Comparing migration laws: Context, equivalence and learning from human rights discourses

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1 New approaches to comparative law

There can be little dispute that governments everywhere are openly studying and copying each other's immigration laws and policies as they compete to attract desirable migrants and to block or deter the less desirable.[2] As a general rule, however, legal scholarship and the practice of immigration law remain stubbornly domestic in their orientation. Few national textbooks across countries attempt to align local laws with developments in other countries.[3] There seem to be at least two sets of reasons for this regulatory introspection. First, there is the bounded nature of sovereignty[4] which sounds in constrictive immigration controls; and the role played by scholars and practitioners in defining inclusion or exclusion in national contexts.[5] Second is the difficulty (and/or perceived inutility) in embracing developments beyond the local, given challenges of complexity, time, culture and language. For comparatists, migration law and policy has all of the classic irritations of legal transplant theory.[6] In developed countries, migration laws are hugely complex and undergo frequent change. They are redolent with cultural understandings and expressed in language that can defy literal translation. Then there are the difficulties of capturing state practice, which might differ sharply from paper representations of law and policy. These are issues experienced first-hand in my first foray into comparative migration law as the Australian

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[2] (Shachar 2006; Daniel Ghezelbash, 'Forces of Diffusion: What Drives the Transfer of Immigration Policy and Law Across Jurisdictions.' (2014) 1(2) *International Journal of Migration and Border Studies* 139-153; Ayelet Shachar 'The race for talent: highly skilled migrants and competitive immigration regimes.' (2006) 81 *New York University Law Review* 148-206.

[3] Exceptions to this rule are texts on international refugee law which engage in the most extensive and sophisticated study of comparative jurisprudence seen in the legal academy. Examples include James C Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014); and Guy Goodwin-Gill and Jane McAdam *The Refugee in International Law* (Oxford, Oxford University Press, 2021).

[4] Joseph Carens *Culture, Citizenship and Community: A Contextual Exploration of Justice as Evenhandedness* (Oxford, Oxford University Press, 2000), 161.

[5] See Linda Bosniac "Citizenship Denationalized," (2000) 7 *Indiana Journal of Global Legal Studies* 447.

[6] Gunther Teubner 'Legal Irritants: Good Faith in British Law or how Unifying Law Ends Up in New Divergences.' (1998) 61 *The Modern Law Review* 11-32; and the earlier work of Alan Watson, Legal Transplants: An Approach to Comparative Law (Scottish Academic Press, Edinburgh, 1974). For discussion of this theory see, for example, Michael Dowdle 'Completing Teubner: Foreign Irritants in China's Clinical Legal Education System and the "Convergenace" of Imaginations' in *Examining Practice, Interrogating Theory: Comparative Legal Stduies in Asia* (Brill Nijhoff, 2008), Ch 6, 164-194.

lead in the International Migration Law and Policy (IMPALA) Database Project.[7] IMPALA began as an attempt to create a mechanism to accurately describe laws and policies across time – without which it can be difficult to measure impact and usefulness.[8]

In an increasingly globalized world, the international movement of people has been greater than at any time in human history.[9] Even though migratory flows slowed sharply during the national and international shut-downs induced by the global Covid-19 pandemic, the 'COVID' years will be marked ultimately as an aberration. Economic imperatives, human conflict and climate change were already bringing mass populations displacements in 2022.[10] The reality of globalization is that trans-border movements are the new normal. Again, understanding how different countries control their borders; attract the brightest scientists; achieve wealth and harmony through migration programs is already a constant preoccupation for governments. It is inevitable that competence in comparative migration law will become a matter of critical importance for lawyers and other migration professionals.

There are already particular areas where comparing laws and policies are of critical importance in the selection and control of migrants. As Szigeti documents,[11] in deciding issues relating to the character and conduct of actual or aspiring migrants, states have a choice in how they measure equivalence in criminal behaviours across states. In what would appear at first glance to be a straightforward process, he demonstrates that states cannot assume that a matter attracting criminal sanctions in one state will be accepted as criminal in all states. This is before one considers the level of punishment that is attached to criminal convictions both in theory and in practice across time and across countries.

For their part, social scientists need no convincing of the importance of the comparative migration law and policy project. In the second decade of the new millennium I joined an inter-

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[7] See further the IMPALA Database website at <http://www.impaladatabase.org/>.

[8] Justin Gest, Anna Boucher, Suzanne Challen, Brian Burgoon, Eiko Thieleman, Michel Beine, Patrick McGovern, Mary Crock, Hillel Rapoport and Michael Hiscox, 'Measuring and Comparing Migration, Asylum and Naturalization Policies Globally: Challenges and Solutions.' (2014) 5 *Global Policy* 261-274.

[9] Marie McAuliffe and Anna Triandafyllidou *World Migration Report* (Geneva: IOM 2022), 2 - 3.

