



**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



**Co-funded by
the European Union**



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: In the Swedish legal system, there is no provision on the legal status of general principles of law or how the principles are to be applied. However, practice shows that general principles of law are primarily used to fill gaps in the legislation. For examples, when the principle of proportionality arises within the scope of EU-law, it may require a breach of national provision so that Sweden does not violate applicable EU-law. Similarly, the Supreme Administrative Court has considered the principle of proportionality with regard to the European Convention on Human Rights. In relation to Swedish law, however, the principle of proportionality according to the Supreme Administrative Courts case-law cannot support the derogation from clear and unambiguous statutory provisions. However, it may be added that (similar to what the Supreme Court of Spain has replied) many general principles of law in judicial practice have been incorporated into positive law.

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.



Co-funded by
the European Union



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

Explain your answer briefly: As stated above in the answer to question 1, general principles of law are applied in the court's practice mainly where there are gaps in the law. This also has the effect that general principles of law 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. General principles of law are also more in common cases where EU-law is applied. It should also be added that many general principles of law, both national and principles influenced by EU-law, have been codified in the Administrative Act (*Förvaltningslagen* [2017:900]) and the Administrative Procedure Act (*Förvaltningsprocesslagen* [1971:291]).

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: There are several principles of Administrative Law in the Swedish legal system. For example, the official principle (which means that an authority must ensure that a matter is investigated as its nature requires), the principle of res judicata in administrative law cases; and the principle of placing the burden of proof.

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?



**Co-funded by
the European Union**



- Yes, in general
- No special or specific incorporation has been necessary, because in general these principles were already recognised and enshrined in the country's legislation and practice.

Explain your answer briefly (this question mainly concerns the work of the legislator, i.e. the “legislative system”). The principles of EU-law are recognised in Swedish case law and they also follow from directly applicable union law. The Supreme Administrative Court does not have advisory judicial functions. The Justices of the Supreme Administrative Court occasionally serve at the Council on Legislation (Lagrådet) which is consulted by the Government to give a statement on important legislative proposals before they are presented to the Parliament. The Council scrutinizes the proposed legislation from a legal viewpoint and may suggest modifications, but its opinion is not binding to the Government. The Council is nevertheless separated from the Supreme Administrative Court. Therefore, the Supreme Administrative Court can unfortunately not contribute with further answers to the question concerning the work of the legislator.

7^o) Is it common in your country’s judicial practice for the specific general principles of European Union law to be invoked and taken into account in areas where there is no regulatory harmonisation?

- Yes, for certain matters
- No, not generally

Explain your answer briefly (this question mainly concerns the work of the judiciary, i.e. “judicial practice”). For example, case law has considered the principles of the right to an effective remedy and the right to a judicial remedy in administrative procedural context in which procedural autonomy is recognised.

8^o) When applying the general principles set out in European Union law, and when it is found that the general European principle applicable to the dispute in question conflicts in some way with national law, has the dispute been resolved through a solution involving the displacement and non-application of the national rule in order to give way to the general European principle?

- Yes
- This solution has been chosen in some cases, while in others different solutions or answers have been used (in this case, explain your answer briefly)

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





- Yes, as a transversal principle
- Yes, but only in certain sector-specific matters and areas harmonised by Union law (please indicate what these are)
- No

Explain your answer briefly. The principle of legitimate expectations has not had a strong impact on Swedish case law in cases that do not concern EU-law. On the other hand, there is a Swedish general principle of administrative law concerning administrative decisions and res judicata (in the case of favourable administrative decisions, the principle is codified by Section 37 of the Administrative Act [förvaltningslagen]). To a certain extent, this principle of res judicata also includes the protection of legitimate expectations. Therefore, the Swedish legal system has not had to be adapted in relation to the principle of legitimate expectations.

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. As mentioned under question 9, the principle of legitimate expectations has not had a major impact on Swedish case-law in cases that do not concern EU-law. With that said, it can still be mentioned that the application of the Swedish principle of res judicata (which to some extent is similar to the principle of legitimate expectations) can lead to an administrative decision being revoked if it violates this principle.

