts like the DEMIG Visa database, DEMIG policy database, and Fitzgerald et al. (2014), among others[7], have begun to fill that gap. Yet despite their impressive scope, these studies generally consider law at a superficial level, often distilling complex regimes to a few binary variables; few [see, e.g., Bauböck et al., (2017); Schmid, (2021), on citizenship requirements, and Helbling et al., (2017), on immigration policies] attempt to parse the complexities of national immigration legal regimes (Schwartz et al., 2021).[8] A systematic effort to catalogue and classify the key features of the world's immigration legal regimes – as expressed in constitutions, code, regulations, executive decisions, and judicial interpretations – would lay the groundwork for the sorts of causal analyses described above.

2.2.2 Experimental data

Comparative migration legal researchers can and should also consider collecting their own experimental data. One particularly promising application might be to investigate the effect of laws and norms on public support for immigration.

A large public opinion literature in political science has explored how different framings, messengers, and other stimuli affect public support for things like policies and government officials. Until recently, those stimuli rarely if ever included legal norms. But in the past decade, studies relying on this theory have begun to explore the impact of law using field and survey experiments (Wallace, 2013; Chilton, 2015; Lupu and Wallace, 2019; Barak-Corren et al., 2018; Cope and Crabtree, 2020, 2021; Chilton et al., 2022). Survey experiments allow researchers to explore whether and how law affects public opinion. These types of experiments first emerged in the international relations literature on treaty effectiveness.[9] These survey experiments typically ask respondents about their support for policies that violate some existing higher-order law, like a human rights treaty

or the constitution, while randomly providing some respondents with arguments that these policies violate law. Researchers can then explore whether providing knowledge that certain policies are illegal changes support for these policies.[10]

As with human rights law, there is reason to believe that enforcement of many areas of immigration law will depend on popular opinion. If publics want governments to adhere to their international, constitutional, or other domestic legal commitments towards refugees, for example, then governments may be more likely to admit refugees then when public opinion is turned against such practices. Though political scientists have conducted experiments to gauge citizens' preferences for different types of immigrants (e.g., Hainmuller and Hiscox, 2010), there has been little inquiry into how different *legal profiles* affect preferences for immigrants. Research might experimentally manipulate the strength of a refugee's legal claim to measure how public opinion on refugee deservingness matches existing legal doctrine.

Relatedly, popular rhetoric over immigration often centres around questions of legality versus illegality, especially in countries where unlawful migration is prevalent. Little is known, however, on how immigration legal status exacerbates/attenuates the effects of other migrant traits like education, nationality, and ethnicity. For instance, survey experiments might present respondents with legal profiles of prospective migrants, randomly manipulating characteristics of both the migrant's legal claim to entry and the migrant's background (Cope and Crabtree, 2020).

While survey experiments are promising mechanisms to gauge public opinion, they also suffer from limitations. First, they are helpful in understanding only one particular mechanism: how law changes popular opinion (or how legality/illegality cues influence perceptions of refugees). And second, they can suffer from external-validity limitations, when the survey environment insufficiently mimics real-world conditions. For instance, written descriptions of a migrant might not fully convey influential intangible aspects of a person, like his or her language, appearance, and personality that real-life interactions would.

3 Methodological debates in traditional comparative law

Comparative immigration law operates at the intersection of comparative law and migration studies from other disciplines. Thus far, I have explored what related fields might offer comparative migration law. I now address the same question for traditional comparative law, focusing specifically on the debate over the functionalist method. Though comparative migration law as a discrete discipline is still in its infancy, comparative scholars have been examining how best to conduct valid comparative institutional analysis for over a century. While this is not a 'methods' question in the sense most social scientists use the term, it is nonetheless an important consideration for the question of how to undertake research in comparative migration law.

Comparative law is perhaps the only legal subfield that denotes an analytical method more than a substantive subject (cf. Lijphart, 1971). Arguably the most fundamental debate in comparative law, therefore, boils down to a question of approach: what precise attributes of a legal regime should be compared? Jurists agree that any comparison should be 'apples-to-apples', that is, a legal institution in country A should be compared with its nearest counterpart in country B, rather than a different type. This may seem self-evident, but operationalising it is not so straightforward. The challenge is to identify the *tertium*

comparationis: that is, the equivalent attribute of the legal systems of country A and country B, to compare with each other (Reitz, 1998). This choice can be meaningful: one *comparationis* may portray the two institutions as similar, whereas a different choice could portray them as quite different.

