Editorial

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Daniel Ghezelbash is an Associate Professor and Deputy Director of the Kaldor Centre for International Refugee Law at UNSW Law and Justice. His research interests include international and comparative refugee and migration law and judicial analytics. He is an Australian Research Council DECRA Fellow, leading a comparative project examining fast-track asylum policies, and whether it is possible to design procedures which are both fair and efficient. He has also published widely on the way restrictive asylum policies have spread around the world and is the author of *Refuge Lost: Asylum Law in an Interdependent World* (Cambridge University Press, 2018).

Kevin Fredy Hinterberger is an Expert on Asylum and Migration Law in the Austrian Federal Chamber of Labour and a re:constitution Fellow 2021/22. He studied law in Vienna and Madrid (2010–2014). In 2015, he received a Doctoral Fellowship of the Austrian Academy of Sciences (ÖAW) for his doctoral thesis at the Department of Constitutional and Administrative Law of the University of Vienna (2016–2019). During this time, he completed research stays in Giessen (Germany) and Madrid (Spain). His doctoral thesis deals with regularisations of irregularly staying migrants and compares the existing regularisations established in the domestic laws of Germany, Austria and Spain (https://doi.org/10.5771/9783748902720). The English version will be published in 2023 with Nomos and Hart (DOI: 10.5771/9783748912798). He publishes widely on issues of Administrative Law, Constitutional Law, Comparative Public Law, European and Austrian Migration and Asylum Law and International Refugee Law. He is teaching at the University of Vienna.

Lukas Heckendorn Urscheler is currently the Deputy Director of the Swiss Institute of Comparative Law, where he co-heads the Legal Division. He is also a Lecturer in Comparative Family Law at the University of Fribourg and member of the executive committees of Swiss Society of International Law as well as of Juris Diversitas, an international association for the study of legal and normative mixtures and movements. Prior to joining the Swiss Institute in 2009, he was an Assistant Professor of Private International Law, Contract and Tort Law at Kathmandu School of Law, where he carried out research on Comparative Tort and Criminal Law. He has also worked at several public and private law offices in Switzerland and Spain, at the University of Fribourg, as well as at United Nations. His current research and recent publications focus on comparative law, business and human rights and family law.

1 Introduction

This special issue represents the first attempt to take stock of and define the emerging field of comparative migration law. It aims to reflect on the purpose and methods of comparative migration law, identify key contemporary debates and chart a program for future research. It does so by drawing on contributions from academics working across a number of inter-related fields, including migration law, refugee law, comparative law, comparative international law and social sciences. The starting point was a conference held in Lausanne at the Swiss Institute of Comparative Law on 4 December 2019 where we had the opportunity to begin developing the ideas and arguments explored in this special issue. The ideas presented in the contributions are not intended to define or limit the field of comparative migration law – rather the intention is to spark a discussion about the future directions of research in this area.

Cross-jurisdictional comparisons are a common feature of migration and refugee law scholarship.[1] However, to date, there has been very little introspection as to the purpose and methods behind the comparison. Moreover, comparative migration law scholarship has largely evolved in isolation from mainstream comparative law. Part of the contribution of this special issue will be to bridge that gap and explore the degree to which the contemporary debates in comparative law are relevant to the migration context.

At the outset, it is important to note a key apparent difference between the purpose of comparative law and comparative migration law scholarship. Comparative lawyers generally compare to understand similarities and differences in legal cultures/systems,

while comparative migration lawyers tend to compare in order to identify the 'best policies'. This special issue attempts to bridge the gap between these two purposes. In particular, helping comparative migration scholars to be more cognisant and engage more deeply with similarities and differences in legal cultures and systems.

That is not to downplay the importance of the policy making focused comparisons. The special issue also aims to provide insights as to how a deeper comparative scholarship may provide solutions for migrants themselves or the authorities applying migration law. Comparative approaches have been associated with holistic, whole-of-society perception of the legal discipline and the interpretation of norms. The challenge will be to understand if a comparative methodology for migration law can help to bring about an empirical turn to the discipline of migration law, as the international cooperation framework of the Global Compact for Safe, Orderly and Regular Migration (GCM) and Global Compact on Refugees (GCR) have been calling for.

2 The paradox of migration law

Migration law is paradoxical. On the one hand, it is intrinsically linked to the state in its traditional conception of territory, people and sovereign power, as it regulates the entry of people (from other states) into a given state's territory. Politically, migration law can also be seen as an expression of state sovereignty. On the other hand, migration law is affected by and affects the laws of other countries. When persons are refused entry or expelled from one state, they are returned to another. The interdependence can also take more subtle forms, as states compete to attract highly skilled migrants (Shachar, 2006) and deter asylum seekers and undocumented migrants (Ghezelbash, 2018). In this context, changes in the migration law of one state can have flow on affects in the composition of migrants travelling to other states.