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. The principle of good administration has not had a strong impact on Swedish case law or in the Swedish administrative procedural law. It has admittedly been codified in Section 5–8 of the Administrative Act (Förvaltningslagen)





and is therefore applicable in cases that are only based on national law but are not regarded as an individual enforceable right.

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. See answer above.

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. The principle of proportionality has been codified in the Administrative Act (Förvaltningslagen) and had already before that “gained ground” in Swedish case-law (see case RÅ 1996 reported case no. 40). For example, the principle of proportionality has been taken into account in relation to limitation of restriction of ownership use of beach property (see case RÅ 1996 reported case no. 44) and prohibition of reforestation (see case RÅ 1996 reported case no. 56).

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

Explain your answer briefly. The answer above relates to the Supreme Administrative Court.



**Co-funded by
the European Union**



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.

Explain your answer briefly. The answer above relates to the Supreme Administrative Court.

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

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

Explain your answer briefly. The principle of equal treatment can be brought to force in certain types of cases, for example when applying the EU legal framework around public procurement. Chapter 1. Section 9 of the Instrument of Government further states that courts of law, administrative authorities and others performing public administration functions shall pay regard in their work to the equality of all before the law and shall observe objectivity and impartiality. The principles expressed in this provision of the Instrument of Government are a starting point in any judicial review. With this said however, the Supreme Administrative Court does not handle cases concerning discrimination or compensation for discrimination. Such cases are handled by the general courts where the Supreme Court is the highest instance. The principle of non-discrimination and gender equality is not normally part of the administrative procedural law. Therefore, the Supreme Administrative Court can unfortunately not contribute with further answers to the question.

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



Co-funded by
the European Union



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

Explain your answer briefly. See above answer.

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. In administrative law cases, the principles of free litigation and free evidence apply. In a clear majority of all administrative cases, no invocation burden is applied to either party. However, it may be added that in cases concerning the basic security of individuals (housing, livelihoods, etc.), more is generally required in terms of good reasons for the authority to be able to intervene than in cases where, for example, it is a purely commercial activity carried out with a permit.

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.

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

- Yes
- No

Principle of impartiality

- Yes
- No

Principle of anti-formalism

- Yes
- No

Explanation: There is no general principle of law with the express term "anti-formalism" in Swedish law and without a more detailed definition of the meaning of the principle, the Supreme Administrative Court unfortunately cannot answer the question.

Principle of gratuitousness

- Yes
- No

Explanation: See above answer.

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. Unlike the Spanish Supreme Court, the Swedish Supreme Court has not ruled on the question of whether the substantive principles underlying the criminal law system are applicable to administrative sanctions law. Neither is administrative sanctions manifested in the Swedish penal system but are handled by the administrative courts. However, the principle of legality and burden of proof are applicable in the administrative procedural rules concerning administrative sanctions.

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 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)

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

(If you consider it appropriate, please indicate any other general principles of subsidies or public aid different from the above)

IV.4. – CONTRACTING BY PUBLIC BODIES

25^o) Is contracting by public bodies governed by different principles from contracting between private individuals and entities?

- Yes. Although based on a common foundation, administrative contracting is governed by different principles from civil or private contracting.
- There are specific principles applicable to contracting by public bodies as regards the procedure for advertising and selecting contractors and the award of the contract, but the performance, execution and effects of the contract are



**Co-funded by
the European Union**



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?

The Supreme Administrative Court does not handle cases or matters related to above topics. Such cases are handled by the Land and Environment courts where the Land and Environment Court of Appeal is the highest instance. Therefore, the Supreme Administrative Courts can unfortunately not contribute with answers to the questions under section 5.

IV.6. – TAXATION

27^o) In tax matters, are the following principles applied in your legislation and judicial practice?

Principle of legality: Tax liability can be established only by rules with legal status.

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

Principle of economic or contributory capacity

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

Principles of equality and generality

- Yes
- No
- 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)

-O-O-O-O-O-O-



**Co-funded by
the European Union**