CHAPTER 11

Explaining Commonality

This chapter discusses the causes of commonality. The discussion addresses the roles played by various factors. As in the previous chapter, the discussion begins with a cautionary note, which concerns the legal relevance and significance of what is commonly regarded as the legacy of 'European common law'. The discussion continues with a distinction between two types of causes of commonality. Some concern the spontaneous developments of national legal systems, either in adhesion to the ‘nature of the things’ or following a foreign model. Others are induced by European integration, including the definition of general principles, legal harmonization, and institutional isomorphism.

1 The Legacy of *ius commune*: A Qualified View

As observed earlier, previous studies concerning the common core took history into account. At the beginning of his innovative research, Schlesinger affirmed that his hypothesis – that is, between legal systems there were not only differences but also 'shared and connecting elements' that could be formulated 'in normative terms' – gained plausibility from historical studies. There were two sides to the same coin. During the seven centuries that elapsed between the emergence of the first scholarly works and the codification of private law in most civil law countries, there had been various waves of migration and the reception of legal ideas and institutions. Accordingly, legal comparison had been characterized by what Schlesinger called an ‘integrative’ approach; that is, one ‘placing the main accents on similarities’, as opposed to the following period characterized by contractive comparison, during which the emphasis was on differences.

Subsequently, as European integration has advanced, a distinction has emerged between two possible uses of historical studies. The first is to look at history as confirming the plausibility of the working hypothesis. So long as there has been a long period in which the differentiation of numerous legal orders coexisted with the existence of some shared legal formants, in particular

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613 Above, Chapter 10, § 1.
judicial decisions and the works of learned jurists, then it is not unreasonable to conjecture that similar circumstances could occur again, though under a different guise. The second way is to argue that a new *ius commune* is emerging, similarly to that which existed for many centuries. While the first statement is by no means unreasonable, the second one must at least be qualified in more than one way.

Firstly, and obviously, there are some analogies between the current time and the long period of *ius commune*, especially from the viewpoint of the relationships between legal orders, which affected not only continental Europe, but England too. The phrase ‘European common law’ has an appeal for many lawyers. However, historians of law have repeatedly and convincingly pointed out the institutional diversity between the two historical periods. Three distinctive traits, in particular, have been highlighted: the existence of the States, with their panoply of legal sources, the incomparably greater role of legislation, and their persistent monopoly on the legitimate use of force, though what is ‘legitimate’ now also reflects common principles. Our factual analysis has confirmed this, with regard to police powers, which belongs only to national authorities, though they must exercise such powers in conformity with the obligations stemming from membership of regional organizations.

Secondly, a specification is needed with regard to a recurring theme: whether and to what extent national legal systems share a common basis or substratum in Roman law. The language in which this opinion is expressed differs. Some writers have spoken of the direct influence of Roman law on modern public law. Others have held that Roman law has been no more than a source of inspiration for administrative law. Both opinions will be briefly addressed here.

Lawyers who have evinced an interest in Roman law have not been motivated by purely historical interest. They have sought to draw upon this great tradition to determine the direction which modern public law should pursue. The objective has been both descriptive and prescriptive. In descriptive terms, many have observed that Roman law provides a vast arsenal of both legal concepts, such as *imperium* and right, as well as the distinction between public law and private law. In prescriptive terms, it has been argued that Roman law developed a concept of respect for the human person, which is preferable to others. Interestingly, different writers such as American historian of law

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615 Gorla and Moccia (n 595) 144. See also HE Yntema, ‘Roman Law and its Influence on Western Civilization’ (1949) 835 Cornell L. Rev 77 (for the remark that even in the area of Anglo-American common law ‘the Roman conceptions had had pervasive ... influence’).


617 Above, Chapter 8, § 5.
McIlwain and German lawyer and political scientist Schmitt have been two of the principal advocates of this prescriptive view. McIlwain criticized the long-standing strand in Anglo-American legal thinking whereby Roman law, from the political perspective, was an instrument of absolutism. He observed that Bracton and other writers had approved of the Roman law doctrine according to which all law ‘is the common engagement of the republic’.\(^6\) He added that it was not fortuitous that Roman law was repudiated by Nazi Germany.\(^6\) After WWII, Schmitt argued that it was from Roman law that sprang ideas of justice and due process, a minimum requirement of legal procedure without which there is no law at all.\(^6\) Similar themes were said to be identifiable in modern public law.\(^6\)

Hauriou reached a different conclusion. He acknowledged the importance of the Roman conception of public power, which could not simply be based on force but also had to be legitimate.\(^6\) However, he argued that Roman political authorities developed a vast administrative regime without being subject to justice themselves. It was only with the development of modern public law that the executive had become subject to justice. This was, for Hauriou, the most salient manifestation of the ‘soumission de l’Etat au droit’, a concept akin to the rule of law.\(^6\) Writing in the same years, Cammeo, an Italian administrative lawyer, acknowledged the importance of Roman law in laying the foundations of ‘juridical thought’ but circumscribed it because ‘many influences besides that of Roman law’ had acted during the previous centuries.\(^6\) On the one hand, the growth of administrative law has owed so much to recent technological developments, such as the postal service and railways, that it could hardly have any connection with Roman law. On the other hand, he argued that the connection of Roman law with those of several countries had been ‘broken at many points by the French Revolution’. On a more overtly prescriptive tone, he