[10] See Daniel Ghezelbash and Nicholas F Tan 'Covid-19: A Watching Brief. The End of the Right to Seek Asylum? COVID-19 and the Future of Refugee Protection.' (2020) *&& *International Journal of Refugee Law* 1 – 12. In May 2022 the United Nations High Commissioner for Refugees reported than the number of persons of concern displaced by human conflict had exceeded 100 million. See https://www.unhcr.org/en-au/news/press/2022/5/628a389e4/unhcr-ukraine-other-conflicts-push-forcibly-displaced-total-100-million.html.

[11] Péter D Szigeti 'Comparative Law at the Heart of Immigration Law: Criminal Admissibility and Conjugal Immigration in Canada and the United States' (2020) 19(5) *International Journal of Constitutional Law* 1632-1663.

disciplinary team on the IMPALA Database Project.[12] Ours was one of a series of contemporary endeavours to compile comparative data on migration laws with a view to measuring the effect (including the stringency) of legal and policy initiatives.[13]

The IMPALA Database was constructed over a number of years in tandem with comparative research by the author into the situation faced by two categories of particularly vulnerable migrants: children[14] and refugees with disabilities.[15] Although the different strands of research have felt very separate, over time I have come to see real synergies across the projects at a fundamental, almost epistemological level.

In this chapter I use preliminary findings from the IMPALA project to reflect on how we can or should approach the task of comparing and evaluating migration laws and policies across countries and through time. The synergies between this work and more classically human rights-oriented projects lie in the idea that true character - and equivalence - across legal systems cannot be determined by formal structures alone. A mechanism must be found to determine the operation and effect of law and policy. In this context, I explore the extent to which the IMPALA database adopts a 'functioning' and 'capacities' approach to comparing migration law so as to obtain true measures of equivalence in law and policy – through time as well as across states. In human rights, functioning and capacities are terms used to distinguish changes in thinking about mechanisms to ensure equal treatment, most particularly in the context of disability rights.[16]

Of course, 'functioning' also features in classical comparative law, although it is not clear that there is complete parity in how the term is understood throughout the academy. What the functional approach does share across disciplines is the foundational premise that the focus should be 'not on rules but on their effect, not on doctrinal structures or arguments, but on events' (Michaels 2012, 342). As I explore in Part 2.2 the comparative law literature emphasizes the

[12] See above n7 and n8.
[13] See Gest et al, above n8, Table 1 for a compilation of the indices compiled between 2006 and 2012.
[14] See, for example, Jacqueline Bhabha and Mary Crock, 2007) *Seeking Asylum Alone: A Comparative Study – Unaccompanied and Separated Children and Refugee Protection in Australia, the UK and the US* (Sydney: Themis Press 2007); and Mary Crock and Lenni Benson (eds), *Protecting the Migrant Child: Central Issues in the Search for Best Practice* (London: Elgar Publishing 2018). (Bhabha & Crock 2007; Bhabha, 2014; Crock & Benson 2018)
[15] See for example, Mary Crock, Laura Smith-Khan, Ron McCallum and Ben Saul *The Legal Protection of Refugees with Disabilities: Forgotten and Invisible?* (London: Elgar Publishing, 2017); Mary Crock, ' 'Protecting Refugees with Disabilities', in Cathryn Costello, Michelle Foster and Jane McAdam *The Oxford Handbook of International Refugee Law* (OUP, 2021); and Mary Crock and Ron McCallum 'Disaster, Disability and Displacement' (authors and section editors) in Marcia Rioux, Ezra Zubrow and Renu Addlakha (eds) *Handbook of Critical Disability Studies in a Globalising World* (Toronto: Springer 2022).
[16] See the discussion in Part 2.1 below.

relationship between law and society, with some arguing that functionalism requires 'cultural immersion' in a foreign country if we are to begin to understand the laws of that country.[17]

As explained in Part 3, the methodology employed in building the IMPALA database grew from a rather intuitive analysis and categorisation of migration law and policy by separate teams tasked with examining one or more national systems. The database provides empirical evidence going to the nature, origins and – most importantly – the effects of immigration policies and laws.[18] It works by cataloguing answers to common questions about laws and policies that describe how individual States regulate immigration and citizenship. An important part of this process is attempting to capture the objective attributes that states require in persons seeking to migrate to a given country.

The article continues in Part 4 with some reflections on the findings made using the data collected by the IMPALA consortium during the first pilot phase of the project. This involves interrogating regulatory responses to migration in nine developed States between 1999 and 2008.[19] Observations are made about two broad trends in the regulation of migration in these nine countries: changes in complexity of laws and policies and changes specific to the regulation of economic migration. The IMPALA data suggests that migration laws and policy have been used to achieve increasingly sophisticated socio-economic objectives, reflected in selective generosity and covalent stringency.[20] The piece concludes with some reflections on the future of comparative law in the study of immigration.

