



**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

### 1<sup>o</sup>) 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.

### OTHER

#### Explain your answer briefly:

The UK has two predominant sources of law: statute law and the common law. Primary statutes enacted by the UK Parliament take precedence over all other sources of law pursuant to the constitutional principle of parliamentary sovereignty. For legal areas and issues where Parliament has not passed legislation or where a statute requires interpretation, the law is provided by the common law. The common law is an evolving body of rules and principles developed by judges through case law over the course of centuries. The common law does not allow for gaps: in principle it will always supply a legal rule to be applied to answer a legal problem. A range of fundamental constitutional principles and rights have been developed by way of the common law. These are the closest that the UK has to “general principles of law”. Certain of these principles can impact the manner in which statute law will be interpreted by the courts. There is a common law presumption, for example, that Parliament will not intend to legislate in a way which interferes with the fundamental rights of citizens (the so-called principle of legality). The courts will therefore only interpret a statute in a way that infringes on fundamental rights if it is clearly apparent that this is what Parliament intended. So while “general principles” cannot displace or prevail over primary statutes passed by Parliament, they can influence the manner in which the courts will approach them.

### 2<sup>o</sup>) 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



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3<sup>o</sup>) 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:**

Most of the major principles governing Public Law in the UK have been developed by the common law and can be considered “general principles of law”. The system of judicial review allowing citizens to challenge acts of the executive in the courts, for example, is a creation of the common law. Moreover, fundamental constitutional principles and rights developed at common law are frequently invoked in judicial review cases, often alongside rights and principles contained in statutes such as the Human Rights Act 1998.

4<sup>o</sup>) 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<sup>o</sup>) 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:**

As discussed above, many of the principles of Public and Administrative Law have been developed by the common law. While certain common law principles will only be relevant to Public and Administrative Law matters, those types of matters may involve





other common law principles which are not limited to Public and Administrative Law matters. The different methods developed by the courts for interpreting statutes can arise equally in both public and private law matters, for example.

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

6<sup>o</sup>) 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. Insofar as EU law is still applicable in the UK, the courts will give effect to general principles of EU law without the need for further specification in statute.**

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

There has been no general incorporation of the general principles of European Union law into domestic law, although many of the principles find expression in the common law. Section 6 of the European Union (Withdrawal) Act 2018 states that the validity, meaning or effect of any retained EU law is to be decided in accordance with the general principles of EU law as they stood on 31 November 2020.

7<sup>o</sup>) 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”).

Even prior to the UK's departure from the European Union it was not common practice for the general principles of European Union law to be invoked in respect of non-harmonised matters, given that most of the principles already find expression in the domestic common law.



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8<sup>o</sup>) 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)

#### OTHER

As discussed above, following the United Kingdom's departure from the European Union the general principles are limited in their effect to that permitted by section 6 of the European Union (Withdrawal) Act 2018 (see question 6 above). They cannot take precedence over domestic law as their function pertains only to retained EU law. Schedule 1 paragraph 3 provides that there is no longer a right of action in domestic law based on a failure to comply with any of the general principles of EU law, and that no court, tribunal or public authority may disapply or quash any enactment or other rule of law, or quash any conduct because it is incompatible with any of the general principles of EU law.

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

Legitimate expectation has been recognised by the courts as a ground for judicial review of executive action. It is grounded in principles of natural justice and fairness and protects a procedural or substantive interest when a public body tries to renege from a representation made to a person or a group of people. Although legitimate expectation has some similarities with the private law doctrine of estoppel, it has not been explicitly extended beyond the public / administrative law context.

10<sup>o</sup>) 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**



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- 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.**

In an appropriate case, the court may quash an administrative decision and order that the relevant legitimate expectation must be satisfied. If it is possible for the public authority to act fairly without satisfying the legitimate expectation, however, then the court may award a different remedy or benefit or simply order that the public authority should reconsider its decision taking the legitimate expectation into account as a relevant factor.

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

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

**Explain your answer briefly.**

The Charter of Fundamental Rights of the European Union was not identified as retained European Union law in the European Union (Withdrawal) Act 2018 and hence no longer has any application to the UK. Certain aspects of the principle have analogues in the common law, however.

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

See above – the principle has no application in the UK. However, various common law rules of public law can be explained as aspects of good administration (eg the obligation to treat individuals fairly), and breach of those rules can result in annulment of a



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decision.



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

The concepts of necessity and proportionality are most commonly invoked in relation to qualified rights contained within the Human Rights Act 1998 and European Convention on Human Rights. This can be in relation to economic activity. In relation to potential infringements of Article 1 of Protocol 1 to the European Convention on Human Rights, for example, the test set by the European Court of Human Rights is a proportionality assessment of whether the person concerned has had to bear an individual and excessive burden (*James v United Kingdom* (1986) 8 EHRR 123 at para 50).

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



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- o No such identification has taken place.

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

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

**Explain your answer briefly.**

The Equality Act 2010 protects against discrimination across a range of societal areas including employment, the provision of goods or services, housing and the provision of public services. Among the protected characteristics are sex and gender reassignment. The principle of non-discrimination in the enjoyment of human rights on grounds of sex is also contained within the Human Rights Act 1998 and European Convention on Human Rights. Discrimination without reason can also found a claim of contravention of the general public law requirement of rationality, which is a feature of the common law and is taken to be implied into statute law.