\(^{618}\) CH McIlwain, ‘Our Heritage from the Law of Rome’ (1941) 19 Foreign Affairs 605.
\(^{619}\) id, 597.
\(^{621}\) See also F Wieacker, ‘Foundations of European Legal Culture’ (1990) 1 AJCL 1 (same remark).
\(^{622}\) M Hauriou, *Principes de droit public* (Dalloz 1910; 2010) 331.
\(^{623}\) id, 333. See, however, N Cornu-Thénard, ‘Le modèle romain du “corps du droit administrative” dans la pensée de Maurice Hauriou’ (2015) 41, 209, at 222 (arguing that drew on Roman law to build his theory of administrative decisions’ executory nature).
asserted that administrative law entails an attachment to three central commitments, namely the ‘new ideas of liberty, equality, and free competition’.\footnote{id, 650.} Several decades later, drawing extensively on Tocqueville, Spanish public lawyer Garcia de Enterria took this further. He argued that the French Revolution had ushered in a new language of rights based on equality.\footnote{Garcia de Enterria, La formación del Derecho Público europeo tras la Revolución Francesa (n 41) 58 and 80.} It was the same driving force that Tocqueville had noticed in the US in the early 1830’s.\footnote{Tocqueville, De la démocratie en Amérique (n 13) 57 (pointing out that equality was the most striking feature of the US).} Such a change had a profound influence on public law. Not only had the whole of society been redefined in terms of ‘nation’, but the relationship between the State and individuals had changed as well.

In a society that is often sharply divided between different visions of the good, and in a legal landscape characterized by a growing variety of individual and collective interests, national laws have recourse to administrative procedure in order to reach decisions and define rules that are both sound and acceptable. The fact that this is increasingly regarded as an instrument of modern government within European laws and that it is subject to principles that are largely similar, if not the same, can hardly be explained by emphasizing the legacy of the past. In fact, it largely depends on other causes, including the individual choices made by national policymakers and the consequences that follow from membership of regional legal orders.

2 The ‘Nature of Things’

In the previous chapters, the ‘nature of things’ has been mentioned more than once. The thematic structure of the argument based on this must now be explained. Two interconnected claims can be delineated. The primary theme is consonant with an old and prestigious school of thought that goes back to the science of legislation, associated with thinkers such as Montesquieu and Smith. The secondary theme is that, with the growth of government caused, among other things, by technological progress, the laws and institutions of modern societies are increasingly similar. Both will be addressed in this section.

As observed earlier, Montesquieu’s approach was innovative because it deviated not only from blind respect for tradition but also from the ancient school of natural law. The fundamental criterion he set out for his enterprise was that
of the ‘nature of things’. In his thought this concept had a twofold dimension, descriptive and prescriptive. When applied to a certain legal institution or norm, the concept of the nature of things considered its essence. But there was also a prescriptive dimension, when a certain institution or norm was said to correspond to the nature of things, especially in civilized nations, as Montesquieu observed of the right to be heard in criminal proceedings. Subsequently, when the idea of progress was increasingly emphasized, laws, customs and institutions were seen in a sequential manner, in the sense that they passed through various stages before reaching civilization, as Smith and others argued. When this way of thinking was extended, it led to the assumption that, because a certain institution or norm was in the nature of things, it could be expected to be shaped similarly in all similar circumstances. Not surprisingly, Smith sought to define an account of the general principles of law and government, though he did not complete this project.

This kind of reasoning became controversial in the following century when the majoritarian view was that the laws reflected, or had to reflect, the spirit of each society. However, it was not abandoned. Writing at the end of the century, Laferrière identified the main issue of administrative law in terms of an appropriate balance between two necessities: achieving the goals set by legislation, and the protection of individual rights. For him, it was axiomatic that the best way to balance such interests was to place jurisdiction over disputes between individuals and the State in the hands of an institution that possessed the technical expertise and experience necessary to ascertain whether discretion had been fairly and appropriately used. Thus, for example, he thought that the creation of an administrative court within the Italian Council of State in 1890 confirmed that, at some stage, public law disputes require a specialized review body.

