



**SEMINAR ORGANISED BY THE SUPREME ADMINISTRATIVE COURT OF FINLAND
IN COOPERATION WITH ACA-EUROPE**

**MAPPING THE MULTILEVEL PROTECTION OF FUNDAMENTAL RIGHTS IN EUROPEAN ADMINISTRATIVE
COURTS**

Questionnaire

The Finnish presidency of ACA-Europe focuses on the vertical dialogue between the national supreme administrative jurisdictions and the European Courts, i.e., the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). This questionnaire addresses this vertical dialogue from the perspective of the pluralist framework of European fundamental rights protection on the one hand and the national constitutional framework of fundamental rights on the other hand.

The term “fundamental right” in the title of the questionnaire is used as an umbrella concept. It refers to rights recognized as fundamental by the respective legal orders. This implies that those rights are in some sense supreme norms, often judicially protected against violation by public authorities, including the legislature.

In national legal systems, these rights are usually laid down by the constitution, or they may be provided by domestically applicable international human rights conventions. Within the scope of application of European Union law, the Charter of Fundamental Rights (CFREU) provides the main source of fundamental rights. Quite often, these various sources of law are simultaneously applicable in concrete cases. Furthermore, each individual system usually provides for specific court(s) or other authorities regarded as supreme or authoritative. In this sense, the fundamental rights protection in Europe may be regarded as “pluralist”.

As legal norms, fundamental rights norms in Europe have several features that complicate their application in national courts. First, they are usually open to different interpretations, which in turn emphasises the role of precedents delivered by both national and European courts. Secondly, because of the pluralist nature of the European fundamental rights system, national courts sometimes need to decide which of the different sources of fundamental rights should be given primacy over the others and on what grounds. Third, it seems that there is not a single right answer to the second question. For instance, European Union law has primacy over national law, and this also applies to national constitutions. However, as provided by Article 52.4 of the CFREU, fundamental rights recognized by the Charter should be interpreted in harmony with the constitutional traditions of the Member States.

Building on the above-mentioned framework, the following questionnaire is prepared with a view to a comparative assessment of the functioning of the system of fundamental rights protection in the light of the legal practice of supreme administrative jurisdictions in Europe.

For this purpose, the questionnaire starts with questions concerning the basic institutional framework for the application of fundamental and human rights in the domestic legal order and then moves to questions about the modes in which the interpretation of national and European fundamental rights norms interact in the practice of national courts.

Acknowledging the differences between European legal cultures, please, feel free to complement any answer with additional and/or clarifying information.





I Background information

1. The formal title of your court? Please include the country.

Council of State (Belgium)

2. The number of decisions your court gives annually (average)?

In 2022-2023, 3344 judgments and cassation orders; 2400 advisory opinions

The Belgian Council of State is composed of two different sections. An administrative litigation section and a legislative section.

A first important competence of the Council of State, administrative litigation section, is related to its power to suspend and to annul administrative acts (individual and statutory) that are contrary to the legal rules in force (including human rights law). The Council of State is also a cassation court, as it reviews the external and internal legality of the decisions of lower administrative jurisdictions. In these latter proceedings, the Council of State cannot reconsider the facts leading to the dispute. Both type of decisions are called judgments.

Another important competence is its advisory task in legislative and statutory matters. In this context the Council of State, legislative section, hands down non-binding advisory opinions in which it assesses inter alia the compatibility of executive degrees and formal laws (at federal but also regional level) with human rights law.

In what follows we must make a distinction between the Council of State's jurisdictional and advisory task (judgments viz. advisory opinions).

3. The number of published precedents your court gives annually (average)?

All judgments and opinions are published on the website, albeit with a delay for the opinions until the draft legislation is introduced in parliament or the executive act is published in the Belgian Official Gazette.

II Constitutionality of legislation and the applicability of fundamental rights norms. Mark your answer with bold letters.

4. Does your country have a written Constitution?

- Yes** – see https://www.dekamer.be/kvcr/pdf_sections/publications/constitution/GrondwetUK.pdf
- No

5.a Is your court authorised to apply the (written or unwritten) Constitution directly in its decisions?

- Yes**
- No

5. b. If yes, how often does this happen in practice?

- Rarely
- Sometimes
- Often***





***Often in its advisory opinions which require an ex officio review of conformity with higher norms including the constitution and the special laws; sometimes in its judgments, as review depends on the arguments put forward by the parties, which may include arguments drawn from the Constitution.**

5. c. *If yes, what areas of constitutional law are typically involved in these cases?*

- Fundamental rights**
- Democratic principles**
- Rule of law**
- Federalism and local self-government**
- Legislative process**
- Finance**
- Other. Please describe below.