Simultaneously, states are aware of the limitations of unilateral policies in this area and recognise the need for interstate coordination and cooperation on the regional and international level. In that respect, the 193 United Nations member states identified, in the New York Declaration for Refugees and Migrants of 2016, the need for a comprehensive approach to human mobility and cooperation at the global level. This principal, in turn, informed the GCM and the GCR. Another example is the Convention relating to the Status of Refugees and the associated Protocol, in which most states agreed on a common refugee definition and minimum protections to be afforded to refugees. However, despite these tendencies in normative processes at international and national levels, the need for global or even common solutions stays unfulfilled. States are reluctant to submit themselves to binding international (and even less supranational) norms regarding migration. While they recognise the need for common solutions, they often seem unwilling or unable to agree and commit to them.

Comparative law can help address the paradox of migration law, between autonomy and interdependence. In order to do so, a more conscious approach is required. Comparative migration law needs transparent and considered methods for credible and high-quality research (see Hinterberger's contribution in this special issue). The articles that form this special issue present a variety of different methods and approaches that can address this need.

3 The birth of comparative migration law

Comparative law already plays an important role in the area of migration law, particularly in refugee law. Comparison of national norms is one of the first steps undertaken when drafting international and regional treaties, such as the Common European Asylum System. In addition, comparison of national norms is an important step in identifying international customary law and establishing consistent state practice for the purposes of interpreting relevant international treaties. Comparative migration law is also an important part of international cooperation, with states often negotiating free movement, access quotas or preferential visas for their nationals as part of trade or investment treaty negotiations. In addition, when drafting national norms, states draw comparisons to foreign law: as a source of inspiration or even a model, an argument for or against a particular measure, or comparison for the sake of understanding the possible impact of different regulations. For example, the Canadian point system for highly skilled migrants has been a template for several other states like Australia, the UK or New Zealand (see Ghezelbash's contribution to this special issue).

While comparative migration law is an important methodological ingredient of international and national law-making, of policy debates and a topic of scholarly enquiry, there has been relatively little discussion of the discipline and, more importantly, on its methods. Migration law practitioners and scholars have drawn from labour law, citizenship law, human rights law, health and education law, and other areas of specialised administrative law, but also civil law, penal law, etc., without being explicitly guided by an express comparatist methodology. This is surprising given the vigorous debates around methodology in broader comparative law scholarship, which have been occurring for the past 20 years or more.

The debate accompanied the gradual extension of comparative law from the so-called 'country and western tradition' of comparative law (focusing on private law in western jurisdictions) to comparative law in other fields: comparative constitutional law, comparative criminal law, comparative administrative law and, more recently, comparative international law (see Kane's contribution in this special issue). This development might indicate that different methods are necessary when talking about comparison in different fields.

With the importance of comparison in and for the development of migration law, it is therefore time to think about the characteristics of this field of research: to take stock of the current comparative migration law scholarship and chart a path for future research.

4 The focus on purposes and methods

When discussing comparative migration law, two main issues need to be addressed: first, the uses and purposes of comparison in migration law, and second, the methods of comparison. The two issues are closely linked, as the method varies according to the purpose of comparison. This has become generally accepted in recent comparative law scholarship, and it is likely that the same holds true in comparative migration law.

Methodological choices can have major ramifications on research outcomes. Take the example of a study that aims to look at ways in which law protects certain types of migrants. A functionalist approach could provide useful inspiration by providing an opportunity to overcome the fragmentation between human rights and migrants' rights. A

conceptual comparison might be less suitable, though it may be an interesting approach if one is interested in finding out how a particular concept, developed in one jurisdiction or at the international level, was taken up in another one. Finally, if one wants to understand reasons for similarities or differences between migration laws in different jurisdictions, a contextual approach might be suitable (see Hinterberger's contribution in this special issue). The contextual approach of comparative law looks not only at the law, but also considers historical, economic, cultural or socio-political factors to get a more complete picture. It is argued that taking account of the context helps avoid the danger of making wrong assumptions based on a 'flat' understanding of law. Here, the struggle within comparative law scholarship to consider non-legal factors, as well as inspiration from other disciplines may provide guidance on difficulties and possibilities (see Cope's contribution in this special issue).