During the first half of the last century, this way of thinking about public law has become increasingly widespread. With the greater involvement of the State in society and in the economy, and the expansion of its capacity to impinge upon the interests of both individuals and social groups (or to

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628 Montesquieu (n 16) 115.
629 For this distinction, see W Maihofer, ‘Droit naturel et nature des choses’ (1965) 51 Archives for Philosophy of Law and Social Philosophy 233.
630 Montesquieu (n 16) 328. This shows that between Montesquieu and Smith there was a difference of emphasis on progress, but not the diversity asserted by Loughlin (n 23) 5.
631 See the last section of A Smith, The Theory of Moral Sentiments (1759), ed by EG West (Liberty Fund 1969) 535.
632 Laferrière (n 100) 15.
interfere with them, according to critics), for instance through licensing and the disbursal of public funds, a growing demand for the applicability of the rule of law and principles of good governance has emerged. As a result, public lawyers have held that the similarity of the problems facing modern administrations implies that the solutions, too, will probably be very similar, if not the same. In the 1950s, Lawson, a British professor of comparative law argued that ‘in the field of administrative law all civilized countries have much the same problems and much the same desire for their proper solution’.633 Few years later, Rivero called this ‘parallelism of solutions’.634

A further stimulus for the development of functionalist thinking about public administration and administrative law came from European integration. The impact of both EU law and that of the Council of Europe will be discussed at a later stage in this chapter; meanwhile, it can be observed that the gradual transfer of functions and powers from national to common institutions stimulated new thinking about how the various legal systems dealt with the problems that emerged. From the observation that all the six founding States had administrative bodies that exercised authoritative powers under the control of the courts, one could reasonably conclude that administrative powers and judicial remedies were the ‘natural’ features of modern government. Thus, the Schuman Plan envisaged that both had to be reproduced at Community level.635

There are, however, some difficulties with this way of thinking about the fundamental unity of public law. They can be briefly summarized as follows. There is a risk of assuming that the process of refinement of legal institutions can be regarded as necessarily leading in one direction, while history is replete with differences and failures.636 There is a risk of taking for granted that certain principles can be regarded as optimal for every legal system, regardless of history and institutional context. For example, the gist of Laferrière’s argument – ie, that judicial specialization has several advantages – is confirmed.

633 FH Lawson, ‘Review of C.H. Hamson, Executive Discretion and Judicial Control and B. Schwartz, French Administrative Law in the Common-Law World’ (1955) 7 Stanford L Rev 159. See also Schlesinger, ‘The Common Core of Legal Systems: An Emerging Object of Comparative Study’ (n 548) 65 (for the remark that decision-makers, though ‘widely separated by time or space, more often than not would respond in a similar way’).
634 Rivero, Cours de droit administratif comparé (n 71) 15 (noting the ‘similitude des problèmes administratifs modernes, largement commandée par des facteurs techniques identiques de pays à pays’).
635 Supra, Chapter 3, § 7.
by the developments of national systems of administrative justice. However, specialization can, and does, take more than one form, including the establishment of special panels within courts endowed with general jurisdiction and the creation of administrative courts. Moreover, the latter may be granted advisory functions, as in the case of France, Italy, and other nations, but not in others, such as Austria and Germany. Similarly, administrative procedure legislation has been adopted within most European legal orders, but not in all. The nature of things can therefore be a concurring cause of commonality, but neither the only nor the main one. Another kind of relationship between administrative systems will be discussed in the next section; here, one of them can be regarded not only as an ideal-type in the Weberian sense but also as a prototype due to the influence it exerts over others.

3 Legal Transplants: Authority, Prestige, and Quality

This theme will be addressed in two ways, one of which is general because it concerns legal transplants, while the other focuses on the borrowings and exchanges examined in the previous parts of this essay.

Rivero can be said to have been a forerunner. After noting in previous studies that public law had been replete with exchanges across national boundaries during the nineteenth century,\(^{637}\) in the early 1970s he examined these phenomena more systematically in the field of administrative and constitutional law. He observed that a State, especially in a period of rapid political or social transformation, essentially has two options. The first is to create its legal structures and processes from nothing. The second is to copy, and if necessary to adjust, those of another State. He argued that the latter option was empirically prevalent. He brought this argument to a further point by asserting that the entire history of constitutions, apart from a few prototypes, was studied with borrowings and transpositions.\(^{639}\) He made more than a mere hint at the metaphor of the transplant, drawn from surgery. Both the phenomena and the terminology (prototypes and transplants) were thus well identified, though not all subsequent academic works have shown adequate knowledge.

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\(^{637}\) J Rivero, ‘Maurice Hauriou et le droit administratif’ (1968) in Pages de doctrine (LGDJ 1980) 34.


\(^{639}\) id, 459.
of this fundamental contribution to the understanding of the real forces that lead to commonality.