5. d. *If your court is not authorized to apply the Constitution directly, please explain briefly how your national system works.*

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6. a. *Is your court authorised to repeal a piece of ordinary legislation if it is found unconstitutional?*

- Yes
- No**

6. b. *If yes, how often does this happen in practice?*

- Rarely
- Sometimes
- Often
- Very often

6.c. *If not, which institution, if any, has the power to decide on the constitutional validity of ordinary legislation (either in abstracto or in concreto)?*

The Constitutional Court of Belgium is competent to decide on the constitutional validity of ordinary legislation, i.e. acts adopted by the federal parliament or the assemblies of the regions and communities.

The administrative litigation section of the Council of State is authorized to annul generally binding executive decrees that have to be considered to be legislation in the substantive but not formal sense.

The legislative section of the Council of State assesses the constitutional validity of all proposed legislation (both in a substantive and in a formal sense) without having the possibility to prevent its adoption. Parliament or the government decide how to deal with the remarks about the constitutional validity of their piece of legislation.

7. *During the last 10 years, has your court given precedents involving the following topics:*

- Right to asylum**
- Social rights**





- Environmental rights**
- Rights of future generations**
- Rights of indigenous peoples
- Human Dignity**
- Fundamental rights in the context of national security**
- Fundamental rights in the context of state of emergency**

8. In the cases where your court has referred to the Constitution, what kind of role has the Constitution had in the reasoning? Choose all applicable options.

- Symbolic / Decorative**
- An additional argument supporting a decision which is inherently based on ordinary legislation**
- A source of interpretation which provides for the correct application of ordinary legislation in the concrete case at hand (i.e. fundamental rights friendly interpretation)**
- A decisive role so that the decision is based solely on constitutional grounds in a situation where ordinary legislation is silent or unclear on the issue at hand**
- An overriding role so that otherwise applicable ordinary legislation is set aside/declared invalid on constitutional grounds***
- Other. Please explain and/or provide an example.

***In order to set aside ordinary legislation in the formal sense (i.e. acts of parliament) the administrative litigation section is obliged to seek a preliminary ruling from the Constitutional Court. Only if the latter rules that the ordinary legislation is incompatible with the constitution the Council of State will set this legislation aside. In respect of executive acts the Council of State can invoke the Constitution within the limits of the dispute as set by the parties. The legislative section relies ex officio on the Constitution, when reviewing the competence of the author of the draft legislation, or its compatibility with higher norms.**

III Interplay of national and European fundamental rights and international human rights norms

9.a. Is your court authorised to apply international human rights conventions and follow their international case law in its decisions?

- Yes**
- No

9. b. If yes, how often does this happen in practice?

- Rarely
- Sometimes
- Often**
- Very often

10.a. Is your court authorised to apply the Charter of Fundamental Rights of the European Union (CFREU) in its decisions?

- Yes**
- No





10. b. *If yes, how often does this happen in practice?*

- Rarely
- Sometimes**
- Often
- Very often

11. *When applying fundamental rights provisions of the Constitution, is your court also simultaneously applying similar provisions of the European Convention on Human Rights and Fundamental Freedoms (ECHR)?*

- Very rarely
- Sometimes
- Often**
- Very often

12. *When applying fundamental rights provisions of the Constitution in the field of application of European Union law, is your court also applying corresponding provisions of the CFREU?*

- Very rarely
- Sometimes**
- Often
- Very often
- My court does not apply the Constitution in the field of application of European Union Law.

13. *In the cases where your court refers to the ECHR, what kind of role does the convention have in the reasoning? Choose all applicable options.*

- Symbolic / Decorative**
- An additional argument supporting a decision which is inherently based on ordinary legislation**
- A source of interpretation providing for the correct application of ordinary legislation in the concrete case at hand (i.e. human rights friendly interpretation)**
- A decisive role so that the decision is based solely on the ECHR in a situation where national legislation is silent or unclear on the issue at hand**
- An overriding role so that otherwise applicable ordinary legislation is set aside /declared invalid based on the ECHR.**
- Other. Please explain and/or provide an example.

14. *It follows from the case law of the CJEU (see, eg, C-14/83, von Colson) that national courts must interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of EU law. Within the scope of the application of EU law, how frequently does this kind of interpretation and application of law appear in the argumentation of your court?*

- Never
- Rarely
- Sometimes**
- Often





For the administrative litigation section, it falls first to the parties to rely on the relevant EU law instruments. For the legislative section, interpretation in conformity with EU law is strived for, but hampered by the fact that the opinions often come out a time when there is no relevant case law (yet) on the interpretation of the EU norms being implemented or transposed, and the legislative section is precluded from seeking preliminary rulings.