Whether studies of comparative migration law are requested by states, undertaken by scholars or established to lobby for specific improvements, for the findings to be convincing, an appropriate (and openly disclosed) methodology is crucial. In the current context of disinformation, cherry picking might be a big temptation, say, for example, by selecting only some countries or norms that help demonstrate the validity of one's point of view. Credible research and reliable solutions depend on thorough analyses and transparent methods.

The identification of methods that allow for credible research in comparative migration law requires a dialogue with other disciplines that have faced similar challenges. This is a task that is taken up by many of the contributors to the special issue. They draw on not only comparative law, but also disciplines outside of the legal sphere that provide valuable insights. It is hoped that these interdisciplinary approaches and debates can lay the groundwork for advancing high-quality comparative migration law research. In turn, this interdisciplinary dialogue may also bring about important findings for the development of the general discipline of comparative law.

5 Structure

The contributions to the special issue explore the diversity of purposes for which migration scholars engage in comparative endeavours and examine the methodological challenges and approaches to the study of comparative migration law.

Kevin Fredy Hinterberger introduces and showcases the critical-contextual method and its utility in the context of comparative migration law. By combining three established comparative law approaches: functionalism, contextualism and critical approaches, Hinterberger demonstrates how critical-contextual comparison of migration laws can facilitate context-sensitive, critical and reflexive comparisons. The approach is demonstrated in action with respect to a case study on the regularisation of irregularly staying migrants in Germany, Austria and Spain.

Thomas Spijkerboer also advocates for the need for a critical approach to comparison that is cognisant of the power differences between different countries and legal systems. By adopting a colonial lens to compare refugee case law in Australia, Nauru, and Papua New Guinea, he demonstrates how colonial conceptual and ideological patterns of thought shape judicial responses. In doing so, Spijkerboer makes a very compelling case for the need for not just comparative migration law scholarship, but comparative law

scholarship more broadly, to engage more deeply with the legal systems and case law from the global south.

Gillian Kane's article focuses on the possible lessons that comparative migration scholars can draw from comparative international law. The article demonstrates the utility of such an approach to untangling and understanding how the many discrete international migration law regimes interact and operate within states. As examples, she explores how refugee status, as defined in the Convention relating to the Status of Refugees and the associated Protocol, is approached by regional and domestic actors. She also examines *non-refoulement* communications before the UN Human Rights Committee and Committee against Torture and shows how *non-refoulement* provisions can play a meaningful role in practice.

Kevin L. Cope explores the potential to integrate methodologies from the social sciences into comparative migration law scholarship. There is a long-standing tradition of comparative migration research in fields such as economics, political science, human geography, and sociology. Cope explores some of the lessons comparative migration scholars can glean from those discipline, with a particular focus on empirical methodologies. At the same time, he identifies the value add that legal analysis can bring to social science research, making the case for 'an interdisciplinary marriage of methods'.

Daniel Ghezelbash examines comparative migration law through the lens of legal transplants/transfers. He provides some reflections on why we should care about how and why countries are borrowing policies from abroad. Like Cope, he advocates for the need for developing a transdisciplinary approach drawing on social science scholarship. He critically engages with the comparative law scholarship on legal transplants/transfers, and how it can better integrate approaches adopted by social scientists studying diffusion and policy transfer.

In the final contribution, William Hamilton Byrne, Thomas Gammeltoft-Hansen and Henrik Palmer Olsen, put forward network analysis as a useful methodology for comparative (and international) migration scholarship. They explore how computational methods can be used to develop large-scale case citation networks that identify networks between cases through their citations and provide new insights into the networks overall characteristics. They illustrate the potential of such an approach by applying a network analysis approach to the migration scholarship of the European Court of Human Rights and explore a number of future applications of network analysis in the comparative migration law space.

Together, the six articles in this special issue demonstrate that – as in comparative law, more generally – there is not *one* correct method, but rather a methodological toolbox for scholars to draw upon [Husa, (2015), p.206]. The hope is that the contributions in this special issue will assist scholars in selecting the most appropriate tool for their purpose at hand.

The ideas and approaches presented in the contributions are not intended to define or limit the field of comparative migration law – rather the intention is to spark a discussion about the future directions of research in this area. In this regard, it is heartening to see the topic gain further interest and that these discussions are already afoot. This includes as part of the forthcoming *Oxford Handbook for Comparative Immigration Law*, that a number of the contributors of this special issue are involved with [Cope et al., 2023; cf. also Husa, (2021), p.768].

References

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Notes

1 We use the term migration law as an umbrella term, which includes refugee law. However, one of the themes touched upon in the contributions and ripe for further analysis is the degree to which the purposes and methods to comparing refugee law may differ from broader studies of migration.