Few years later, Watson published his seminal work on legal transplants, reaching the same conclusion from the viewpoint of private law. He argued that if we pay attention to the development of law over a long period of time and in several societies, it becomes evident that ‘the transplanting of individual rules or of a large part of a legal system is extremely common’, the reception of Roman law in Germany and the spread of civil codes based on the Code civil des Français being only some of the most notable examples. Turning from description to explanation, he argued that ‘transplanting is in fact the most fertile source of development’ of legal systems. There is more than one reason why this is so. Transplants provide reformers with solutions that have the advantage of being ‘socially easy’. This is the case, in particular, when the receiving society is less advanced than the exporting one. It is also the case when two societies are equally developed, but in one of them, many are dissatisfied with the ambiguities and gaps that beset the legal system, and reformers can point out that a certain legal mechanism has the further advantage of having been successfully tested elsewhere. From these two reflections, it follows that legal transplants rest on a variety of rationales, including authority (in the transplants that are said to have a divine origin), prestige, and intrinsic quality.

Legal transplants can be better understood thanks to these studies. They can be either voluntary or coerced. Both private and constitutional law provide examples of the use of external coercion, such as the imposition of the French Civil Code on Italy after 1805 and the US imposition of the Japanese

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640 Watson (n 19). There has been much discussion about Watson’s theory, with a distinction depending on whether the transferability of legal institutions and norms is either accepted albeit in a relative manner, or excluded in general terms: for the first position, see O Kahn-Freund, ‘On Uses and Misuses of Comparative Law’ (1974) 37 Modern L Rev 1 and E Stein, ‘Uses, Misuses – and Nonuses of Comparative Law’ (1977) 72 Northwestern Univ School of L 198; for the other, see P Legrand, ‘The Impossibility of Legal Transplants’ (1997) 4 Maastricht J Eur & Comp L 111.

641 Watson (n 19) 95.

642 id, 96.

643 id, 97.

644 id, 88.

645 id, 89 and 100.

646 id, 99.

Constitution of 1946, respectively. Administrative law does not lack cases of external forces exerting coercion, though not necessarily with a view to imposing foreign institutions and norms but to weakening existing institutions or even suppressing them. Thus, for example, administrative courts were abolished in Hungary when it fell under Soviet rule after 1945. Conversely, two main events that have characterized administrative law in the last couple of centuries are characterized by both prestige and quality: the spread of the French model of administrative justice during the second half of the nineteenth century and that of the Austrian model of administrative procedure legislation after 1925.

Though there is variety of opinion about the remote origins of national systems of administrative justice, our analysis has traced the diffusion of the English model in both Belgium in 1831 and Italy in 1865. Subsequently, the French prototype was borrowed and adapted to different institutional frameworks such as those of the German states, the Habsburg Empire, and Italy in 1980. Laferrière observed that new Italian legislation followed the French model and quoted the parliamentary report according to which the reform served ‘to give a judge to matters which did not have one’. He also noted that Spain, which had abolished administrative courts in 1868, reversed the decision in 1875. His analysis then turned from describing legal change to explaining it. Laferrière thus quoted the opinion of a foreign observer, Goodnow, for whom the jurisdiction of French administrative courts ensured broader protection for citizens than the system in the US. When Goodnow reviewed Laferrière’s treatise, he noted the ‘great influence’ exerted by the French model and found two reasons for this: the ‘wider knowledge of the real needs of the administration’ and the ‘most effective remedy against illegal administrative action’. He thus emphasized the quality of the French system of

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648 For further analysis, see HS Quigley, ‘Revising the Japanese Constitution’ (1959) 38 Foreign Affairs 140 (for a critical assessment of the ‘foreign imposition not wholly suited to a people of very different legal and social tradition’, such as that of Japan). But see also J Williams, ‘Making the Japanese Constitution: a Further Look’ (1965) 59 Am Pol Sc Rev 665 (for whom more recent studies have brought additional information showing that the Japanese side supported innovations).


650 Laferrière (n 100) V.

651 id, ix. The citation was taken from Goodnow, ‘The Executive and the Courts’ (n 134) 557. See, however, F Melleray, ‘Les trois ages du droit administratif comparé et comment l’argument de droit comparé a changé de sens en droit administratif français’ in F Melleray (ed), L’argument de droit comparé en droit administratif français (Bruylant 2007) 17 (for the remark that Laferrière recognized the importance of context).
judicial review. Other external observers have also pointed out the prestige and authority that the Conseil d'État has acquired over the years, as the ‘bulwark of liberty and tradition’. It is precisely for this reason that it is traditionally regarded as the maker of a model of administrative justice from which all other legal systems of Continental Europe have drawn. In this sense and within these limits some writers have suggested that French law is the common source of European public law. In a similar vein, Croce, a philosopher well versed in legal institutions wrote that:

When the Napoleonic adventure was at an end ... among all the peoples hopes were flaming up and demands were being made for independence and liberty ... In Germany, in Italy, in Poland, in Belgium ... and among other peoples, there were longings for many things: for juridical guarantees; for participation in administration and government, by means of new or revised representative systems. Since the historical antecedents and existing conditions, the spirits and customs of the various nations were diverse, these demands differed in the several countries in question, as to order of appearance, as to magnitude, as to details and as to their general tone.

