



**SEMINAR ORGANISED BY THE SUPREME COURT OF SPAIN IN COOPERATION WITH ACA-
EUROPE**

Madrid, 21 November 2022

***Questionnaire
Application of general principles and clauses in the case law of contentious-
administrative courts***

In order to deepen the open dialogue between the high administrative jurisdictions of Europe, this seminar will analyse the application, within the administrative legal system, of different general principles or clauses of law.

Given the variety and large number of existing general principles, an effort has first been made to delimit and select, on the basis of their topicality or potential expansion, a series of general principles which, although underlying most legal systems, nevertheless present differences in the various legal systems in terms of their nature, their recognition in legal norms and, in short, with regard to their functionality, with divergences evidenced in particular by their judicial application.

The seminar offers an eminently practical vision. For this reason, the questionnaire primarily takes judicial experience into consideration, suggesting the following perspectives as lines of analysis:

- (i) General principles of law in the system of sources;
- (ii) Common incorporation of general principles of law: European Union and horizontal dialogue;
- (iii) General principles and fundamental rights;
- (iv) General principles in certain sector-specific areas of public law, selecting, in this regard, some of these principles to determine their application and projection in fields such as *administrative organisation and procedure / administrative sanctions / public subsidies or grants / contracting by public bodies / town planning and environment / taxation*.

In short, the aim of the seminar is to find out whether there are convergences in the guidelines of the high jurisdictions of the Member States, by determining the degree of influence of European Union law (e.g. through Directive 2006/123/EC on services in the internal market, or through incorporation of the principle of good administration, recognised in Article 41 of the Charter of Fundamental Rights) in its application, without



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losing sight of the effects of the horizontal dialogue between the high national jurisdictions, which we hope the seminar can continue to stimulate.

I. – GENERAL PRINCIPLES OF LAW IN THE SYSTEM OF SOURCES

1º) What place and function do general principles of law have in the system of sources of your country's legal system?

- They are applied where there are gaps in the law
- They may be applied directly, even to the extent of displacing the initially applicable written law and prevailing over it.

Explain your answer briefly:

Unlike Spain, our legislation does not specify the place and function of general principles of law. As explained below, most of the central values of administration (legality, fundamental rights, equality, transparency, impartiality, accountability, good governance, judicial protection) can be derived from the Constitution. Most general principles have been incorporated into law and can be invoked directly.

2º) Can it be said that the most relevant general principles of law in your culture and legal tradition have been positivised, i.e. enshrined with legal status in your country's judicial system?

- Yes
- Yes, the most relevant ones (please indicate briefly the most notable of these)
- No

3º) In the judicial practice of Public Law, are general principles of law frequently invoked and applied as a basis for decisions?

- They are frequently invoked and applied and are also relevant and decisive in the settlement of disputes.
- They are frequently invoked and applied, although generally in a complementary manner, to reinforce challenging arguments based primarily on the interpretation and application of written rules.
- They are not frequently invoked and applied as a basis for decisions.

Explain your answer briefly:



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The majority of the most relevant general principles of law are enshrined in legislation, so the citation of such principles is usually done through direct invocation of the written rules.

4º) If you have answered yes to the previous question, can it be said that the invocation and application of general principles of law is done in a general and transverse way, in all areas or matters of Public Law?

- Yes
- Especially or particularly in certain matters, or in certain sector-specific areas (in this case, explain your answer briefly)

5º) In your country's legal system, are there general principles specific to Administrative Law, independent of other general principles of law?

- There are no general principles specific to Administrative Law
- There are principles specific to Administrative Law that may be applied in conjunction with other general principles
- There are principles specific to Administrative Law that exclude and displace the application of the other general principles

Explain your answer briefly:

According to section 21 of the Constitution the guarantees of good government shall be laid down by an Act.

The legal principles of administration are enshrined in article 6 of the Administrative Procedure Act according to which an authority shall treat equally those to whom it is providing services in administrative matters and shall exercise its competence only for purposes that are acceptable under the law. The acts of an authority shall be impartial and proportionate to the objectives sought. These acts shall protect expectations that are legitimate under the legal order.