2 Unpacking Comparative Law Methodologies

2.1 Capabilities, Form and Function in Human Rights

Before turning to a discussion of the IMPALA Database, it is useful to reflect in more detail on the understandings of functionality in the human rights discourse and comparative law more

[17] E J Eberle The Method and Role of Comparative Law. (2009) *& *Washington University Global Studies Law Review* 451 – 485. See the discussion in Part 2.2 below.

[18] Michel Beine, Brian Burgoon, Justin Gest, Anna Boucher, Suzanne Challen, Mary Crock, Patrick McGovern, Hillel Rapoport, Eiko Thieleman, and Michael Hiscox,' Comparing immigration policies: An overview from the IMPALA Database' (2015) 49 *International Migration Review* 827- 863.

[19] The countries are Australia, France, Germany, Luxembourg, Netherlands, Spain, Switzerland, United Kingdom (UK) and the United States of America (US). These countries have been identified by the Organization of Economic Cooperation (OECD) as 'recipient' countries for immigrants. The plan for the IMPALA Database was to include laws and policies from 26 OECD countries across 60 years.

[20] See Beine et al, above n 18.

generally. Modern disability theory is anchored in the equality and well-being theories propounded by Amartya Sen,[21] Martha Nussbaum,[22] (Nussbaum, 1999), Martha Fineman[23] (Fineman 2008) and others.[24] The central argument is that justice and equality must be measured in impact and outcomes. That is, lived experience should be valued over formal (theoretical) equality. Amartya Sen uses notions of functioning and capability to describe the prerequisites for determining human well-being in the context of justice and development. Functioning describes actions – what people do to survive and thrive – such as obtaining food and shelter; accessing adequate health care; engaging in gainful employment. It also captures achievements such as engagement with political processes; emotional happiness and other attributes of wellbeing and participation in society.[25] The notion of capabilities provides the third dimension of context, acknowledging that functioning can become illusory without the practical ability to act and achieve. Capability is also about freedom, including the freedom to choose, as well as about the options that may or may not be available to a person in any given circumstances. It is Nussbaum who bridges the gap between functioning and capacity with the notion of rights in her liberal theory of justice. Functioning becomes the right to do something, while capabilities determine what a person can actually achieve.[26] Martha Fineman builds on these notions with her determination to acknowledge human vulnerability as a necessary consideration in any attempt to achieve true equality.[27]

In our research into refugees with disabilities we applied these theories in an attempt to improve the identification of disabilities in displaced populations so as to encourage compliance with Art 31 of the UN Convention on the Rights of Persons with Disabilities.[28] This Convention was embraced almost immediately by states parties to the UN Convention relating to the Status of Refugees and its attendant Protocol.[29] This CRPD requires state parties to abandon the notion that

[21] Amatya Sen *Development as Freedom* (Random House 1999).
[22] Martha Nussbaum *Sex and Social Justice* (Oxford, Oxford University Press 1999).
[23] Martha A Fineman The Vulnerable Subject: Anchoring Equality in the Human Condition. (2008) 20 *Yale Journal of Law and Feminism* 1-23.
[24] Marcia Rioux, LA Basser and M Jones (eds), *Critical Perspectives on Human Rights and Disability Law* (Amsterdam, Martinus Nijhoff, 2011). See also Crock et al, above n 15, 5.
[25] Sen, above n 21, 75.
[26] Naussbaum, above n 22, 34.
[27] Fineman, above n 23.
[28] Convention on the Rights of Persons with Disabilities. Adopted 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) (CRPD).
[29] *Convention Relating to the Status of Refugees*, adopted 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) and the attendant *Protocol Relating to the Status of Refugees*, adopted 31 January 1967, 606 UNTS 267

disability is about deficit and impairment – a medical problem to be solved.[30] Rather, it defines disability as a social construct. Disablement can involve both the failure to provide reasonable accommodations for impairments and/or the construction of (psycho-social and physical) barriers to participation. Hence, instead of adopting a 'labelling' approach to (obvious) impairments, or expecting our refugee participants to volunteer their disabilities, we interrogated interview subjects on their functioning. We adopted the International Classification of Functioning, Disability and Health (ICF) as a model (see WHO and Crock et al, 2017 Ch 4). Our qualitative questionnaire embraced both impairments and access to assistance. For example, instead of asking 'Are you deaf', we asked both 'Do you have difficulty hearing?' (with graduated responses) and 'Do you have access to (appropriate assistive devices)'.