French writers have not disdained the view that emphasizes the prestige of their institutions. However, they have shown awareness of the fact that it is precisely the success of the French model of administrative justice that, among other things, has long prevented any serious step in the direction of adopting administrative procedure legislation. In other words, there has been an all too evident bias in favor of the judicial process rather than the regulation of administrative procedure. This partly explains why the leadership in innovation was taken by Austria and Spain. These cases

652 FJ Goodnow, ‘Review of Laferrière, Traité de la jurisdiction administrative et des recours contentieux’ (1896) 1 Pol Sc Quart 352.
655 A Salandra, La giustizia amministrativa nei governi liberi (con speciale riguardo al vigente diritto italiano) (Unione Tipografico-Editrice 1904) 146.
658 JB Auby, ‘Introduction’ in Melleray (n 651) 9.
of diffusion must be distinguished, because the former has one single exporter and several receivers while the latter is characterized by the existence of both direct and indirect transplants. However, they also have two shared elements concerning the rationale of transplants and the conditions of transferability. The rationale of both transplants has been the prevalent opinion among the receiving legal systems, that the general legislation on administrative procedure was a high-quality product, able to bring significant advancement. From the viewpoint of transferability, the factors that seem to have played a role are cultural affinity and the traditional links between the legal systems involved, rather than geographical or social factors. The continuity of such legislation, notwithstanding the changes in the political systems, confirms the adaptation of the receiving legal systems. As other clusters emerged, including the Scandinavian legal systems, several countries have set a process of approximation of national laws in motion which has greatly reduced the environmental obstacles to legal transplants in other countries, such as Italy, Greece, and the Netherlands and, after 1989, the Baltic countries. In brief, shared beliefs and ideas about administrative procedure have paved the way for legal assimilation, as distinct from harmonization within the EU.

4 General Principles

Parallel developments and legal transplants are driving forces that affect commonality and diversity among national legal systems without any stimulus from regional organizations. However, they are affected by the principles defined by such organizations. These principles are important in themselves because they characterize the legal landscape, especially after 1945. Moreover, only in very limited areas (for example, public procurement, the recognition of professional qualifications, and procedural requirements for the protection of the environment) does the harmonization of laws replace national law and become the new legal framework, usually based on a comparative study of the systems to be harmonized and the choice of a standard. In the great majority of cases, national laws will remain unmodified, but will be subject to common general principles.

Our focus on general principles of law deserves further discussion. While less recent doctrines either ruled out that general principles could

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659 See Stein, Legal Evolution. The Story of an Idea (n 571) 199 (for the remark that, of the various factors indicated by Montesquieu, those of a political nature, such as the nature of government, seem to prevail over other factors).
be included among legal norms or ascribed them a limited function, namely filling gaps when the law was obscure or absent, there is an increasing awareness that they are foundational norms. Unlike their international predecessor, the International Court of Justice, neither the European Court of Justice nor the European Court of Human Rights have an express legal basis referring to the use of general principles in the treaties. However, they have found grounds to define general principles. The former has referred to its mission to ensure that the law is respected in the interpretation and implementation of the treaties, as well as its duty to ensure the observance of any rule of law. The latter has systematically interpreted the ECHR, in particular, in order to refine the principle of proportionality. Both European courts have thus expressed their intent to apply general principles when relevant to a dispute. However, there is no codified statement of the content of the general principles, and no authoritative prescribed method for identifying and applying them.

Historically, as indicated earlier, the most important principles materialized in national judicial decisions. In some cases, principles had a meagre legislative basis. In other cases, they filled gaps existing in legislation, the emblematic case being the development of the general principles by the French Conseil d’État. In still other cases, judges applied general principles as inherent elements of their legal systems. Thus, for example, the individual’s right to be heard before an administrative authority takes a decision adversely affecting his interest has been regarded by both the Austrian and Italian administrative courts as a requirement imposed by the nature of things. It is precisely this judicial work that explains why most general principles are unwritten constructs, gradually institutionalized as case law, even though subsequently they have been referred to either by constitutions or by legislation. It is no exaggeration to say that much European public law has been constituted by the construction of general principles.

Taken as a whole, these general principles show what Rivero called parallel development. When judges identify and apply a new general principle to resolve a dispute, the law they make, it is asserted, already exists as a matter of law, to the extent that other judges in neighboring legal systems have developed the same principle in ways that have made it both normal and legitimate for use by all judges. Thus, for example, an Italian administrative court has held that the necessity to annul or withdraw unlawful acts or measures taken by public authorities must be regarded in the light of the settled jurisprudence of German administrative courts. Not surprisingly, those who worry about the destabilizing effects of judicial lawmaking, and who believe that judges can

660 Tribunale amministrativo regionale of Trento, decision No 325 of 2009.
effectively resolve disputes without becoming lawmakers, will find no comfort in jurisprudence that justifies the emergence of new law with reference to prior episodes of judicial lawmaking undertaken elsewhere.

