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.

Co-funded by
the European Union

I BACKGROUND INFORMATION

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

The Supreme Court of Ireland / Cúirt Uachtarach na hÉireann

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

85-120

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

85-120

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**
- 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**

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.

n/a

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)?

n/a

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.

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 (explanation below)**
- No

Article 29.3 of the Irish Constitution provides that "Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States." Ireland, although legally bound by the obligations set out in treaties that it has ratified, has a dualist system which means that sources of international law do not have direct application in Irish law unless they are incorporated in domestic legislation. This is provided under Article 29.6 of the Irish Constitution, which states: "[n]o international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas".

This Article of the Irish Constitution was operationalised, for example, in the case of Re Ó Laighléis [1960] I.R. 93. The appellant stated that his detention was unlawful on the grounds that it had infringed the Convention for the Protection of Human Rights and Fundamental Freedoms, of which Ireland was a party. The appeal failed in the Supreme Court, with the court affirming that the primacy of domestic legislation could not be displaced by the State ratifying the Convention. In accordance with Article 29.6 of the Irish Constitution, in recent years, the Supreme Court and Court of Appeal have emphasised that an international agreement will not have direct effect in Irish law unless the Oireachtas (Irish Parliament) clearly determines that it does so.

Therefore, the Supreme Court cannot directly apply conventions that have not been incorporated into domestic law if doing so would contradict the Constitution, common law, or other legislation. The Supreme Court can only use international human rights conventions as aids when interpreting unclear or ambiguous pieces of legislation or principles.

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.**

  The EHRC has been codified in Irish legislation under the European Convention on Human Rights Act 2003. The Convention itself is part of Irish law by virtue of its incorporation into domestic legislation, not through the signing of the Convention itself. The Court can hear appeals relating to declarations of incompatibility with the Convention "where no other legal remedy is adequate and available". As per the Supreme Court ruling in *Carmody v. The Minister for Justice, Equality and Law Reform and Others* [2009] IESC 71, issues of constitutionality are generally to be considered first, followed by a consideration of the ECHR issue if necessary.

14. It follows from the case law of the CJEU (see, e.g., 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

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 (e.g., 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 (e.g., 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 *PO v. Minister for Justice* [2015] IESC 64, the Supreme Court considered an appeal as to the dismissal of a request for judicial review relating to a deportation order. In considering the issue of wasted costs, the Supreme Court held that there was no application to enlarge the grounds of appeal, and if such an application was to be made, this could only be permitted in "the most extraordinary circumstances" at such an advanced stage of the proceedings. The Supreme Court interpreted Article 51 as being addressed to 'to the institutions and bodies of the Union' but only 'when they are implementing Union law', and furthermore, recognised that it "does not establish any new power or task for the community or the Union, or modify powers and tasks defined by the Treaties." In finding for certain costs against the appellant, the Supreme Court found that an application for reference to the Court of Justice of the European Union for a preliminary ruling (which was withdrawn by the appellant) was a "completely unnecessary diversion".

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).***

The Supreme Court delivered a precedent regarding the application of Article 52 of the CFREU in the case of *Minister for Justice & Equality v. Celmer* [2019] IESC 80. This case concerned a European Arrest Warrant issued against a Polish individual resident in Ireland, who subsequently objected to his surrender on the grounds that changes made to the legal system in Poland could result in a breach of his right to a fair trial pursuant to Article 6 of the ECHR. An *amicus curiae* to the case put forward that article 52(3) of the EU Charter of Fundamental Rights allows for more "extensive protection" of human rights under EU law as opposed to the ECHR alone. This was rejected by O'Donnell J., who held that there was not enough evidence that the article permitted a more expansive interpretation and that, if this provision was intended to expand the protections of human rights further than the ECHR, this would have been explicitly stated within the Charter.

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.*

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).

No

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).

No

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 Supreme Court does not often explicitly compare the fundamental rights laid down in the Constitution with those provided for in international human rights conventions. However, in certain circumstances, comparison is unavoidable. An example of this can be seen in the case of *Gorry v. Minister for Justice and Equality and A B M v. Minister for Justice and Equality* [2020] IESC 55. In this case, it was held that the Minister for Justice and Equality had misidentified the weight to be given to constitutional rights when deciding as to the revocation of a deportation order. The Minister had treated the constitutional protection of the family as to be of equal (or perhaps lesser) weight than the protections provided by the European Convention on Human Rights. The Supreme Court thereby determined that the protections of Article 41 of the Constitution are stronger than those contained in Article 8 ECHR.

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.

Yes, the Supreme Court has 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 the European Convention on Human Rights (ECHR). An example of this can be found in the judgment of Hogan J. in

MK (Albania) v. Minister for Justice & Equality [2022] IESC 48, in which the right to privacy was considered in both the context of the ECHR and the Constitution.

In his judgment, Hogan J. referred to the essence of the Article 8 right to private life as being the privacy and *associated dimensions* of that right, which in turn informed the reading of the constitutional right to privacy as being "essentially associational in nature, and therefore similar in language to Article 8" (as noted by MacMenamin J., dissenting). Hogan J., in acknowledging that Article 8 served as a "single, convenient, omnibus clause", held that aspects of this wider right can be found in different parts of the Constitution. Article 8 thereby informed the reading of the provisions pertaining to the right to private life, contextualising the right as an associational one.