The difference in the data we elicited relative to official statistics on the incidence of disabilities in our target communities was stark (Crock et al 2017, ch 4). Our central finding that refugees with disabilities were 'invisible and forgotten' was reinforced (if not redressed) when the UN agency with most responsibility for refugees embraced the ICF in its own data collection processes. In Pakistan, the government and UNHCR adopted a CRPD compliant 'functionality' approach to identifying disabilities when conducting a verification exercise involving nearly one million Afghan refugees in 2011. The statistics from that exercise aligned more closely with those predicted by the WHO (WHO 2011, 27; Crock and Smith-Khan 2017). The importance of this work lay in realising that aid agencies could not begin to accommodate persons with disabilities if they were ignorant of the nature and extent of impairments amongst their client group (Smith-Khan et al 2015, 41)

2.2 Functionalism in Comparative Law Theory

3 The IMPALA method: Form, Function and the Search for Equivalence

(entered into force 4 October 1967). (Collectively the 'Refugee Convention'). See also See UNHCR Executive Committee (ExCom), 'Conclusion on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR', Conclusion No 110 (LXI), 12 Oct 2010, available at: <http://www.unhcr.org/4cbeb1a99.html>. For early commentary see Mary Crock, Christine Ernst, and Ron McCallum, 'Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities' (2012) 24(4) *International Journal of Refugee Law* 735, 739-740.

[30] Teresa Degener 'A Human Rights Model of Disability' in P Blanck and E Flynn *Routledge Handbook on Disability Law and Human Rights.* (London, Routledge, 2016), Ch 3.

The problem at the heart of the IMPALA project was – and remains – the difficulties inherent in comparing migration law and policy as adopted in different states and even as adopted within states across different periods of time. States literally employ different languages; they describe things in different ways; responses to issues and situations can vary greatly as states develop and culture changes. The creation of international legal instruments such as the UN Convention relating to the Status of Refugees and anti-trafficking conventions (to use two examples) encourages some degree of convergence in domestic laws and practices (Hathaway and Foster 2017). Parties to international instruments at least have a common point of departure when each moves to give effect to obligations assumed as signatories. However, outside of humanitarian law, the broader field of migration has remained stubbornly diverse and opaque, driven by assertions of state sovereignty and general resistance to interventions from UN bodies (See Chetail *).

As we explained in 2014, the IMPALA team decided against using either migration flow data (outcomes) or policy outputs as measures because of the potential for misleading results (Gest et al, 2014, 264). For example, if flow data is used as an indicator, a country with a large population of irregular migrants can appear open and generous, even though its laws and policies are facially restrictive (see Kogan 2007 and Neumayer 2004).

A true functioning approach – in the sense used in human rights discourse – would require consideration of qualitative data on how states behave in practice. Data based on surveys involving specialist practitioners could serve to gather such material. The MIPEX Database constructed by the OECD uses such an approach. Its limitations, however, are that the interview instruments are limited in the range of matters canvassed and generally do not deliver pin-point references to particular laws and policies (or caselaw) across time. No attempt is made to capture all elements in a system (see Huddleston and Niessen 2011; and Goodman 2012).

The IMPALA solution is to seek ways to capture commonality in how the law and policy operate in broad categories across countries and through time. The Database seeks to describe functioning by asking questions directed at identifying legal selection criteria (attributes for migration) adopted by a country in these categories. As explained further below, each of the meta groupings are divided and then sub-divided into what we describe as ‘entry tracks’. ‘Law’ is defined to include legislation, published policies and directives; and publicly available rulings by courts and tribunals. The set questions then function as indicators which allow for equivalence and

statistical computation and regression analysis. The fact that the IMPALA Database seeks to capture equivalences across a whole system is a major point of difference with most comparative law ventures. There is no normative agenda in the project in the sense of trying to evaluate one system in comparison with another.

The starting point for IMPALA is that states generally group migrants into similar categories. Forced migrants (including refugees and asylum seekers) leave for similar reasons, reflected in the most developed of all areas of international law (See, for example, Hathaway and Foster 2014; Costello, Foster and McAdam 2021). Other migrants typically move across borders to form family or join family; to find employment or join or start a business venture; to study or seek training. IMPALA's initial classification process is itself a functioning tool insofar as it interrogates the reason behind a migrant's decision to move. Drilling down into each category and sub-category, we then devised questions to capture both nuanced details relating to how migrants are selected (requirements) and information on what each is entitled to do (rights).

The IMPALA method pursues a classical functioning approach in that it creates a system that facilitates contextual understanding of different laws. This system allows for like with like comparison as well as the evaluation of systems against objective standards. IMPALA is also literally functional in approach in its ability to capture entitlements (functioning) of rights holders in each sub-category.

The pilot phase of the IMPALA Project focused on economic migration; family reunification; asylum and refugee migration; students and other temporary migration; and citizenship (loss and acquisition). Some of these areas had been already the subject of detailed comparative analysis. For example, the naturalisation work in IMPALA draws heavily on the work that underpins the EUDO Citizenship Database (et al 2017; and Bauböck & Heibling 2011)

.The intention is to grow IMPALA so as to include material on legal frameworks (including appeal structures); 'threshold' requirements such as health and character rules; irregular migration; enforcement (including change or adjustment of status); and bi-lateral agreements.