The existence of general principles shared by a plurality of legal orders is not only significant from a factual perspective. It also entails normative consequences. In this respect, a distinction must be made between two ways in which general principles are individuated. First, legal assimilation is enhanced by the standards defined by the Council of Europe. Although it has no legislative authority, the recommendations adopted by its Committee of Ministers draw inspiration from the laws of the member States and are often regarded as indicative of best practices. Among these recommendations, three should at least be mentioned. The first is the recommendation of 1980 concerning the exercise of discretionary powers by administrative authorities, which, among other things, requires them to respect the right to be heard in adjudicative procedures. The second is the Recommendation of 1987 regarding administrative procedures affecting a large number of persons, which defines principles which all member States are required to respect, including the participation of persons claiming to have either an individual or collective interest that is potentially affected by administrative action. A more recent recommendation on good administration includes the principles according to which public authorities must act within a reasonable time limit and must provide individuals with an appropriate opportunity to participate in the procedures affecting them. These standards of good administrative conduct promote the respect of procedural values in the interpretation and application of the principles that legislators developed prior to the ECHR, or subsequently. They can be, and increasingly are, considered by the courts, which read legislation as far as possible to be compliant with them.

Secondly, when the courts regard a certain norm as a general principle of law, important consequences stem from it. On the one hand, general principles express values essential to modern legal orders. In this respect, they are relevant from an axiological perspective. It is in this sense that Rivero, among others, argued that the founders of the ECHR shared a set of fundamental values, which provided the repository of principles against which legal control of

661 Recommendation No R (80) of 11 March 1980.
664 P Birkinshaw, European Public Law (Wolters Kluwer 2014) 289 (noting the influence of the Council of Europe on the substantive and procedural laws of its members); Stirn, (n 81), 45.
government should be measured, as far as the protection of the human person is concerned. On the other hand, general principles serve to render justice, especially in hard cases. Thus, failure to respect procedural guarantees in the exercise of administrative powers is regarded by the European Court of Human Rights as incompatible with Article 6 ECHR. Moreover, the proportionality principle provides an analytical procedure for reconciling opposed values and interests or to resolve conflict between two sets of norms. And virtually all general principles can be deployed to adjust the law dynamically in the face of changing circumstances, as well as to ensure coherence.

General principles bind national authorities when they act within the scope of the treaties, regardless of whether such principles exist within the domestic legal order. This is a consequence of the existence of a duty for all the organs of each State to obey the law. It follows that they must apply precepts of, for example, legal certainty, protection of legitimate expectations, and due process. National courts and other institutions, including those with advisory functions and higher audit institutions, ensure this duty is respected. The other consequence is that legal assimilation is greater than before regional legal orders were established.

5 Legal Harmonization

While general principles, defined either judicially or in recommendations, have a broad scope of application, legal harmonization is a product of EU law in particular areas. It differs from unification of the law, as it serves to coordinate national laws in order to remove obstacles to the Common Market. It is the product of a twofold political choice. There is, first, the choice agreed by the drafters of the treaties to entrust common institutions with the power to adopt norms aiming at harmonizing national legal systems. Then, there is

665 Rivero, ‘Vers un droit commun européen: nouvelles perspectives en droit administratif’ (n 81) 389.
667 For further discussion about the ECHR, see A Stone Sweet and C Ryan, A Cosmopolitan Legal Order (Oxford UP) 155 (arguing that the Convention goes well ‘beyond rights minimalism’).
668 See E Stein, ‘Harmonization of European Company Laws’ (1972) 37 Law & Contemp Probl 318, at 324 (distinguishing harmonization from the unification pursued by the Nordic Council).
the decision to adopt such norms. Both aspects deserve attention and can be examined in the light of the Treaty of Rome.

The aim of integration was obviously of far wider scope than harmonization, but the latter, too, had a broad scope of application, as it concerned the Common Market. It was precisely for this reason that different strategies were available to obtain economic integration. In abstract terms, more than one option was available. One option was to keep national regulatory autonomy, but to exercise it in respect of the principle of non-discrimination. As a result, producers would have had to adapt their goods to the requirements set by each State. Another option was the multilateral enactment of identically structured and worded statutes by the member States. There was still another option: the adoption of a regulation or directive by the institutions of the EC, with the purpose of overcoming national diversity. A choice had, therefore, to be made.

