



**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?

- X 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:

German law is mostly statutory law. Before the promulgation of the Code of Administrative Procedure many questions of administrative law were answered by general principles of law. The existing principles of law were mostly transferred into the Code of Administrative Procedure. So, presently there is only little room for applying general principles of law since these have transformed into statutory law. Yet, a few gaps remain and here, general principles are being applied.

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?

- X 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.
- X They are not frequently invoked and applied as a basis for decisions.

Explain your answer briefly:



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See answer to question 1: Most general principles have been transferred into positive law.

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:

Some general principles of law have to do with the special situation of a citizen facing the public administration. Therefore, these principles are specific to Administrative Law. For example the principle of legitimate expectations, the claim to remedial action upon an illegal action by the public authority are typical to public law. Of course, there are other principles which are applied throughout the legal system, such as venire contra factum proprium, the principle of good faith or volenti non fit iniuria.

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
- 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”).





The European Court of Justice derives the general principles of European Union Law from an analysis of the national law systems. So, it is more or less natural that at least the majority of principles or the major content of these principles was already subject to the national legal order.

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").

General principles of European Union Law are especially invoked where European Union Law is applied, be it directly or indirectly through national legislation serving the implementation of a European Union Directive. In areas which are dominated by national law only, general principles of the European Union are not usually invoked.

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.

This principle also exists in German national law. So, it must be taken into account in merely national cases as well as in cases dominated by European Union Law.



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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?

X 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.

The general principles are one of the sources of European Union Law. Whenever there is a conflict between national law and European Union Law national law may not be applied. Thus, general principles of European Union Law may lead to the non-application of national law.

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?

- x 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 does not exist as such in German national administrative law. Yet, when looking at its contents which are especially laid out in paragraph 2 of Art. 41 one finds the right to be heard, the right of access to one's own files and the right to a reasoned decision. These principles form part of the Code of Administrative Procedure and are thus inherent to the German legal system.

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?

- X 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.
 - No



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Explain your answer briefly.

The principle of good administration mostly concerns the formal legality of an administrative act. Procedural flaws in the administrative procedure will - in German law - only lead to the annulment of a decision in cases of very grave violations.

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?

X 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.

The violation of the principle of proportionality will render an administrative act illegal. In such a case, the administrative court will rescind the administrative act if the plaintiff's rights were violated by it.

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

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?

- Yes, especially on the basis of the case law of the Court of Justice or the European Court of Human Rights





- Yes, especially on the basis of the case law of the Supreme Courts of other Member States.
- No such identification has taken place.

Such an identification may be found in the jurisprudence of the Federal Constitutional Court, less in that of the Supreme Administrative Court.

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

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

Explain your answer briefly.

It is a principle enshrined in the catalogue of fundamental rights in the Constitution. Therefore it is applicable in any case of relevance.

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?

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

Explain your answer briefly.

None of the given answers fit to the situation. Gender Equality is a constitutional principle and fundamental right. The same counts for the protection of minors. The Protection of other vulnerable groups (e.g. people with disabilities) is not subject to a general principle, but to specific statutory law. In addition, the specific situation of vulnerable groups will always be taken into account when weighing their fundamental rights.

18^o) 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?



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

Explain your answer briefly.

Any administrative decision must be reasoned. The extent of reasoning always depends on the peculiarities of the single case.

19^o) 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
- X No

Explain your answer briefly.

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

IV.1. – ORGANISATION AND ADMINISTRATIVE PROCEDURE

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

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

Germany is a Federal State. So, a certain form of decentralization is part of its DNA. Apart from this thought decentralisation and subsidiarity cannot be described as a general legal principle. But both categories exist in the political and administrative culture. It will usually depend on a political discussion and decision making process to see to what extent their application is considered feasible.

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



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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
- It is not clear to me what is meant by this principle.*

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

- Yes
- No
- It is not clear to me what is meant by this principle.*

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

IV.2. – ADMINISTRATIVE SANCTIONS



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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)

- 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.

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?

German Administrative Law does not know administrative sanctions. Administrative law may be enforced by declaring its violation by the individual a crime or a misdemeanour. The following questions are answered as if talking about the law of misdemeanours which come closest to administrative sanctions.

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)

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

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

Principle of non-retroactivity of sanctioning provisions:

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

Principle of culpability:

- Yes



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

Principle of proportionality

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

Principle of defence and legal assistance:

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

Principle of hearing:

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

Principle of separation between investigating authority and decision-making authority

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

Principle of reasoning of the sanctioning decision

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

Principle of time-barring of administrative offences and sanctions

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

Principle of judicial protection

- X 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)

(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

(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.
 - 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)

Principle of economic or contributory capacity

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

Principles of equality and generality

- Yes
- No



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- 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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