Under some more traditional, positivist approaches, the *comparationis* is the formal legal rules of each jurisdiction. Under this approach, the most salient aspect of a given legal system is the law 'on the books'. This approach often confines its comparisons to legal institutions of the same type; for example, a constitutional provision on a given issue from country A would be compared only with its counterpart constitutional provision from country B (see, e.g., Elkins et al., 2009). If a similar rule were contained in, say, a statute, executive order or regulation, or judicial interpretation, it might not be acknowledged. This might be partly a deliberate research decision, as a substantive legal definition's hierarchical location might be meaningful in itself (Law and Versteeg, 2011). Nonetheless, this approach has been criticised as overly formalistic, as a 'comparison by columns' (Nicola and Foster, 2014).

For instance, applied to immigration law, this formal positivist approach to constitutional refugee status might ask how each constitutional text deals with the right to asylum (Kowalczyk and Versteeg, 2017), without enquiring whether asylum rights are defined in sub-constitutional laws or hashed out through regulation or judicial interpretation.

In contrast, a so-called functionalist comparative approach relegates formal rules in favour of how those rules operate, i.e., how they *function*. The functionalist method "relies on the notion that there are similar problems that can be compared, even though these might involve distinct doctrines of legal institutions in different legal systems, by tackling the same functional question" [Nicola and Foster, (2014), p.12]. Functionalist comparison is much debated in comparative law, and several versions exist (Michaels, 2019; *see also* De Coninck, 2010; Husa, 2013; Dannemann, 2006). But in its essence, a functionalist comparison considers to what extent the laws of two countries affect their subjects similarly or differently. In so doing, the functionalist approach captures what a more formalistic approach can miss: how the human interpreters and enforcers transform rules into action. Similar formal rules can be interpreted and enforced differently, and dissimilar rules can be interpreted and enforced similarly. Thus, a functionalist approach to refugee admissions might pay less attention to how national legislation or regulations defined 'refugee' and more weight to the traits of those who receive the refugee status in reality.

For example, if country A defines the refugee status in its constitution, and country B's definition emerged through judicial interpretation, the functionalist might consider them similar or identical, so long as they operated to recognise refugees in the same way.[11] A more formalist comparison, in contrast, might consider these disparate origins to be a significant legal difference, worthy of further exploration.

Some say that most functional comparisons do not adequately take stock of a law's context, that is, how it is 'embedded in a particular society and history' [Nicola and Foster, 2016 (citing Tushnet, 2008)]. They emphasise that any comparative technique should primarily consider the socio-political-cultural origins of law. Some argue that understanding law requires observing more than the text that emerges from the lawmaking process; the social, political, and cultural context in which the law emerges is also integral to law (Legrand and Munday, 2003). Under this contextual approach, the

law is 'viewed in the context of the historical, economic and political framework to obtain a more complete picture' (Hinterberger, 2022). In this vein, Legrand and Munday (2003) argue that comparativists should be 'difference engineers' rather than similarity-seekers.

The concept of apples-to-apples or oranges-to-oranges comparison is particularly relevant for any empirical study of immigration law that uses cross-country comparison. Empirical data, in whatever form, are a prerequisite to tackling the kind of questions mentioned above. Before assembling such data, a researcher must decide what exactly she is attempting to measure, specifically, whether a positivist/formalist or functionalist approach is more appropriate.

One example of a formalist comparative dataset is the 'Comparative Constitutions Project Dataset' (Elkins et al., 2009). The dataset captures over 600 characteristics for each of the historic and contemporary written constitutions it contains. However, it excludes other legal sources that are not constitutional text but nonetheless 'constitutional in nature', such as judicial decisions (in common law countries), and treaties incorporated into constitutions (in many civil law systems) (Chilton and Versteeg, 2020). The dataset, therefore, is useful for a researcher interested in comparing how constitutions address certain problems or establishing the effect of constitutionalising certain institutional features. It is less helpful to someone interested in a specific problem. For example, if a researcher is interested in knowing whether a particular person seeking asylum would receive it, simply knowing whether a right to asylum is constitutionally codified will not be so helpful.[12] In contrast, a comparative foreign relations law dataset (Verdier and Versteeg 2016; Cope et al., 2021) uses a more functionalist approach. This dataset captures how foreign legal systems incorporate international law, such as how treaties are ratified and the status of treaties in the domestic legal order. In establishing these foreign relations law characteristics, it looks at different legal sources, including the constitution, statutes, judicial decisions, and conventions.

