



**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.

The Administrative Jurisdiction Division of the Council of State of the Kingdom of the Netherlands

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

Approximately 9000

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

Approximately 5000

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. There is constitutional prohibition to assess legislation adopted by the legislature on its compatibility with the Dutch Constitution (see question 5). Legislation adopted by regional and local authorities or executing bodies, on the other hand, can be assessed on their compatibility with the Constitution. In cases before the Administrative Jurisdiction Division that concern such lower-level legislation, the Court can directly apply the Constitution.

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.

Article 120 of the Constitution ('Grondwet') stipulates that courts may not evaluate whether formal laws (acts of the legislature, consisting of government and parliament) and Treaties violate the Constitution.





However, it follows from Article 93 of the Constitution that universally binding provisions of Treaties and decisions of international organizations can be directly relied upon by individuals and legal persons before the Court. The Courts, including the Administrative Jurisdiction Division, are then allowed to assess the compatibility of all national legislation with the obligations in these international treaties. The importance of this compatibility requirement is stipulated by Article 94 of the Constitution. This provision provides that statutory regulations applicable within the Kingdom shall not be applied if such application is not compatible with 'universally binding provisions' of treaties. In this way, Article 94 makes clear that it is possible to invoke a provision of international law in court, at least if it can function as an independent legal norm, with the argument that a national law is in violation therewith. 'Universally binding' treaty law prevails not only over legislation in the formal sense, but also over the Constitution and all other legislation

When confronted with a party's appeal to the Constitution or fundamental rights in an international Treaty, the Administrative Jurisdiction often explicitly references articles 93, 94 and 120 of the Constitution. For a reference to articles 93-94, see e.g. judgment of 30 August 2023, [ECLI:NL:RVS:2023:3305](#), pt. 21.1. For references to article 120, see e.g. judgments of 16 August 2023, [ECLI:NL:RVS:2023:3135](#), pt. 6, and 26 April 2023, [ECLI:NL:RVS:2023:1624](#), pt. 9.2).

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

- Yes
- No, because the courts are not allowed to evaluate whether formal legislation violates the constitution. When lower-level legislation is found unconstitutional or when any type of legislation is found to violate a universally binding treaty provision, the courts are not able to repeal the legislation, but they can deem it non-binding or inapplicable to the case before it.

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

- Rarely. As was stated in the previous question, the courts are not allowed to repeal legislation, but they can deem it non-binding or inapplicable and this happens occasionally.
- 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)?

Under the present Article 120 of the Constitution it is Parliament that has to decide whether a proposed law is constitutionally valid or not. Under Articles 93 and 94, however, all courts in the Netherlands are obliged to look at rights and freedoms in treaties such as the European Convention on Human Rights. Because of this many scholars argue that Article 120 of the Constitution does not pose a real problem: almost all rights and freedoms mentioned in the Constitution are also mentioned in the CFREU, European Convention on Human Rights and Fundamental Freedoms and/or similar treaties. Other scholars argue that (also) because of this the Article 120 of the Constitution could or should be cancelled. This political debate is ongoing at this moment.





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.

As mentioned earlier, courts as such would not refer to the Constitution when dealing with formal legislation because its Article 120 impedes them to do so, but they would refer to relevant international treaties which because of Article 94 of the Constitution have an even higher ranking than the Constitution itself.

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. Since the Administrative Jurisdiction Division does not apply the Constitution in itself we will always (also) apply the ECHR and similar treaties.

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
- The Administrative Jurisdiction Division 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





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).*

No, the Administrative Jurisdiction Division has not made any ground-breaking rulings on the scope of Article 51 of the CFREU. However, the CJEU case law on this subject recurs with some regularity and is applied to assess whether an appellant's reliance on the CFREU can result in an evaluation of the compatibility of the contested ruled with the CFREU, because the legal question falls within the scope of Union law. See e.g. the court's judgment of 23 February 2022, [ECLI:NL:RVS:2022:558](#), pts. 8-8.1 (Charter unapplicable, but subsidiary evaluation on the basis of the ECHR) and the court's judgment of 19 May 2021, [ECLI:NL:RVS:2021:1060](#), pt. 4.1 (Charter deemed applicable before substantive assessment of the compatibility of the national measure with the Charter).

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).*

There are a few dozen judgments in which the Administrative Jurisdiction Division refers directly to Article 52 of the Charter. These judgments involve the interpretation of Charter rights by reference to the corresponding provisions in the ECHR (Article 52(3) of the Charter). This approach seems to be in line with the intention of this provision and the ECJ's case law on the subject.

See e.g. the judgments of 13 December 2023, [ECLI:NL:RVS:2023:4632](#), pt. 12, 19 May 2021, [ECLI:NL:RVS:2021:1060](#), pt. 4.3 and 19 May 2021, [ECLI:NL:RVS:2021:1061](#), pts. 5.6-5.9. Another example in which the Administrative Jurisdiction Division references article 52 of the Charter is the ruling of 29 March 2017, [ECLI:NL:RVS:2017:869](#), pt. 10.1. In this judgment, the Administrative Jurisdiction Division considered that the equivalence rule ensuring that the CFREU provides at least the same substantive protection as the ECHR does not prevent Union law from providing broader protection than the ECHR, for example when it comes to effective judicial protection (Article 47 CFREU).





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).

The only ruling in which Article 53 Charter was cited was the ruling of 28 September 2012 (ECLI:NL:RVS:2012:BX8644). The Article is cited without further explanation.

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).

See question 19.

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.

No.

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. If the Constitution, the ECHR and/or the CFREU are invoked simultaneously, the Administrative Jurisdiction Division normally assesses the compatibility of the national provision or the contested decision with the provisions in the ECHR and the CFREU. Whenever possible, it links to the protection provided by the Constitution, but the starting point is thus the protection in the treaties. See e.g. the ruling of 30 August 2023, [ECLI:NL:RVS:2023:3307](#), pts. 4-4.1. Another example is the ruling of 2 August 2023, [ECLI:NL:RVS:2023:2384](#), pt. 11. This case concerned a zoning plan that may, in principle, be tested against the Constitution. The Division nevertheless first ruled that the zoning plan violated the Services Directive and therefore did not engage with the argument on the Constitution.