15. The obligation to interpret national legislation in line with EU law is extensive, but it is not without limits. According to the case law of the CJEU (eg, C-12/08, Mono Car Styling), that obligation is limited by the general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law contra legem. Where there is any inconsistency between national law and Union law, which cannot be removed by means of such a construction, the national court is obliged to declare that the provision of national law which is inconsistent with (directly effective) Union law is inapplicable (eg 152/84, Marshall). How frequently does this kind of reasoning appear in the argumentation of your court?

- Never
- Rarely**
- Sometimes
- Often

16. Has your court given any precedents regarding the application of Article 51 (Field of application) of the CFREU? If yes, please provide a brief description of the context and outcome of the decision(s).

In one case (n° 238.474 of 12 June 2017) in an appeal against a decision of a migration court, a discussion of the scope of Article 51 was combined with a discussion of the scope of Article 41 Charter to determine whether an applicant for residence permit could rely on the right to be heard. The argument was however dismissed on the ground that Article 41 Charter only applies vis-à-vis EU institutions and bodies, rather than on the ground that the subject matter of the dispute fell outside the scope of Article 51.

In another case (n° 244.268 of 23 April 2019) concerning the termination of the tutelage of an unaccompanied minor seeking asylum, the administrative litigation section simply bypassed the question of the applicability of the Charter by assuming that it did ("regardless of whether the Charter applies"), only to reject the appeal on the merits.

There is occasional discussion in advisory opinions on whether the Charter applies, though often this is assumed – the Charter rights are just being mentioned (often alongside the ECHR and the national constitution) without specific justification. Often the reason will also be discernable from the context e.g. if EU law instruments are implemented or transposed, or free movement is at stake. However, occasionally a debate occurs, e.g. in opinion 59.484/3 of 29 June 2016 on a Flemish draft law on the prohibition of slaughter without sedation. In a footnote the issue was raised whether the Charter actually applied, as the draft law was in essence a further going national measures under Article 26 of Regulation (EC) 1099/2009, which allows Member States to adopt stricter rules on animal welfare. The Council of State expressed doubts as to whether the measure fell within the scope of the Charter but left it undecided - arguing that the Charter would not offer anything new beyond the analysis under the ECHR. Subsequently, in case C-426/16 *Liga van Moskeeën*, the ECJ applied the Charter to this legislation without explaining why the Charter was applicable.





17. *Has your court given any precedents regarding the application of Article 52 (Scope and interpretation of rights and principles) of the CFREU? If yes, please provide a brief description of the context and outcome of the decision(s).*

In judgment n° 253.485 of 8 april 2022 the validity of Regulation (EU) 2019/1157 on strengthening the security of identity cards of Union citizens and of residence documents issued to Union citizens and their family members exercising their right of free movement was called into question, so Article 52 Charter was included in preliminary reference to the ECJ, as the applicants challenged a Belgian Royal decree that imposes the submission of biometric data to be stored on the ID cards issued to certain aliens pursuant to that Regulation. This question about the validity of the obligation to have digital fingerprints on an ID-card is still pending before the ECJ, as pending case C-280/22 *Kinderrechten coalitie Vlaanderen and Liga voor Mensenrechten*.

In judgment n° 250.422 of 27 April 2021 relating to an expulsion order targeting a suspected foreign fighter it was held that the applicant did not prove a violation of Article 7 Charter, nor of article 8 ECHR (right to family life). As the content of both provisions is similar, the Council of State ruled that Article 52 Charter was also not violated.

18. *In the cases where your court has referred to the CFREU, what kind of role has the Charter had in the argumentation? Choose all applicable options.*

- Symbolic / Decorative**
- An additional argument supporting a decision based on EU law and ordinary domestic legislation**
- A source of interpretation which provides for a correct application of EU law and ordinary legislation in the concrete case at hand**
- A decisive role so that the decision is based solely on the CFREU in a situation where EU law and national legislation is silent on the issue at hand
- An overriding role so that otherwise applicable ordinary legislation is set aside / declared invalid on grounds based on the CFREU

Other. Please provide an example.

In judgment n° 212.387 of 4 April 2011 the Council of State held that the mere fact that Article 18 of the Charter enshrines a right to asylum, does not lead to the conclusion that this is a civil right as understood in the context of Article 6 ECHR.

19. *Has your court given any precedents regarding the application of Article 53 (Safeguard for existing human rights) of the ECHR? If yes, please provide a brief description of the context and outcome of the decision(s).*

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20. *Has your court given any precedents regarding the application of Article 53 (Level of protection) of the CFREU? If yes, please provide a brief description of the context and outcome of the decision(s).*

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Usually the legislative section invokes the rights in the Charter – when likely applicable – alongside national constitutional provisions and the ECHR, often treating them as interchangeable. In advisory opinion 72.972/3 of 1 February 2023 the legislative section of the Council of State has for the first time recognized that the Charter of Fundamental Rights is the sole standard of review – to the exclusion of the national constitution – for reviewing whether certain national measures relating to the energy markets envisaged by the King pursuant to EU law are compatible with the right to property and the right to pursue a business.