As noted, the IMPALA Database identified first the common ways in which migrants are admitted in all countries, with categories then disaggregated into smaller and smaller sub-groupings. Even in the broadest of the categories, we were challenged to find language that captured practice across countries without arbitrary exclusions. For example, a great number of migrants move countries to find work or to engage in business activities. In Australia, the national

bias towards selecting needed and desirable migrants is captured in language that favours terms such as 'skilled' or 'highly skilled' migrants. For the database, these terms proved unhelpful because they did not adequately describe the way different countries prioritized or selected migrants. For example, while Australia has always placed equal value on tradespersons and professionals including doctors and allied health workers (Crock 2002), the United Kingdom has treated tradespersons and nursing staff as 'labourers' (Buchan & O'May 1999) Yet both countries embrace these groups as desirable migrants. The IMPALA solution was to create the meta category of 'economic' migration. The solution is practical and intuitive yet captures points of commonality without the 'noise' of qualitative terms like 'skilled'.

The refined sub-categories are referred to as 'entry tracks.' These represent groups of migrants who are subject to similar admissibility criteria, modes of entry and conditions (which determine what an individual is and is not permitted to do). Attributes are objective criteria that can include: age and family situation; qualifications and skills; proficiency in native or community languages; work experience; health status; and criminal record history. Attributes can also capture desires such as length of requested residence. Comparative examples in the economic category are the H-1B visa in the US; the General Skilled Migration visas in Australia and the Tier 2 Intra-Company transfer visa in the United Kingdom.

In some instances, entry tracks capture particular visa classes. In others they can embrace a series of visa classes where a state has disaggregated criteria across a series of legal provisions. The entry track concept allows clear and effective comparison across countries of how a country selects a particular type of migrant. The IMPALA method showcases how countries use an applicant's characteristics, intentions and support networks (including sponsorship) as determinants for entry. It also captures what a state permits entrants in each case to do.

The IMPALA Database indicators comprise a series of common questions that are predominantly susceptible to yes/no/not applicable/not mentioned in sources answers, together with data fields that pin-point authority for the answer in law and policy, plus space for comment. (Each entry track also includes a qualitative question on the quota, if any, limiting the number of permits issued each year.) In the selected country we began by identifying relevant national legislation, policy documents and (where relevant) secondary source materials including case books and compilations of case law. For every entry track and each year, coders use these materials to answer common questions designed to describe the operation of law and policy

relative to the entry track. Again, the answers tell the story of how many and what type of migrants can be allowed into a country each year; the conditions under which migrants are admitted; and their legal rights. It is worth noting that the Database does not attempt to record state practice or *de facto* policies: this would require qualitative research that was beyond the scope of the project. Even so, the collection of data on migrants' rights does provide a proxy of sorts for determining state practice.

4 Using IMPALA to identify trends in the regulation of migration

3.1 Quantifying and assessing skills: indicators of economic sophistication in migration policy

The treatment of economic migration in IMPALA provides a useful case study of how states have grown in their understanding of migrants as agents of change and economic growth. The story is very much one of movement from numbers to economic attributes. The variations also demonstrate deep philosophical differences between states in terms of perceptions about the roles that should be played by governments and/or the market in regulating and selecting economic migrants. The IMPALA data provides tangible measures of how the placing or removal of constraints on economic migration can change a destination country.

The IMPALA pilot is described in detail in Beine et al, 2015. For present purposes, I will refer to some of our findings reported in that article. Coders in each team identified the key economic entry tracks for 1999 and 2008. Putting to one side the number of such tracks, the common descriptor questions operate as indicators of the nature and extent of government control over economic migration. This, in turn, can be seen as change or development in the economic sophistication of the system.

In devising these questions, the IMPALA team drew a distinction between matters that were common across a whole category in each country (described as 'country level' questions) and matters that served to define groups of entry tracks (described as 'track level' questions). Examples of country level indicators for the economic category include:

Does this category form part of an overall country level quota?
Are there per-country (of origin) caps or quotas?
Is a standard classification of occupations used for migration purposes?
Does the country adopt a labour shortages test (or list)? and
Does the country operate a points test?

Some of these questions were also asked at track level. Otherwise, track level questions go to requirements about age; personal net worth or available financial resources; educational qualifications; expected future earnings; preference given to country of origin; whether entrants are prohibited from accessing the general labour market; and projected place of work and residence (regional migration questions).

