



**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,



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without 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:**

Article 1.4 of the Spanish Civil Code states that *“General legal principles shall apply in the absence of applicable written law or custom, without prejudice to the fact that they contribute to shaping the legal system.”* Based on this precept, case law indicates that general principles of law can be successfully cited in judicial practice only in the absence of legal or customary rules. Thus, the Supreme Court of Spain's judgment 107/2005 of 3 March explains that principles of law, *“as subsidiary sources, after written law and custom, can be invoked only by justifying their strict necessity due to a deficiency in the written or customary legal system”*. However, as we will explain below, the great majority of the most relevant principles in judicial practice have been incorporated into positive law through their recognition and inclusion in written laws, so that they tend to be invoked directly through citation of the laws in which they are enshrined.

**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.



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- 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:**

The majority of the most relevant general principles of law are positivised, having been incorporated into the 1978 Constitution, or in different general and/or sector-specific legal rules, so the citation of such principles is usually done through direct invocation of the written rules in which they are contained and enshrined.

**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:**

The specific principles of Administrative Law that may be applied in conjunction with other general principles include the principles of effectiveness and efficiency, administrative simplicity, good regulation or, for example, the principle of good administration.

## **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?**



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- **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”).**

In Spain, there has not been any particular difficulty in implementing the general principles of European Union law in our legislation. However, this process has sometimes been complex when institutions outside our legal tradition have been incorporated into Spanish law, such as the transposition of the *Directive on services in the internal market*, which entailed limitation of the traditional administrative “authorisation regime”, with other mechanisms such as self-responsibility or citizen self-control gaining ground.

**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”).**

In Spain, in certain areas such as non-harmonised taxation (direct taxes), case law has applied principles relating to the freedom of capital and the proportionality of the measures adopted. Case law has also taken into account the principles of equivalence and effectiveness in administrative procedural contexts (in which “procedural autonomy” is recognised) where Union law may be applicable. Another area is town planning, because although this is a non-harmonised area, case law has also taken into account the principles associated with the freedom to provide services or the principles of public procurement in the execution of town planning.

**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)



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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.**

The principle of legitimate expectation is applied to harmonised and non-harmonised areas because it is a transversal principle of Spanish law and therefore intended to be applied to all areas.

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.**

Although the scope of application of the principle of legitimate expectation has, for the most part, concerned the analysis of the Administration's liability in order to assess the scope of the unlawful damage, the duty to bear the damage or the causal relationship, there are certainly decisions where this principle has served to modulate the analysis of the legality of the contested measure (see, in particular, STS of 15 February 2006 - rec. 6166/2002-).

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.**



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This principle is often invoked and applied transversally because although it is not included under this name in the Spanish Constitution, it is implicit in other general constitutional principles such as objectivity, coordination, efficiency and effectiveness.

**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.**

Spanish judicial practice shows that the principle of good administration has constituted the *ratio decidendi* of some judgments in the face of disproportionate or unjustified administrative behaviour that may have caused some harm to the citizen. In short, this principle has been considered to entail a correlative “right” for citizens in relations with the Administration.

**13º) 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.**

For example, in relation to properties for tourist use and limitations on their existence (see, in particular, STS of 15 January 2019 - rec. 6255/2017).

**14º) 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



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The Spanish Supreme Court has taken into consideration decisions of the French Court of Cassation concerning the application of principles associated with the freedom to provide services and with proportionality in matters of town planning that affect the exercise of economic activities (e.g. properties for tourist use), as well as decisions of the German Constitutional Court in relation to the limits of the principle of economic capacity. Recently, in the judicial response to the Covid-19 pandemic, the Spanish Supreme Court has applied general principles of law similar to those considered by other Supreme Courts within the scope of the ACA (such as the French Council of State or the Italian Council of State), arriving at common solutions to ensure the upholding of constitutional values or the defence of public order.

### III. – GENERAL PRINCIPLES AND FUNDAMENTAL RIGHTS

**15º)** 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?

- 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.

**16º)** 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.**

Directly anchored in the fundamental right to equality and non-discrimination (Art. 14 of the EU Charter), the principle of non-discrimination and gender equality has multiple applications and is generally applied transversally in different areas of action by the public authorities. Specific recognition of this transversality can be found in Articles 4 and 14 of Organic Law no. 3/2007 of 22 March for the Effective Equality of Women and Men.



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17º) 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.**

There is no predetermined list of particularly vulnerable groups as such, but it is recognised that minors, victims of gender-based violence, people with disabilities in certain cases, people affected by certain diseases, the elderly, or essentially anyone at risk of economic or social exclusion, can join groups that are required to be given special attention both in the actions of the public authorities and in the exercise of the judicial activity.

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.**

In direct connection with the previous question, both the constitutional and ordinary courts (particularly the Supreme Court) place particular emphasis on the requirement for enhanced reasoning for an administrative decision when it affects vulnerable individuals or groups. For example, the recent STS 1521/2021 of 17 December highlights the imperative for the Administration to *“provide reasoned evidence of the analysis of the specific personal circumstances”* of an applicant for Spanish nationality, especially when there are *“circumstances of vulnerability such as a female migrant with little education or cultural training, without prejudice to the requirement for integration with regard to the social, cultural and political values of our country”*. The Administration is therefore criticised for having based its actions solely on the results of the questionnaire and issued a decision that *“failed to take the applicant's personal circumstances into account”*, and it is established as jurisprudence that *“the sufficient degree of integration into Spanish society required by Article 22.4 of the Civil Code*



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*must be assessed according to the special vulnerability that this training entails, and the integration must be adapted according to this training and the particular degree of such integration that is therefore acceptable and sufficient; the reasoning with regard to this assessment must be particularly exhaustive in the decision that is issued”.*

In the same vein, there is an abundance of case law that underlines the need for a judge who is asked for authority to enter a home in order to remove a person to weigh the circumstances of the case, paying particular attention to the best interests of the minor (or victims of gender-based violence) before granting such authority (e.g. SSTC no. 139/2004 of 13 September or SSTC no. 188/2013 of 4 November; and SSTS no. 194/2021 of 15 February or SSTS no. 1197/2021 of 4 October).