For most data collection efforts in comparative migration law, a functionalist approach is more promising than a formalist one. In comparative migration law, we are unlikely to be interested in how one particular legal source deals with immigration problems; instead, we are interested in how the legal system as a whole tackles a problem (cf. Hinterberger, 2022). Drawing on the expertise of immigration legal scholars, data collection efforts will therefore need to be mindful of the existence of functional equivalents: if one legal system deals with immigration issues through statue, another may do so through court decisions, and yet another may deal so through administrative law. For satisfactory comparisons, all of these legal sources will likely need to be considered.

At the same time, any of these efforts should be mindful of cultural critiques, particularly given the confluence of cultural systems that migration entails. Even when nuances of legal systems are considered, large-*n* data collection efforts are mostly divorced from the socio-political context in which they operate. A data collection effort directed at formal laws may not reveal how these laws operate in practice. While there is no easy way around these problems (as creating large-*n* data on 'law in action' is notoriously difficult, and probably impossible), it is important for researchers to recognise these limitations.

4 Conclusions

I have argued that the field of comparative migration law, as a fledgling discipline, can and should go beyond merely classifying legal approaches to migration. Indeed, it is uniquely positioned to address important questions about how law affects migrants, migration, and citizens. In addition, the discipline can help us better understand how and why countries enact immigration laws.

To accomplish these goals, researchers must look to fields and literatures that, over the last few decades, have developed methods and data to study migration comparatively and empirically. Social sciences like sociology, human geography, economics, and political science have long sought to determine the causes and effects of migration, though they have been hamstrung by a lack of sophisticated understanding of law across legal sources and institutions. As such, those disciplines provide ideal opportunities for borrowing. Such an interdisciplinary marriage of methods could empower researchers to tackle a series of new and lingering questions related to the global causes and effects of migration law.

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Notes

1 The term 'migration law' is more common in Europe, whereas the term 'immigration law' is commonly used in North America. They are often used interchangeably, and I do so here.

2 Siems (2018) identifies three broad categories of purposes for undertaking comparative analysis:

   a general knowledge and understanding

   b practical use at the domestic level (e.g., legislatures, courts, and attorneys' incorporating foreign laws)

   c practical use at the international level (e.g., unification, aiding in the creation of international law).

3 But see Reyes (2007).

4 See New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (Brandeis J., dissenting).

5 A more readily available source of data would be one country's changes in its own policy over time; a researcher could observe the results before and after the policy change. But she could not know what other changed factors that might have contributed to the changed outcome.

6 In a famous application, Daron Acemoglu and co-authors used settler mortality as an instrumental variable to estimate the effect of colonial institutions on economic growth (Acemoglu et al., 2001; for an application in studying the effect of law, see Simmons, 2009). Others have used the colonial origins of the legal system ('legal origins') as an instrumental variable for a host of different variables that predict growth (see Bazzi and Clemens, 2013).

7 See also Chilton and Posner (2017) (bilateral labour agreements) and Kowalczyk and Versteeg (2017) (constitutional right to asylum).

8 Relatedly, referring to the legal diffusion literature, Ghezelbash notes that 'large quantitative studies allow for generalisations about the causes and consequences of the diffusion process', but that "this sometimes results in oversimplifications that fail to capture the nuances of the process through which the laws and policies are transferred. … [D]iffusion 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" (Ghezelbash, 2022).

9 Because many believe that popular opinion is key to effectuating treaties (Simmons, 2009), researchers turned to survey experiments to see whether treaties can indeed shift popular opinion. Since then, scholars have done the same for constitutional law (Chilton and Versteeg 2020).

10 In the human rights treaty literature, this line of research has mostly found that invoking international law can change respondents stated opinions on policies and stated willingness to mobilise (see, e.g., Wallace, 2013).

11 For this reason, functionalist approaches have been criticised for searching too zealously for similar effects, thereby overlooking important differences in the formal sources of those effects (*see generally* Siems, 2018). For example, Zweigert and Kotz (1998) endorse functionalist approaches, arguing that 'legal systems give the same or very similar solutions, even as to detail, to the same problems of life' and that "the comparativist can rest content if his research[] through all the relevant material has lead to the conclusion that the systems he has compared reach the same or similar practical results" [Zweigert and Kotz, (1998), p.40] By contrast, they claim, "if he finds that there are great differences or indeed diametrically opposite results, he should be warned and go back to check again whether the terms in which he proposed his original questions were purely functional and whether he spread the net of his research[] wide enough".

12 Kowalczyk and Versteeg's (2017) data on the constitutionalisation of asylum are well-suited for the research question that those researchers studied (how constitutions are used to protect asylum rights). But they would be of limited value for many other research questions, as most countries have codified their refugee and asylum provisions outside the constitution.