The pilot involved taking one highly skilled and at least one lesser skilled track for each country across one decade (1999-2008). The tracks were coded against indicator questions which operate to measure economic worth in the potential migrant. We found that States in the IMPALA pilot were increasingly showing preference for young and educated migrants, with achievements and experience in work or business. Another interesting feature is the increasing emphasis on fluency in one or more community languages, suggesting consideration for integers of integration potential. The findings from the IMPALA pilot align with subsequent, targeted research into the use of points tests in seven countries undertaken for the US Congress (Global Legal Research Directorate 2020. See also Yale-Loehr & Hoashi-Erhardt 2002).

The IMPALA pilot shows that between 1999 and 2008 Australia, Germany and the US devised increasingly complex or nuanced entry requirements for economic migrants. In Australia, these years saw the convergence of economic visa criteria with moves to classify and standardize the qualifications and experience required to work in various occupations first in Australia and later across Australia and New Zealand (ANZCO 2021). Macro- and micro-economic data on job vacancies was then used to set quotas such that visas would only be available to persons seeking to work in certain occupations. 'Skilled Occupations Lists' (SOL) were created in 2000 first for permanent and later for permanent and temporary economic visas. These lists have since become the mainstay of all economic migration in Australia. Used to mark visa eligibility, the lists underpin a system that requires economic migrants to be 'job-ready' so that no issues arise about whether they have the (recognized) qualifications and experience to work in their chosen job (Castles et al 1989; Chapman & Iredale, 1990; and Jackman 1995). Australia's SOL operate quite separately from the more commonly used preference lists of 'occupations in demand' which have applied both generally and in specific geographic areas (Crock and Berg 2011, ch 9).

In contrast, Luxembourg and the Netherlands appear to have relaxed the entry criteria for economic migrants (described as Third Country Nationals (TCNs) to denote the movement of workers from outside the European Union). The trend probably reflects European-wide policies

designed to attract skilled TCN workers through the establishment of a unified EU Blue Card working visa system when free movement within the EU failed to deliver the workers needed in different EU countries. The increasingly stringent policies Australia and the US suggests that these countries were confident of their attractiveness to skilled migrants, allowing greater scope for selectivity.

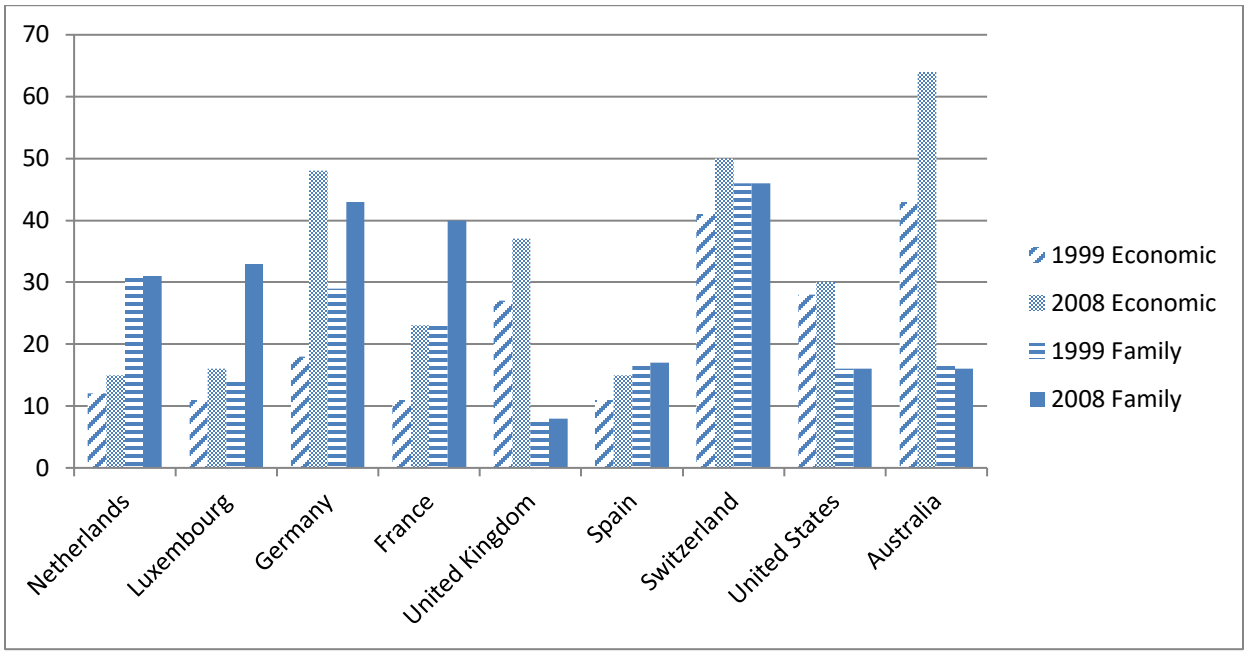
In many respects, disaggregating the regulation of economic migration was the most complex of the tasks attempted by the IMPALA Consortium. Without specific questions on entitlements to social security and income support, this category may fall short of completeness in its functioning approach. Having said this, the ability to capture the *portals* to eligibility should make it a valuable tool to comparatists. This field holds intrinsic interest, not in the least because of the extensive borrowings that have occurred between states. At the outset of the project, there were many aspects of Australia's economic migration law that seemed peculiar and exceptional to the Australian case. Indeed, it took some persuasion to even include questions that would capture the full operation of law and policy in this country. As the project progressed, however, more and more countries began adopting at least elements of the scheme, with the proliferating use of points tests a noteworthy example (Global Legal Research Directorate 2020). Although beyond the scope of this survey piece, the use of points tests as a device for selecting the most suitable economic migrants itself demonstrates functioning and capacity-based migration policy!

