



**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 in the event of loopholes/ 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:

According article 12 of preliminary provisions of the Italian civil code if a dispute cannot be settled applying a specific rule, rules concerning similar cases can be considered. Only if a specific rule is not available, general principles can be applied 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:

Although principles of law generally have a subsidiary role in the Italian hierarchy of sources of law, they are often invoked in our judicial practice. They serve not only to reinforce arguments based on written rules, but also as tools to interpretate those rules whenever they are ambiguous or uncertain.



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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:

In the Italian legal system, general principles concerning Administrative Law are specific and included both in the Constitution and in the law. They are even able to prevail over other general principles concerning different matters, as a result of the balancing the Court does deciding a case.

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”).

General principles of impartiality and good administration are enshrined in article 97 of Italian Constitution. Other general principles concerning administrative law are positivized in article 1 of Law 7th August 1990 n. 241, which also recalls general principles of EU law.





7º) 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").

Article 1 of Law n. 241 of 1990, the Italian administrative procedure act, recalls general principles of EU law in the same way as national general principles. This allows the judges to apply such principles - especially proportionality and legitimate expectation - to the whole administrative activity, even in so called non harmonised areas.

8º) 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)

9º) 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.

Principle of legitimate expectation was already known in the Italian judicial practice even before the EU law, because it was provided for by civil rules on good faith and fairness duties. The Italian case law states that public authorities must respect those duties in their relationship with citizens as well as private individuals, even when exercising their powers according to law. Citizens can invoke legitimate expectations if they have been misled by some public behaviour in violation of such duties.





10º) 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.

According to law n. 241 of 1990, cancellation or revocation of an act by the same authority that issued it is subjected to strict conditions. Among them, the legitimate expectations the act might have aroused in subjects must be considered. Otherwise the judge may annul the self-defense measures.

11º) 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.

Article 97 of Italian Constitution already mentioned the principle of good administration. That principle is strictly related to the organization of public offices, but it has been considered a general and transversal principle of administrative activity through the judicial interpretation of the Constitutional Court.

12º) 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.
- No

Explain your answer briefly.

Given its constitutional rank, principle of good administration can act as a parameter of constitutionality. In some cases, it can indirectly lead to the annulment of administrative acts through the application of some principles provided for by article 1 of Law n. 241 of



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1990 (efficacy and effectiveness of administrative action, prohibition to weigh down procedures).

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.

According to article 41 of Italian Constitution, right of economic initiative may be limited for social reasons. Nevertheless, not all the limitations written into law are held as justified on the ground of that provision in judicial practice, in which rules of law are displaced and non-applied or administrative decisions are annulled applying directly the EU principles above mentioned. That happens when judges hold the limitations to economic activity due to merely economic and not social reasons.

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

In some judgments dealing with Covid 19, reference was made to solutions adopted by other Courts.

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



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- Yes, especially on the basis of the case law of the Supreme Courts of other Member States.
- 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?

- 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.

Principles of non-discrimination and gender equality are taken into account by the Italian administrative jurisprudence in specific areas such as career in public administration through competitions or for elective positions. In the latter area, the law has introduced specific provisions to ensure the presence of women in offices in a certain percentage. Such provisions have been repeatedly submitted to the Constitutional Court as suspected to conflict with these principles.

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.

Principle of protection of vulnerable groups comes in relief when the case concerns administrative measures that may affect the rights of people which belongs to them. E.g. in 2010 Council of State annulled a Government decree declaring a state of emergency because of the consistent presence of Rom communities in the outskirts of major Italian cities. Enforcing measures taken by Ministry of Interior, including survey and profiling of Rom people, were annulled as well. Council of State considered the emergency reason not legitimate as discriminatory, because based only on the presence of Rom people.

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



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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.

Except cases in which law establishes special measures of protection for vulnerable groups, no enhanced motivation is required for administrative decisions when they involve people belonging to those groups. Regarding immigration, however, Courts evaluate the absence of guarantees of protection in the applicant's country among the circumstances that are relevant for the judgement, if the applicant belongs to one of vulnerable groups.

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
- No

Explain your answer briefly.

Recourse to electronic technology in the decision making process is still not widespread in Italy. It is used mainly for decisions which are legally devoid of any discretion, because in such cases it is easier to prepare an algorithm that includes the elements to be taken into account. Only in such cases the correct preparation of the algorithm with respect of the principles above mentioned may be relevant for the judgement.

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



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- 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)

- 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.

General principles concerning the administrative sanctions are stated in Law n. 689, 24th November 1981. They are built on the model of criminal law, but with significant differences, e.g. with respect to effects of the law over time and subjective element of the offence.

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)

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
- 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 proportionality is not included among the general principles of administrative sanctions stated in Law n. 689 of 1981. Although it is largely applied in judicial practice in order to ascertain if the penalty level exceeds the seriousness of the sanctioned behaviour, when law gives public authority the power to graduate the penalty.

Principle of defence and legal assistance:

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

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)

The mentioned principle is not included among the general principles of administrative sanctions in Law n. 689 of 1981, but it is applied in judicial practice. E.g. internal organizational measures of the proceeding public authority are sometimes held non-legitimate if they don't respect that principle, especially if the administrative body which decides about the sanction holds an economic interest that can be directly referred to the proceeding authority.

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)

(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)
When someone obtains public aids or resources, the relationship between public and private parties after the financing is held the same as a private relationship by Italian jurisprudence. Every principle of civil law concerning the breach of legal duties must be applied in this field, including proportionality between the offence and consequential sanction. However, if subsidies or aids have an EU origin, resources wrongly received must be totally recovered in any case according to EU law on that matter.
- 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



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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?



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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
- 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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