II. – COMMON INCORPORATION OF GENERAL PRINCIPLES OF LAW: EUROPEAN UNION AND HORIZONTAL DIALOGUE

6º) Has your country's administrative legal system patently incorporated the general principles of European Union law?

- Yes, in general



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- No special or specific incorporation has been necessary, because in general these principles were already recognised and enshrined in the country's legislation and practice.

Explain your answer briefly (this question mainly concerns the work of the legislator, i.e. the “legislative system”).

7^o) Is it common in your country’s judicial practice for the specific general principles of European Union law to be invoked and taken into account in areas where there is no regulatory harmonisation?

- Yes, for certain matters
- No, not generally

Explain your answer briefly (this question mainly concerns the work of the judiciary, i.e. “judicial practice”).

Typically, the general principles as enshrined in national law would be invoked and applied in areas of law which are not harmonised.

8^o) When applying the general principles set out in European Union law, and when it is found that the general European principle applicable to the dispute in question conflicts in some way with national law, has the dispute been resolved through a solution involving the displacement and non-application of the national rule in order to give way to the general European principle?

- Yes
- This solution has been chosen in some cases, while in others different solutions or answers have been used (in this case, explain your answer briefly)

9^o) Is it common in judicial practice for the principle of legitimate expectation to be invoked and taken into account?

- Yes, as a transversal principle
- Yes, but only in certain sector-specific matters and areas harmonised by Union law (please indicate what these are)
- No

Explain your answer briefly.

The principle of legitimate expectation is a central principle of administrative law. As noted above, it is enshrined in section 6 of the Administrative Procedure Act. There are



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also some provisions of law referring specifically to the principle of legitimate expectation, e.g. in tax law.

10^o) Can taking the principle of legitimate expectation into account even result in the annulment of administrative decisions that are contrary to or violate those principles?

- Yes
- No, these principles are applied only in order to provide for compensation or reparation when they are violated in some way by the decisions of the Administration.

Explain your answer briefly.

As noted, the principle of legitimate expectation is enshrined in law, and if an administrative decision is contrary to this principle, it could potentially result in the annulment of such decision.

11^o) Has the “principle of good administration” referred to in Article 41 of the Charter of Fundamental Rights of the European Union been adopted and applied in your country’s judicial practice?

- Yes, as a transversal principle
- Yes, but only in certain sector-specific matters and areas harmonised by Union law (please indicate what these are)
- Not commonly applied

Explain your answer briefly.

The principle of good administration is not usually invoked as such but rather functions as an overarching principle, but like mentioned above, the right to good governance is guaranteed by article 21 of the Constitution, and the various elements of good administration are enshrined in section 6 of the Administrative Procedure Act and in certain other sections of the Administrative Procedure Act (e.g. section 34, right to be heard).

12^o) Can taking the principle of good administration into account even result in the annulment of administrative decisions that are contrary to or violate that principle?

- Yes, in some specific cases.
- This would never be possible because, among other reasons, this principle applies solely as a guideline for conduct within the Administration and cannot be invoked by the citizen.



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- No



Explain your answer briefly.

Not as such, but an administrative decision could be annulled if it violated one or several of the components of the principle of good administration (eg. the right to be heard, or if the administration has neglected to give reasons for a decision).

13^o) Is it common in judicial practice for the principle of necessity and proportionality of administrative measures that limit or restrict access to or the exercise of an economic activity to be invoked and taken into account?

- Yes, this is a positivised principle whose non-observance results in the nullity of the measure or provision of a general nature.
- Yes, in certain matters and to different extents**
- No

Explain your answer briefly.

It is not uncommon for appellants to rely on the principle of necessity and proportionality. For instance, in recent cases concerning restrictions on economic activity due to covid-19, this principle is very often invoked.

14^o) With regard to any of the above principles (legitimate expectation, necessity, proportionality or good administration) or other principles, has your country's Supreme Court taken into consideration the interpretation and manner of application of these principles by other European national high jurisdictions?

- Yes, on some occasions (in this case, explain your answer briefly)
- Never

We are not aware of any concrete cases, but the Finnish SAC takes notice of other European (national) courts' decisions in some cases e.g. in the fields of immigration law and environmental law.