3.2 Complexity as a measure of stringency and sophistication

In the pilot phase of the IMPALA project, the explosion in the complexity and volume of relevant laws and policies was immediately apparent. This could be seen as a measure of restriction or stringency. The number of entry tracks identified in each state and the number of questions required to give a sense of how the systems operate are also indicators of economic sophistication or at least reflectiveness.

Figure 1 compares the number of entry tracks across the pilot countries in 1999 and in 2008 in the two categories of economic migration and family reunion. In almost every instance the number of entry tracks increased (Australia offering an exception in the family category) over the decade. This suggests a general trend towards greater regulation, most particularly in the area of economic migration. Having said this, the results are also interesting in showing the divergence between States in the way that the meta categories are broken down into entry tracks.

Figure 1 – Count of entry tracks in family and economic categories, 1999 and 2008



The three states with the most elaborate systems for regulating economic migration are Australia, Switzerland and Germany. Of these, Australia and Germany saw the most change in complexity across the decade. In contrast, the Netherlands, Luxembourg, France and Spain revealed more simplicity in approach, with much less variation across time. The US sat somewhere in between, with moderate to high numbers of entry tracks with modest change. These patterns are almost directly reversed for family migration. In this field the European countries stand out in comparison with the new world settler countries. Australia's large number of economic entry tracks dwarfs its family migration tracks which even shrank over time.

Of course, noting entry track changes within broad categories does not tell anything like the full story. Australian laws reveal patterns of expansion and contraction: there has been a tendency over time to allow entry tracks to proliferate before a dramatic simplification occurs. For example, in 1996, changes in the temporary skilled migration saw 17 visa subclasses reduced to four (Crock & Berg, 2011, Ch 9). In 2015, 7 student visa subclasses were reduced to two (Spinks 2016). By 2012, there were 43 entry tracks across all IMPALA categories, compared to 64 in 2008. This pattern typically reflects a desire to make a system more efficient – most particularly for desirable migrants!

The creation of targeted tracks of entry reflects a process of states seeking out specific types of economic migrants to intervene to promote or protect national markets. Entry is only

available to migrants with certain qualifications or skills (typically in short supply in the receiving country). Preference can also be given to individuals who are prepared to fill gaps in regional labour markets. In fact, the system is one that calls into question the extent to which countries like Australia truly function as free markets!

All the IMPALA countries preference sponsored workers, independent migrants and investors. However, Australia and the US have created entry tracks for a wide range of sub-varieties of economic migrants. These range from the rarified 'distinguished' or 'exceptional' talent migrants through religious worker; professional sportspeople; the crew of 'super yachts'; to entertainers and artists. This proliferation is one manifestation of stringency or at the very least reflective policy. The US and Australia also provide examples of economic migration used to encourage increasingly targeted growth in regional areas. For example, Australia's Regional Migration scheme began in the 1990s as a measure to simply boost population in remote or sparsely inhabited parts of the country. After 2000, concessions began to be made across many of the economic entry tracks for migrants prepared to live, work and invest in designated regional areas. The policies began to have a much sharper economic focus.

3.3 Migration, economics and family reunification

Family is a concept that is widely understood and so easy to define. It is also the point at which migration laws are perhaps most universal. There are remarkably few countries that do not allow some form of family-based migration. This fact is both reflected in and reflects acceptance of international human rights law (Motomura 2006). [31] For present purposes, the IMPALA Pilot provides interesting insights into how the target states allowed migrants to fully function as humans, in the basic sense of creating and maintaining family relationships. Sadly, the results suggest that states have increasingly tied understandings of family in migration to economic objectives.

[31] The right to family life and the right to protect the integrity of the family unit is enshrined across the core human rights treaties including in the International Covenant on Civil and Political Rights (art 23), the International Covenant on Economic, Social and Cultural Rights (art 10(1)) and the Convention on the Rights of the Child (art 18). Article 44 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families contains specific protections for the unity of the families of migrant workers. Article 8 of the European Convention on Human Rights also protects a right to respect for private and family life.

Human rights law should operate to encourage States to be generous in terms of which migrants they admit and on what terms. The IMPALA pilot suggests that states have relaxed family migration policies to attract desirable economic migrants. Interestingly, it is in this area where we found the most variation between the States.