**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.**

Although the Supreme Court has not yet had occasion to rule on the application or projection of the principle of transparency (or of access to information) in the field of artificial intelligence, the contentious-administrative courts have already heard a case concerning a telematic application that allows the reference marketer to verify that an applicant for the *Bono Social* [income-based electricity bill discount] meets the requirements to be considered a vulnerable consumer.

Following a request for access to the source code of the algorithm, denied by the Administration for reasons of security and protection of intellectual property and partially granted by the Transparency Council, the Central Contentious-Administrative Court no. 8 (Judgment no. 143/2021 of 30 December) upheld the denial of access, finding that delivery of the requested information (source code) would run counter to the limits established in Art. 14.1, points d), g), i), j) and k) of the Transparency Act (public security; administrative functions of surveillance, inspection and control; economic and monetary policy; professional secrecy and intellectual and industrial property; and guaranteeing the confidentiality or secrecy required in decision-making processes). This judgment has been appealed, and is therefore not final.

In the same vein, there have not yet been any rulings relating to the possible introduction of discriminatory biases in computer applications used by the public authorities.



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

##### IV.1. – ORGANISATION AND ADMINISTRATIVE PROCEDURE

20<sup>o</sup>) 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<sup>o</sup>) 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



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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<sup>o</sup>) 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.**

The Spanish Supreme Court has recognised that the substantive principles underlying the criminal law system are applicable, with certain nuances, to administrative sanctions law, since they are both manifestations of the State’s punitive system, and has projected on to measures aimed at exercising the Administration’s sanctioning powers the principles of legality, criminality and culpability, as well as procedural guarantees of the following rights: the right to defence, with proscription of any lack of defence representation; the right to legal assistance, which can be transferred under certain conditions; the right to be informed of the accusation, with the unavoidable consequence of the unalterability of the allegations; the right to the presumption of innocence, which means that the burden of proof of the constitutive facts of the offence lies with the Administration, with prohibition of the use of evidence obtained in violation of fundamental rights; the right not to incriminate oneself; and the right to use the appropriate means of proof for the defence.

**23<sup>o</sup>) 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?**



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**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 defence and legal assistance:**

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

In sanction proceedings, the sanctioned person has the right to be assisted by a lawyer, but if they do not appoint a lawyer and pay the related fees out of their own pocket, the Spanish State will not provide them with a duty lawyer. The duty lawyer system is a service provided by lawyers who, on a rotating basis, defend citizens who, due to lack of funds or in certain situations of special protection (minors, detainees, foreigners “without papers”, victims of gender-based violence, etc.) require “free justice.” Conversely, in criminal proceedings under Spanish law, if the accused does not





appoint a lawyer to defend them, the Spanish State must provide the arrested person with a lawyer through the *Colegio de Abogados* [Spanish Bar Association].)

#### 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)

The Plenary of the Contentious-Administrative Division of the Supreme Court recently delivered two judgments on 25 November 2021 (RRCA/8156/2020 and 8158/2020) establishing as doctrine that the requirement for review by a higher tribunal of a judgment confirming an administrative decision imposing a criminal





sanction, as referred to in Article 2 of Protocol 7 to the European Convention on Human Rights, in the interpretation given by the ECHR judgment of 30 June 2020 in *Saqueti v. Spain*, can be satisfied by the filing of an appeal for cassation, the admission of which shall be subject to assessment of whether the criminal nature of the sanctioned offence is justified in the notice of appeal in the terms established by the ECHR, as well as the basis of the offences imputed in the appealed judgment confirming the administrative sanctioning decision.

**(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<sup>o</sup>) 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 principle of proportionality is used in these cases to modulate the consequences of an undisputed non-compliance, tempering the negative effects according to either the degree of partial compliance identified or the inexcusable third-party intervention as a determining cause of the non-compliance.

Thus, for example, the principle of proportionality, of jurisprudential origin, has been expressly enshrined in the *Ley General de Subvenciones* [General Law on Subsidies], Article 37.2 of which (in relation to Art. 17.3.n) provides that when compliance with the obligations and conditions of the subsidy *closely approximates total compliance and the actions of the parties concerned are unequivocally geared towards fulfilment of their commitments*, the amount to be repaid will be determined by the application of certain criteria, and the principle of proportionality must be satisfied (see, in particular, STS 186/2020 of 12 February).

To give another example, in the regulated energy sector, case law has held that the right to be paid the premium tariff should not be lost when delay in the fulfilment of formal obligations (registration) or material obligations (feed-in of energy into the network) is due to the actions of a third party (either the Administration or the energy distributor), without finding any lack of diligence on the part of the facility's owner. This modulation or tempering of the consequences of non-compliance is conceived as





a concrete expression of the principle of proportionality (see, in particular, STS 1261/2017 of 26 October and STS 1517/2017 of 5 October).

(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***

**25º) 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***

**26º) 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)



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

#### **IV.6. – TAXATION**

27<sup>o</sup>) 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
- 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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