The drafters of the Treaty made their choice, identifying both a problem and the solution. The problem was the existence of ‘such legislative and administrative provisions of the Member States as have a direct incidence on the establishment or functioning of the Common Market’. The problem was not, therefore, national diversity in itself, but its negative impact on the Common Market. Harmonization was the solution, with a slight differentiation between the title of the third chapter of Title I of the Treaty and the text of Article 100. The rubric of Chapter 3, in the French text, referred to the ‘rapprochement des législations’ (similarly, the Italian text used the phrase ‘ravvicinamento delle legislazioni’ and the German one the phrase ‘Angleichung der Rechtsvorschriften’): the approximation of laws. The text of Article 100, however, had a wider reach, because it included both legislative and administrative provisions. Article 100 expressly equated legislative and administrative

669 For further analysis, see G della Cananea, ‘Differentiated Integration in Europe After Brexit: A Legal Analysis’ in I Pernice and AM Guerra Martins (eds), Brexit and the Future of EU Politics. A Constitutional Law Perspective (Nomos 2019) 45 (distinguishing two visions of European integration, one aiming at achieving ‘ever closer union’ and the other favorable to a wider and looser union); A von Bogdandy, ‘European Law Beyond Ever Closer Union Repositioning the Concept, its Thrust and the ECJ’s Comparative Methodology’ (2016) 22 European L J 519 (suggesting that a new idea, the European legal space, should be explored, rather than the ‘ever closer union’, which is characterized by the goal of further integration).

670 Article 100 (1) of the Treaty provided that: ‘The Council, acting by means of a unanimous vote on a proposal of the Commission, shall issue directives for the approximation of such legislative and administrative provisions of the Member States as have a direct incidence on the establishment or functioning of the Common Market’. For further analysis of the various national texts, see JG Polach, ‘Harmonization of Laws in Western Europe’ (1959) 8 AJCL 153.
provisions. For both, what mattered was whether they prevented the good functioning of the Common Market, in which case, national diversity had to be overcome.

The implementation of this norm has, however, proved to be difficult. Before 1978, some harmonizing directives were adopted, but they entailed significant negotiation costs, as it implied the transfer of sovereignty from the national to the supranational level and met the opposition by special national interest groups. The difficulties that emerged in reaching political agreements within the Council of ministers explain why the Commission readily endorsed the alternative solution envisaged by the ECJ in its Cassis de DiJon ruling; that is, mutual recognition of national legal rules. Many commentators have agreed that the new strategy was preferable to the old ones, on the grounds that regulatory powers remained in the hands of national authorities, especially with regard to the marketization of goods. Others, however, have observed that there is another, horizontal, type of transfer of sovereignty, distinct from the vertical type associated with harmonization. Moreover, with regard to services, the EU has adopted several directives. Some of them, eg, the directives that liberalize the telecommunications, electricity, and gas markets, define the general principles which national regulatory authorities must apply. Included among these principles are those of non-discrimination, transparency and public consultation. Since the early 1970s, other directives, especially those concerning public procurements, lay down the general principles of open competition and transparency. Throughout the years, these directives have also included increasingly detailed provisions requiring contracting authorities to respect certain publicity requirements, as well as to abide by certain procedures in the choice of private contractors. The shared legal framework has thus become increasingly similar to a sort of code, thus reducing room for national regulatory autonomy.

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671 W Feld, ‘Legal Dimensions of British Entry into the European Community’ (1972) 37 Law & Cont Probl 247, at 257 (referring to the directive aiming at creating an EC company law).
672 ECJ, Case 120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein.
673 P Craig and G de Burca, EU Law: Text, Cases, and Materials (5th edn, OUP 2011) 596.
674 See, for example, the EU directive n. 2002/21 on a shared regulatory framework for electronic communications networks and services, in particular Articles 6 and 12 (regulating consultation and transparency mechanisms and establishing that during consultation ‘all interested parties must be given an opportunity to express their views’).
675 EC Directive n. 2004/18 (Public Sector Directive) for the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.
The distinctive trait of harmonization consists, therefore, in the fact that national laws retain their distinctiveness, but the main differences are either attenuated or eliminated so that the effects that such laws produce are roughly the same.\textsuperscript{677} Moreover, there are various instances where EU law has a ‘spill-over’ effect for the efficacious resolution of similar problems of a domestic character,\textsuperscript{678} an effect that is coherent with the principle of equality, which is established either by national constitutions or by the courts.

It can thus be noted by way of conclusion that the relationship between national laws and the law of the two regional organizations has a twofold dimension. On the one hand, Rivero’s remark that the most frequent way to shape new institutions is to borrow from others is confirmed, in the sense that both European courts have drawn inspiration from national administrative laws. On the other hand, the last seven decades have ‘had the effect of bringing the public law systems of the differing European countries closer together’ and has increased the awareness of the mutual dependence of its various component parts.\textsuperscript{679} It is for this reason that a further aspect deserves adequate attention, namely, the adjustment of those components to the perceived necessities, which will be examined in the next section.

6 Institutional Isomorphism

There is still another factor of commonality which bears some analogies with others; that is, institutional isomorphism. As a first step, we clarify the meaning of this expression. Some of its manifestations in the field of administrative law will then be considered.