Returning to Table 1, Germany stands out as the country with the most family migration tracks overall. Luxembourg showed the most substantial increase in the density of regulation between 1999 and 2008. Australia and the US had fewer entry tracks and remained more stable over the pilot decade. In Australian entry tracks such as Partner, Parent, Child and Carer were the main vehicles for this migration category.

Again, the number of entry tracks is a very crude measure of the changes that have occurred in this area. Attention also needs to be given to the content of the laws and policies regulating admissions in each track. The Australian case is worthy of further consideration in this regard. While the family entry tracks remained similar over the 10 years of the IMPALA pilot, their substantive requirements changed quite dramatically. The conflation of economic issues and family played out in more and more restrictive criteria in the regulation of parental migration, with 'contributory parents' required to pay up to $75,000 for the privilege of gaining permanent residence in the country (ref).

Another illustration of the stability of tracks belying content change is the move to expand the definition of partner to include same sex couples and persons in de facto relationships. These are changes that clearly reflect the embrace of international human rights law governing family life and reunification, most particularly when migrants from developed, rights-respecting states carry expectations of inclusiveness. Here, Australian law has shown considerable generosity since the 1980s (Crock & Berg 2011, Ch 7). In contrast, the US did not recognise any forms of de facto or registered partnerships for the purposes of partner visas or accompanying family over the pilot decade. The complication was that the term marriage was defined in State law rather than in federal immigration law. When the Defence of Marriage Act (DOMA) was struck down by the Supreme Court in 2013 (*United States v Windsor*, 570 US _, 2013 WL 3196928, No 12-307) US states began to recognise same-sex marriages, allowing for convergence with the federal immigration statute (Preston 2013; USCIS 2013). *Matter of Zeleniak*, 26 I&N Dec. 158 (BIA 2013) was the first official immigration decision following *US v Windson* regarding immigration benefits for same sex couples. The US example underscore the shortcomings of using federal immigration law and policy as a vehicle

for capturing state practice. Once again, however, IMPALA's inclusion of full citations and comments opens pathways for further investigation.

An interesting challenge that we faced when coding the family tracks for the IMPALA Database was in determining how countries counted the family migration. This became important when trying to measure the generosity or restrictiveness of the subject states. Again, the functional approach proved useful. For example, we discovered that Australia included as economic migrants all family members entering with or in reliance on a primary economic migrant. In contrast, most European countries broke up the group, categorizing the primary migrant as an economic migrant and any accompanying family as family migrants. This helps to explain the relative proliferation of family entry tracks in the EU states included in the IMPALA pilot. By capturing both modes of entry across each year, the IMPALA database allows comparison of regulatory approaches to family unity across the spectrum of migration law – family and economic.

4 Comparative migration law as the way of the future

Constructing the IMPALA Database was an ambitious undertaking that ultimately stalled because of the reliance on an expensive (and labour-intensive) manual coding process that involved the interrogation of laws and policies in different countries across years. With the development of high-speed computing and hugely sophisticated data search functions, the process problems could possibly be overcome in time. For present purposes, the interest lies in the method and theoretical approach devised which represents IMPALA's first and real advance in knowledge. The IMPALA database demonstrates what practitioners increasingly understand: local trends are often transnational or even global trends. (Crock and Ghezelbash, 2013, Ghezelbash, 2014). Broad categories of entry can be broken down or refined into recognizable entry tracks or paths and it is possible to find common ways to describe the criteria for admission (and exclusion).

In this piece I have argued that the results of the IMPALA pilot demonstrate that states have used a functional understanding of who migrants are and what they have to offer to build the economic sophistication of their migration programs. This is seen in policies that articulate as requirements the age, education/ qualification, skills, work experience and employment record of desired migrants.

The family migration category provided an opportunity to see how norms of international and transnational human rights law have encouraged openness and generosity in state laws and policies. Seen most particularly in the treatment of same-sex and de facto partners, the trend

towards more generous policies was counter-balanced by economic concerns in areas such as parent migration. In this context, the fact that (aging) parents equate with economic burdens have played out in greater regulation and more restrictive measures. The identified trends bear out, at least to some extent, Hollifield's liberal paradox:

> Since the end of the Second World War, international economic forces (trade, investment and migration) have pushed states towards openness while the international state system and powerful (domestic) political forces push them towards greater closure. (Hollifield, 2004, 885)

The IMPALA project demonstrates that the international push for openness and the domestic pull for closure does not adequately explain States' responses to different *categories* of migration. It is only by examining how states select desirable migrants and what they do to deter and exclude the undesirable that we can truly understand the conflicting forces that govern states' desire to foster selective immigration. The imperative for economic growth and the realities of globalization show us that immigration will remain a constant - even in societies resistant to admitting strangers.