In doing so, the Council of State has, for the first time, applied the doctrine of the Melloni judgment, according to which the national constitution cannot be invoked to offer further-going protection in an area that has been harmonized. The impact, however, appears to be rather limited, as the right to property is not protected under the Belgian Constitution at a higher level.

21. Has your court applied fundamental rights laid down in the Constitution in a way that provides for a better standard of protection of individual rights than those provided for in international human rights conventions? If yes, please explain and/or provide an example.

The Belgian constitution leaves hardly any margin for ex ante censorship, and thus offers stronger protection in that field than the balancing approach under other instruments. See e.g. judgment n° 80.282 of 18 May 1999 and judgment n° 116.818 of 10 March 2003 (about Article 19 and 25 Constitution -freedom of expression); n° 2387 of 24 April 1953, n° 83.940 of 7 December 1999 and n° 257.184 of 21 August 2023 (about Art. 26 Constitution freedom of assembly). In judgment n° 2387, for instance, it was stated that the municipality cannot require public (dancing) events in a private room to get a municipal authorization. In judgment n° 80.282 the illegality was alleged of the obligation introduced by the contested regulation to give prior notice to the mayor in order to distribute non-commercial leaflets on the public highway, to be accompanied by an assistant to collect the discarded leaflets and the prohibition of displaying leaflets on parked vehicles. The Council of State found a violation of Articles 19 and 25 of the Constitution.

In opinion 68.936/AV of 7 April 2021 about the pandemic law the legislative section has ruled that interferences in constitutional fundamental rights “almost always” require a formal law (and not only a substantive law as required by the ECtHR) in which the “essential elements” are established. The Council of State, legislative section, holds that Article 22 of the Constitution (right to privacy) requires that certain elements concerning data protection are established in a formal law, hereby setting a higher standard than GDPR.

Sometimes our institution is referring to international human rights treaties (Convention on the Rights of the Child- CRC) to explain that certain (procedural) obligations are required, while the ECtHR refers to a margin of appreciation in order not to impose such (procedural) obligations (see ECtHR, Odièvre v. France of 13 February 2003 versus advisory opinion n° 46.052 of 21 April 2009 on anonymous births). Both the ECtHR and the Council of State had to deal with the right of access of a child to information about her mother after an anonymous birth. In Odièvre the ECtHR held that the veto right of the mother, meaning that the mother could refuse that her identity was disclosed to the child, was not a violation of Article 8 ECHR given the wide margin of appreciation of the State. The Council of State ruled that “the reasons to afford a wide margin of appreciation at supranational level were not present at domestic level”. It held that a veto right for the mother was not compatible with the interests of the child as defined by the CRC and the Belgian constitution. An independent court should on a case by case basis be able to balance the rights of the mother and the child to consider whether the refusal to disclose the identity of the mother is in the best interests of the child.

22. Has your court applied fundamental rights laid down in the Constitution in a way in which the substance of a fundamental rights provision has been defined by reference to either international human rights conventions or to CFREU, and the case law relating to them? If yes, please explain and/or provide an example.

Unlike the Constitutional Court, the Council of State, administrative litigation section, can directly apply human rights treaties (at least when its provisions have direct effect -which is generally recognized for all ECHR provisions), which makes it often redundant to refer to the similar constitutional provisions.





In judgment n° 223.042 of 27 March 2013 the General Assembly of the Council of State held that a prohibition for teachers to wear any religious, political or philosophical signs was compatible with Article 19 of the Constitution (freedom of religion and freedom of expression) and Art. 24 of the Constitution (right to education). The judgment extensively refers to Art. 9 ECHR and the existing case law of the ECtHR.

In judgment n° 187.998 of 17 November 2008, about the compatibility of nocturnal flights with the right to privacy (Article 22 Constitution), the General Assembly of the Council of State referred to Art. 8 ECHR and the ECtHR Hatton case.

The legislative section has recently argued (opinion 74.464/1 of November 2023) that the right to translation under Directive 2010/64 must be assumed to also encompass the right of translation into tactile or audio signals for the visually impaired, even though the Directive is silent on that issue (in contrast to the rules on interpretation that do refer to people who have a speech or hearing impairment). Invoking the principle of equal treatment, the right to inclusion in Article 22^{ter} of the Constitution and the Articles 21 and 26 of the Charter, the Council of State thus interpreted the Directive in such a way as to require Belgium to implement the right to translation in this inclusive manner.

