

KONSTANTINOS LALENIS, MARTIN DE JONG
& VIRGINIE MAMADOUH

FAMILIES OF NATIONS AND INSTITUTIONAL TRANSPLANTATION

1. FAMILIES OF NATIONS: MERITS AND LIMITATIONS OF THE CONCEPT

The 'goodness of fit' argument is an influential perspective to predict suitability of an institutional transplant. A complementary question is, however, how to assess this goodness of fit between the intended transplant and the host society. In Chapter 2, the concept of 'families of nations' was introduced for this purpose. A common application of the goodness of fit perspective relies on the assumption that (1) families of countries can be distinguished, and (2) the characteristics of each of these families are influential to the suitability of any potential institutional transplant in such a way that transplants between members of the same family are less difficult than borrowings between families. This chapter aims to present what is known of 'families of nations' and test the validity and usefulness of the concept. This testing is done by examining the empirical evidence about the existence and the delimitation of such families of countries and the empirical evidence about their relevance for institutional transplantation. This chapter presents families of countries that are based on selected but seminal literature in comparative law, political science, public and business administration, planning and anthropology.

Some preliminary remarks are necessary before presenting some of these typologies, seen as influential and/or especially relevant to institutional transplantation. The term 'families of nations' is not that usual although clustering countries is a common strategy to reduce complexity in comparative studies. In the conclusion of *Families of Nations*, the book edited in 1993 by Francis Castles, Göran Therborn distinguishes four types of families, of which two are based on the evolutionary reasoning that underlies the goodness of fit perspective.

We may distinguish between four types of families or groupings of nations. First, there is the lineage type, held together by descent from a common origin of some sort. Secondly, there are the *separated* siblings, kindred nations kept apart by state boundaries or, more concretely, non-state bound social units with significant similarities between them, irreducible to common ancestry. Then we have what might be called (elective) *affinity groups*, the *Wahlverwantschaft* connected by the process of diffusion, of imitation or avoidance (negative affinity), freely elected or established by pressure. Finally, there are the *partnerships*, the unions of deliberate co-ordination. The kinship of nations is multilinear, over layered and subject-centred. Any given member may

count his or her kinship affiliation in terms of overlapping lineages, affinities and partnerships. So should the observer (Therborn, 1993, p. 329).

A family has a *style* of formal legislation and informal social conventions in politics and policy-making, which creates a resemblance among its members. Therborn's first type has a recognisable parent somewhere in its genealogy that has exported the system elsewhere and whose descendants have inherited many or all of the characteristics. An example of this is how France's Civil Law, England's Common Law, Saudi Islamic Law and the Soviet Communist party rule found their way into many legal systems in the world. However, in the course of time, some members have taken on additional characteristics from other systems or have become a family of their own and ceased to be a copy of the original. This is how affinities of the second, third and fourth type can also come about.

It has been said that institutional structures bear the imprint of the era in which they originated (Hannan & Freeman, 1989). Countries with characteristics of various families depending on the policy area can be labelled 'hybrid'. Generally, countries at the core of cultural spheres of influence, such as France, Germany and the United Kingdom have fairly archetypal state traditions to which they stay true (Dyson, 1980; Dobbin, 1994), while countries in border zones adopt institutions from different models, depending on the age and the dominant powers in that age. Israel, Greece, Turkey, the Netherlands, Finland, Scotland and Quebec are for instance widely seen as hybrids in the comparative law literature (Raadschelders, 1998; Örtücü, Attwooll, & Coyle, 1996), as they have variably adopted and reframed French, German and Anglo Saxon models in the course of time and have transformed these impetuses into mixtures which are much harder to grasp in terms of 'families of nations'. Clearly, processes of institutional transplantation are at the very heart of the notion of families of nation, as institutional borrowing is seen as the major cause of familiarity.

In available typologies, types are often named after one country, which is seen as the pure type.¹ This is often implicitly and sometimes explicitly acknowledged as the model for the whole family. The main limitations of the available typologies concerned the selected institutions, the selected indicators to grasp relevant differences and similarities between countries on that point and the data on which classification is based. In addition, studies generally cover a small number of countries, sometimes clustered in a specific part of the world.

As for institutional transplantation itself, the categories distinguished in the previous chapter, with three levels of action, the constitutional, policy area and operational levels and two dimensions, formal and informal institutions (see Table 1 in Chapter 2) suggest that a pertinent clustering should be based on indicators relevant to that category of institutions.

Families of nations can be discerned at different levels (constitutional, policy area, operational level), both formally and informally, and the resulting clusters certainly do not always match. A country's legal system may be part of one family, but characterised by value orientations that belong to another country cluster. In addition, a country's characteristics at the constitutional level may diverge from some at the level of policy areas, especially in countries that underwent the influence

of different powers in history. These countries may have taken their legal or political system from one exemplar, while their education or spatial planning systems originate from different models. Even considering one system, borrowing could be from different sources, for example borrowing from one country for family law and borrowing from another for commercial law. In such a case, a country can be called a hybrid.

To grasp possible incongruencies, our review of the literature examines typologies based on different institutional aspects. Section 2 deals with legal families, section 3 with cultural families. Both sections examine this at the constitutional level: legal systems and value orientations, respectively. In turn, section 4 examines how families of nations have been applied to a specific policy area considering both legal and cultural aspects, namely spatial planning. Section 5 discusses the evidence about the relevance between families of nations and institutional transplantation. Section 6 examines institutional transplantation between families and hybridity.

2. LEGAL FAMILIES

2.1 *Families of nations in private law*

In international comparative law, it is customary to distinguish a number of distinct legal families, especially in private law (Damaska, 1986; Zweigert & Kötz, 1998; David & Jauffret-Spinosi, 1992; Örtücü *et al.*, 1996). Most legal scholars point to the notion of 'legal families' based on origin. France has disseminated its Napoleonic principle of unitarism and the *Code Civil* to a number of neighbouring countries. The same is the case for England, which exported its legal system to large parts of the new world. Most authors on European legal systems end up with families of which the British common law group is by far the most distinct one, for it has no written constitution and applies mostly precedent law using analogous reasoning instead of systematised codes.

Instead of using one single criterion or dimension (origin or otherwise), Zweigert & Kötz (1998) refer to what they call *legal styles*. The comparativist must strive to grasp these *legal styles* and to use distinctive traits as a basis for putting legal systems into groups. The concept of style, which originated in the literary and fine arts, has long been used in other fields. Style in the arts signifies the distinctive element of a work or its unity of form, but many other disciplines use this fertile concept to indicate a congeries of particular features, which the most diverse objects of study may possess (Zweigert & Kötz, 1998, pp. 67-68). It is this concept of style that underlies their classification of legal systems or 'families'. Historical development certainly plays a part in this, but so do a distinctive mode of legal thinking, specific legal institutions, the choice of sources of law and the ideology (political or religious) lying at the heart of legal theory and practice. With the help of this concept of style, they come up with at least seven different families.

The Theory and Practice of Institutional Transplantation

Experiences with the Transfer of Policy Institutions

de Jong, M.; Lalenis, K.; Mamadouh, V.D. (Eds.)

2002, XI, 313 p., Softcover

ISBN: 978-1-4020-1108-5