The term ‘isomorphism’ is used both in mathematics and in social sciences. In mathematics it designates two or more structures of the same type and having the same properties (isomorphism is, in effect, derived from the Greek concepts of equal form or shape). As a consequence, they cannot be distinguished from the viewpoint of the structure alone, while there may be additional elements. The social sciences have built on the concept of isomorphism, especially in the world of organizations, in order to seek to explain

\textsuperscript{677} D Thompson, ‘Harmonization of Laws’ (1965) 3 J Common Market St 302, at 304.
\textsuperscript{678} Leyland and Anthony (n 27) 59.
\textsuperscript{679} Craig, \textit{Administrative Law} (n 23) 324. Fromont (n 4) 3 (same remark).
homogeneity among organizational structures and practices. The starting point is the observation that in their initial stages, various social environments ‘display considerable diversity in approach and form’, but subsequently, ‘once the field becomes well established, ... there is an inexorable push towards homogenization’. Three more specific features of institutional isomorphism are then identified. The first is the temporal dimension, which makes it possible to consider structuring an organizational field as a result of the activities of a set of institutions. The second is that, especially in well-organized networks, there is a set of requirements or threshold, the respect of which provides legitimacy. The fact that such requirements are normatively established and that there are controls to ensure that commitments are taken seriously (coercive isomorphism) ‘increases the likelihood of their adoption’. However, adjustment is often spontaneous because the various components learn appropriate responses and adjust their conduct accordingly (mimetic isomorphism). As a result, organizations are ‘increasingly homogeneous within given domains’. The third feature, the ‘connectedness’ which ties organizations to one another may be established both horizontally, among such organizations, and vertically, between one placed at the top and all the rest. Thus, for example, there are records of meetings between members of national administrative courts since the first stage of European integration and more recently these courts have created a network for managing regular exchanges of views and experience. Vertical networks exist, instead, between regulatory agencies.

This theory can provide a better understanding of some of the phenomena we identified earlier. It explains why certain changes are necessary to honor legal commitments, such as the due process of law, for instance. Institutional isomorphism also explains the adoption of general legislation on administrative procedure by new entrants to the EU. Whereas in the founding States and

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680 I am grateful to Alec Stone Sweet for drawing my attention to this body of literature.
682 Dimaggio and Powell (n 681) 148–9.
683 id, 150.
684 For example, 1964 saw a meeting of Dutch and Italian administrative judges. Regular meetings are organized in the framework of ACA-Europe, the association of councils of State and supreme administrative courts.
685 Thirty-four jurisdictions are represented within the network, as the judges of EU member States are joined by those of Albania, Montenegro, Serbia, and Turkey, which have observer status, while those of Norway, Switzerland and the United Kingdom are invited as guests.
those that had joined the EC few decades later, the general principles of administrative procedure had been defined and refined by the courts, for those that sought to join the EU at the turn of the century it was easier to define those principles by way of primary legislation. Lastly, institutional isomorphism explains why even the most consolidated and prestigious organizations must adjust their rules and practices from time to time. This is the case of the general rapporteur before the French Conseil d’Etat, when the Strasbourg Court found that the absence of a duty to give reasons for reports was in contrast with the guarantees imposed by Article 6 ECHR.686

7 The Growing Impact of Common Standards

At the end of the preceding chapter, it was observed that a comparative approach that emphasizes only commonality would be, prescriptively, particularly weak in the European context and that an approach emphasizing only diversity would be equally weak. Two arguments support the latter remark.

First, there are not only standards of administrative conduct that are shared by all national legal systems, or by most of them. There are also the standards established by supranational laws. For example, national authorities are required to respect the Charter of Fundamental Rights, of the same legal value as EU treaties. Among the protected rights is the right to good administration, which is recognized and protected by Article 41. This states that ‘every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time’, and goes on to specify that this right includes the right to be heard, access to files, and the duty to give reasons. Even if this is considered a closed list, it can nevertheless be argued that the meaning, for instance, of the right to be heard should be considered in the light of the standards shared by European legal orders, including the right to prior notification and legal assistance. If, on the other hand, the right to good administration is regarded as an open repository of shared standards, it can be interpreted against the background of these standards, thus ensuring procedural safeguards against arbitrariness, unfairness, and favoritism, as well as providing the opportunity for judicial review.

686 ECtHR judgment of 7 June 2001, Kress v France (Application No 39594/98). For further analysis, see J Bell, ‘From ‘Government Commissioner’ to ‘Public Reporter’: A Transformation in French Administrative Court Procedure?’ (2010) 16 Eur Public L 533. See also Fromont (n 4) 4 (for other examples of national rules revised in order to ensure compliance with EU law).
Moreover, there remains the question of the applicability of shared standards in the interpretation of Treaty provisions applicable to national authorities in the discharge of their own functions and powers. Administrative officers and judges are often requested to enforce vague, open-textured provisions. These standards are merely stated, with no further definition. The most obvious example is the due process clause laid down in Article 6 ECHR. As the Court considers Article 6 as a repository of standards of administrative conduct, such as the right to be heard and the duty to give reasons, it can be argued that – logically – it should take into account existing shared standards, for example, when it considers whether the right to be heard implies entitlement to receive legal assistance. Similar remarks can be made concerning the standards of impartiality, openness, and participation as defined in some EU directives.