



**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:

General principles will not displace applicable written law or directly prevail over it, but will be important interpretative factors when interpreting written law. Some principles are positivized in the Constitution, and can by virtue of their Constitutional Rank displace other applicable written law.

2º) Can it be said that the most relevant general principles of law in your culture and legal tradition have been positivized, 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:

As stated in the answer to question 1, general principles of law are important factors when written law provides for alternative interpretations. Most areas of Public Law are



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covered by written legislation to some extent, but many laws in the Public Law domain allude to general principles of law formed by the Courts.

4^o) 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)

5^o) 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 are specific to Administrative Law in the sense that they do not apply in Private Law. E.g. the Legality Principle, stating that any interference of an administrative body towards a physical or legal person requires a basis in (written) law. In the context of Private Law, there is no strict principle requiring a basis in written law for the Courts' decisions. Mostly, the specific principles of Administrative law do not collide with other principles so as to displace the application of the latter.

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

6^o) 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.



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

Norway is not a member of the European Union, but applies relevant principles in the context of the EEA Agreement. The principles that derive from that Agreement are incorporated through the adaptation of the “EEA Act” which states that the Agreement applies as Norwegian law, and that in the event of conflict between an legislative act designed to ensure compliance with EEA Law and other provisions of Norwegian law, the EEA Law compliant rule will prevail. The EEA Agreement has not led to any patent changes in law making procedures or the general principles underlying these.

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”).

As explained in Question 6, Norway is not a member of the European Union. Where there is no regulatory harmonisation, general principles of the EU are generally not invoked or decisive for the Courts.

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)
- No.**

Brief explanation:

The alternative “no” has been added, and selected. In Norway, there is a dualist system approach to international law, which generally excludes direct application of international law to displace a national rule.

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



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- 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.

In general, each party bears the risk and responsibility of their own legal understanding. It can happen that a subordinate body has a different interpretation of a rule than the superior administrative body, in which case the superior body on certain conditions can change decisions made by the subordinate body even if the chance will be to the detriment of the private party (See the Administrative Act (forvaltningsloven) § 35). Likewise, it could happen that the Courts disagree with the legal understanding of an administrative body, in which case the understanding of the Courts will normally be decisive. The private party will in such a case normally not be entitled to compensation for losses incurred by the error made by the administrative body, unless the error was a result of negligence.

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.

The expectations of a private party can normally not dictate the administrative powers. As a consequence, any loss incurred by the private party as a result of their expectations normally will not be compensated. Access to compensation can depend on the basis for the expectation, and also on the circumstances leading to the decision in breach of those expectations.

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.

Much of the general contents of the Principle of Good Administration applies in Norwegian law, but it is not set out as a specific principle or right for the individual to have his or her affairs handled fairly and within a reasonable time. The courts will generally not strike down an administrative decisions on the grounds that it has taken a long time or is unfair – for the latter, the unfairness must either constitute something substantially unreasonable or be based on discrimination without just cause.

It is a positivized principle that administrative bodies shall handle all cases impartially, via general rules disqualifying civil servants and politicians from partaking in decisions where they have certain attachments to the parties or another kind of interest in the case that can harm the public's trust in their impartiality. There is no *general* principle of

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.
- No

Explain your answer briefly.

Especially breaches of the rules of impartiality can lead to the annulment of administrative decisions; this will normally be the case. To some extent breaches of fairness can lead to the annulment of administrative decisions if the decision is discriminatory without just cause, or is otherwise substantially unreasonable or unfair. The threshold for annulment in the latter category is generally high.

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.

There is no general principle of necessity or proportionality of administrative measures in Norwegian law, and not specifically with regards to measures that limit or restrict access to exercise of an economic activity. However EEA Law applies, and any administrative measure which is incompatible with EEA Law will be illegal by default. It may therefore be said that these principles apply within the scope of the EEA Agreement.

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.**

Brief Comment:

Norway is not a party to the TEU, and therefore the Supreme Court has not explicitly tied fundamental rights to the rule in TEU article 6 paragraph 3.

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



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- **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.

Norway has adopted a sector transversal law prohibiting discrimination in the basis of gender and a series of other factors, see the Equality and Anti-Discrimination Act. The law explicitly states that it applies “in all sectors of society”.

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.

Application in accordance with the Equality and Anti-Discrimination Act, see Question 16.

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?

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

Explain your answer briefly.

There is no positive rule stating what grounds must be given in these types of measures, but there is a general principle stating a requirement for proportionately more thorough reasoning for a decision depending on how serious the consequences of the decision can be. The reasoning shall also be such that the recipient may understand the decision and the main reasons for it. Vulnerable groups generally therefore require enhanced reasoning.





Also, there is a rule in the Equality and Anti-Discrimination Act (§ 37) stating that discrimination shall be assumed if there are circumstances in the case giving rise to a suspicion there may have been discrimination, and the responsible party cannot prove by the balance of probability that there has been no discrimination. Indirectly, this rule may lead to a de facto demand for enhanced reasoning in cases where vulnerable groups are on the receiving end of an administrative decision.

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.

These questions have not been raised for the Supreme Court of Norway yet. It is not apparent that the District Courts have had such disputes either.

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
- 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



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- 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.



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The general principles of criminal law are, with certain nuances, also applied to administrative sanctions law. The applicable principles include several fundamental substantive and procedural safeguards, but the extent of their application do to some extent vary depending on the severity and nature of the administrative proceedings. Infractions that can be characterised as “criminal” in accordance with the doctrine of the ECHR entail application of general principles of criminal law close to or fully on par with criminal proceedings. For less severe infractions and proceedings, some of the general principles do not apply to the same extent.

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)



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In so far as the as the infraction can be characterised as “criminal” in accordance with the doctrine of the ECHR, the reaction is to be determined based on criteria that promote proportionality, such as the extent and effects of the infringement, the degree of guilt on the hand of the private individual or entity etc. For administrative proceedings regarding the withdrawal or restriction of a public permit, there is also a more strict principle of proportionality.

Principle of defence and legal assistance:

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

While the private individual or entity is always afforded the right to let him or herself be represented by an attorney – and the right to a defence that includes the use of appropriate means (of proof) to contradict or dispute the factual or legal assessments of the authorities – the costs of engaging said attorney are not automatically paid for or reimbursed by the authorities in less severe proceedings.

Principle of hearing:

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

While the principle of contradiction always applies, there is not a general principle of *oral hearing* that applies to all administrative sanctions proceedings.

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)

(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

As in all other cases, consequences are modulated to fit proportionately to the nature of the non-compliance, so that less severe breaches will be less severely sanctioned. There is no particular focus on proportionality in these cases, compared to when sanctioning other types of rule infringement.

(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?



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- 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**



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- 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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