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

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

**Explain your answer briefly.**

Although it would be difficult to identify a discreet common law principle requiring the “protection of vulnerable groups”, Parliament has passed various Acts seeking to protect persons with particular characteristics. The Equality Act 2010, for example, provides protections to people on the basis of nine protected characteristics: age, disability, gender reassignment, marriage or civil partnership (in employment only), pregnancy and maternity, race, religion or belief, sex, and sexual orientation. Section 149 of the Equality Act 2010 also requires public authorities to have due regard to the need to eliminate discrimination, harassment, victimisation and other undesirable conduct in the exercise of its functions.

Although the role of the courts is to apply the law equally, in appropriate circumstances the fact that a person belongs to a vulnerable group will be a relevant factor. When determining a question with respect to the upbringing of a child, for example, the



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Children Act 1989 requires the court to have that child's welfare as its paramount consideration.

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

Although often required by the relevant statute, the common law does not recognise a general duty to give reasons for an administrative decision (*R (JJ Management LLP) v HMRC* [2019] EWHC 2006 at paragraph 85). Although there has been some judicial disagreement on this point, this has focused on the need to provide reasons in order to enable a person affected to know whether they have grounds to challenge a decision rather than on the nature of the decision taken or the characteristics of the person(s) affected (see, for example, *R (Help Refugees Ltd) v Secretary of State for the Home Department* [2018] EWCA Civ 2098 at paragraph 122).

**19<sup>o</sup>) 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 not widespread, there have been cases raising issues of discrimination in the context of artificial intelligence. In *R (Edward Bridges) v The Chief Constable of South Wales and others* [2020] EWCA Civ 1058 the Court of Appeal considered the lawfulness of the use of live automated facial recognition technology by the South Wales Police Force. Among the grounds of appeal were that the police and other government departments had failed to comply with its duty under section 149 of the Equality Act 2010 (see question 17 above) because it had failed to consider the possibility that the technology might produce results that were indirectly discriminatory on grounds of sex and/or race. The Appellants succeeded on this ground, meaning that there had been a failure to comply with the duty.



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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**





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.**

In certain areas government departments can impose administrative penalties as alternatives to instituting criminal proceedings. In respect of benefit fraud, for example, the Department for Work and Pensions is able to offer an administrative penalty to a person where the case is deemed not to be so serious that prosecution should be considered in the first instance. A person can choose to accept this penalty without any admission of guilt and without many of the same processes and principles of the criminal law being applied. But it is usually only where infractions of administrative measures can be characterised as criminal pursuant to the ECHR that the heightened protections associated with criminal law would apply.

**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?**

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

- Yes
- No



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- 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)

**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)**

For certain administrative sanctions the body imposing it will be required to give reasons. When imposing sanctions for various failures to perform investigative requirements, for example, the Competition and Markets Authority are required to provide reasons. In other circumstances – such as the benefit fraud example provided above – there is no requirement to provide reasons, although the relevant person must be informed that it is considered that there are grounds for criminal prosecution.

### 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)**

In certain contexts, such as the Competition and Markets Authority example given above, there is a possibility of appealing to an independent tribunal. In other cases, there is the possibility of seeking judicial review from a court under the common law of a decision imposing a penalty. There is the possibility of further appeals in both these cases.

**(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



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**24º) 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***

**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)**



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The courts will not impugn government action for a failure to apply the precautionary principle as a matter of course (*R (Duddridge) v Secretary of State for Trade and Industry* [1995] Env L.R. 151). The courts have accepted, however, that where the government has purported to apply the precautionary principle using a specific or identifiable mechanism or methodology, then a challenge could be brought on the basis that the government failed to follow those mechanisms (*R (Amvac Chemical UK Ltd) v Secretary of State for Environment, Food and Rural Affairs* [2001] EWHC 1011).

The precautionary principle has been incorporated into domestic law in a limited sense by section 17 of the Environment Act 2021. This requires the Secretary of State to prepare a policy statement setting out how certain environmental principles should be interpreted and proportionately applied by government ministers when making policy. The precautionary principle so far as relating to the environment is one of these principles.

#### **“Polluter pays” principle**

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

Although the “polluter pays” principle receives some expression in legislation (see, for example, Part IIA of the Environmental Protection Act 1990 concerning contaminated land), the courts have been hesitant to adopt the principle as a more general basis for liability. For example, the House of Lords held in *R (National Grid Gas plc v Environment Agency* [2007] UKHL 30 that the “polluter pays” principle was not a basis for extending liability under the Part IIA regime to successors in title of past polluters.

The “polluter pays” principle has however been incorporated into domestic law in a limited sense by section 17 of the Environment Act 2021. This requires the Secretary of State to prepare a policy statement setting out how certain environmental principles should be interpreted and proportionately applied by government ministers when making policy. The “polluter pays” principle is one of these principles.

**(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.**



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- 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)**

There is no general principle of equality and generality in UK tax law. Article 14 of the European Convention on Human Rights protects, however, against tax liability being imposed in a discriminatory manner. Provided it is not discriminatory, however, tax may be imposed on different persons at differing rates without this being unlawful (see, for example, *Inland Revenue Commissioners v The National Federation of Self-Employed & Small Business Limited* [1982] AC 617).

### **Principle of progressiveness and its limit: non-confiscatory taxation**

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

Taxation is generally applied in a progressive manner, but there is no general principle that it must be or that there are limits based on non-confiscation. The form and amount of taxation is a matter for Parliament. The Human Rights Act 1998, which gives some force to Convention rights under the ECHR, may affect the interpretation of taxation statutes to provide a limited degree of protection against confiscatory taxation.

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

Taxation is imposed by Acts of Parliament. These are interpreted in a purposive manner, to ensure that Parliament's basic intention in imposing a tax is restricted and the scope for illegitimate tax avoidance is minimised.



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