III. – GENERAL PRINCIPLES AND FUNDAMENTAL RIGHTS

15^o) According to Article 6, paragraph 3 of the Treaty on European Union, fundamental rights that result from the constitutional traditions common to the Member States shall constitute general principles of the Union's law. Has your country's Supreme Court identified any of these common constitutional traditions?



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- o Yes, especially on the basis of the case law of the Court of Justice or the European Court of Human Rights
- o Yes, especially on the basis of the case law of the Supreme Courts of other Member States.
- o No such identification has taken place.

16^o) What status and importance does the principle of non-discrimination and gender equality have in your country's judicial practice?

- o It is a principle commonly and generally taken into consideration, across all areas
- o It is a principle that is taken into consideration and applied in certain legal relations and sector-specific areas

Explain your answer briefly.

The principle of non-discrimination is frequently invoked across all sectors. In addition, there is also quite ample case law on the application of the Non-discrimination Act (e.g. a recent decision KHO 2021:189, ECLI:FI:KHO:2021:189, where an airline was found to have neglected to make reasonable accommodations for a disabled passenger as required by section 15 of the Act). Issues of gender equality would perhaps more typically arise as matters of their own. There is a large body of case law on the application of the Act on Equality between Women and Men, which came into force already in 1986.

17^o) In the judicial practice of your country, is the principle of protection of particularly vulnerable groups (e.g. minors, women, people with disabilities) invoked and applied?

- o Yes, in a general, open and transversal manner
- o Yes, for certain groups that are predetermined and identified in the different sector-specific rules (give a significant example)
- o No

Explain your answer briefly.

There are no specific groups designated in legislation as particularly vulnerable, but in several sector-specific acts, certain groups, such as children, the elderly, disabled persons, refugees, victims of trafficking etc are recognized as vulnerable. Finland's international treaty obligations (e.g. the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities) are also invoked and applied.





18º) Do the judicial bodies demand enhanced reasoning in cases where the contested administrative measure or decision (e.g. eviction from housing, granting of nationality) affects these vulnerable groups (e.g. minors, women, people with disabilities) or has an impact on other constitutional values such as protection of the family?

- No special grounds are required in these cases
- Yes, and their absence results in the nullity of the decision

Explain your answer briefly.

No special grounds are required, but that does not mean that decisions would not be particularly carefully reasoned in situations where vulnerable groups are involved.

19º) In your judicial practice, have disputes been raised regarding the issue of the principles of transparency, equality and non-discrimination in relation to decisions based on artificial intelligence or predictive data management systems?

- Yes
- These principles are not frequently invoked, but some examples exist
- No

Explain your answer briefly.

So far, such disputes have not been raised.

There are

IV. – GENERAL PRINCIPLES IN CERTAIN SECTOR-SPECIFIC AREAS OF PUBLIC LAW

IV.1. – ORGANISATION AND ADMINISTRATIVE PROCEDURE

20º) In the administrative organisation, do the principles of decentralisation and subsidiarity apply?

- Yes
- No
- Not generally, but in certain areas or sectors (in this case, explain your answer briefly)





21^o) Are the general principles set out below applicable to the procedure for formulating administrative acts and provisions?

Principle of publicity and transparency

- Yes
- No

Principle of proportionality

- Yes
- No

Principle of impartiality

- Yes
- No

Principle of anti-formalism

- Yes
- No

Principle of gratuitousness

- Yes
- No

Principle of self-correction (executory decision, without the need for judicial assistance).

- Yes
- No

(If you consider it appropriate, please indicate any other general principles of administrative procedure different from the above)

IV.2. – ADMINISTRATIVE SANCTIONS

22^o) Are the general principles of criminal law applied or projected in the area of administrative sanctions law? (Indicate the answer that you consider best reflects your legislation and practice)



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- Yes
- Yes, although with nuances arising from the different natures of criminal offences and administrative offences
- Not in respect of minor, lesser or trivial infractions
- Only in relation to infractions that can be characterised as “criminal” in accordance with the doctrine of the ECHR

Explain your answer briefly.

There is no specific legislation or case law that would state that the general principles of criminal law are applied in administrative sanctions cases. However, most of the below listed principles are also central principles of administrative law and are therefore applied in matters concerning administrative sanctions.

23^o) If you have answered yes to the previous question, could you specify whether or not the following general principles are applied for administrative sanctions, or to what extent?

Principle of presumption of innocence and right not to incriminate oneself or plead guilty:

- Yes
- No
- With nuances (in this case, explain your answer briefly)

The burden of proof in administrative sanctions cases lies generally with the administration. The right not to incriminate oneself can be applied in some situations involving administrative sanctions.

Principles of legality and definition of the constituent elements of the offence:

- Yes
- No
- With nuances (in this case, explain your answer briefly)

The principle of legality applies.

Principle of non-retroactivity of sanctioning provisions:

- Yes
- No
- With nuances (in this case, explain your answer briefly)

Principle of culpability:



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- Yes
- No
- With nuances (in this case, explain your answer briefly)

Principle of proportionality

- Yes
- No
- With nuances (in this case, explain your answer briefly)

Principle of defence and legal assistance:

- Yes
- No
- With nuances (in this case, explain your answer briefly)

Generally, legal aid is available in administrative judicial matters to persons of low means who cannot afford counsel themselves.

Principle of hearing:

- Yes
- No
- With nuances (in this case, explain your answer briefly)

Principle of separation between investigating authority and decision-making authority

- Yes
- No
- With nuances (in this case, explain your answer briefly)

Principle of reasoning of the sanctioning decision

- Yes
- No
- With nuances (in this case, explain your answer briefly)

Principle of time-barring of administrative offences and sanctions

- Yes
- No
- With nuances (in this case, explain your answer briefly)





Principle of judicial protection

- Yes
- No
- With nuances (in this case, explain your answer briefly)

Principle of double instance

- Yes
- No
- With nuances (in this case, explain your answer briefly)

Decisions by administrative courts can be appealed to the Supreme Administrative Court subject to the requirement of leave to appeal.

(If you consider it appropriate, please indicate any other general principles of administrative sanctions law different from the above)

IV.3. – SUBSIDIES AND PUBLIC AID

24^o) Is the principle of proportionality applied in order to modulate the consequences of non-compliance by a beneficiary of public subsidies, aid or resources, or in the area of regulated sectors?

- Yes (in this case, explain briefly in what areas and with what consequences or effects)
- No

The general principle of proportionality is taken into account. However, interpretation of law e.g. linked to the recovery of EU subsidies is rather strict.

(If you consider it appropriate, please indicate any other general principles of subsidies or public aid different from the above)

IV.4. – CONTRACTING BY PUBLIC BODIES

25^o) Is contracting by public bodies governed by different principles from contracting between private individuals and entities?

- Yes. Although based on a common foundation, administrative contracting is governed by different principles from civil or private contracting.



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- There are specific principles applicable to contracting by public bodies as regards the procedure for advertising and selecting contractors and the award of the contract, but the performance, execution and effects of the contract are governed by principles substantially the same as those applicable to private contracting.
- No, public and private contracting are essentially governed by the same rules and principles.

(If you consider it appropriate, please indicate any other general principles of contracting by public bodies different from the above)

IV.5. – TOWN PLANNING AND ENVIRONMENT

26^o) Could you say whether the following principles of environmental law are invoked and applied in your judicial practice?

Precautionary principle

- Yes
- No
- Occasionally, or on a limited basis (in this case, explain your answer briefly)

“Polluter pays” principle

- Yes
- No
- Occasionally, or on a limited basis (in this case, explain your answer briefly)

(If you consider it appropriate, please indicate any other general town planning or environmental principles different from the above)

IV.6. – TAXATION

27^o) In tax matters, are the following principles applied in your legislation and judicial practice?

Principle of legality: Tax liability can be established only by rules with legal status.

- Yes
- No
- With nuances (in this case, explain your answer briefly)



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Principle of economic or contributory capacity

- Yes
- No
- With nuances (in this case, explain your answer briefly)

Principles of equality and generality

- Yes
- No
- With nuances (in this case, explain your answer briefly)

Principle of progressiveness and its limit: non-confiscatory taxation

- Yes
- No
- With nuances (in this case, explain your answer briefly)

(If you consider it appropriate, please indicate any other general principles of tax law different from the above)

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