



**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.

Supreme Administrative Court (Naczelny Sąd Administracyjny), Poland

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

13 000 – 19 000

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

90 - 120

Comment:

*It is necessary to make a comment regarding the publication of decisions of the Supreme Administrative Court. With some exceptions (some refugee cases or security clearance cases) **nearly all** decisions of the Supreme Administrative Court are available publicly via the Central Database of the Jurisprudence of Administrative Courts (<http://orzeczenia.nsa.gov.pl/> - Centralna Baza Orzeczeń Sądów Administracyjnych – CBOSA).*

The Supreme Administrative Court in cooperation with the Wolters Kluwer publishing house issues an official collection of its decisions: “*Orzecznictwo Naczelnego Sądu Administracyjnego i wojewódzkich sądów administracyjnych*” (Decisions of the Supreme Administrative Court and of the Voivodship / Regional Administrative Courts). In this official paper collection of the decisions, there is published about 120 decisions / precedents per year. Their selection and approval fall within the responsibility of the special research and documentation unit - Judicial Decision Bureau.

For the purpose of the answer, we assume that a precedent is a decision of significant importance for judicial practice.

Among decisions of the Supreme Administrative Court there is a special category – so called resolutions of the Supreme Administrative Court. The SAC adopts resolutions aimed at clarifying legal provisions, the application of which has caused discrepancies in the case-law of administrative courts, doing so at the request of the President of the SAC, the Public Prosecutor General, the Commissioner for Human Rights, the Commissioner for Small and Medium Enterprises and the Commissioner for Children’s Rights (so called “abstract” resolutions). The SAC also adopts resolutions resolving legal questions that raise serious doubts in a specific pending administrative court case (so-called “concrete” resolutions). Each time, a substantive response to a legal question which is presented to an extended panel pursuant to relevant provision of the Law on Proceedings before Administrative Courts is preceded with an analysis whether the motion satisfies the criteria to initiate the resolution procedure.

Case-law of administrative courts on the understanding of the concepts of “discrepancy” and “serious doubts” is uniform. Abstract resolutions are adopted where there are discrepancies in the jurisprudence of administrative courts. Discrepancies should be understood not only as differences in legal opinions expressed in case-law, but also as tendencies for certain standpoints in interpretations to become entrenched. Case-law discrepancies must be real and lasting, which, in turn, implies and deepens further inconsistent application of the law. Abstract resolutions touch on specific legal doubts in the context of inconsistent jurisprudential views which are not directly related to the proceedings pending in a specific administrative court case.

As for “concrete” resolutions, both doctrine and jurisprudence assume that the Law on Proceedings before Administrative Courts refers to legal questions of particular importance. Whether such a resolution may be





issued depends on satisfying both of the following prerequisites: there being a serious legal doubt in the case, and it being necessary to resolve this doubt in order to examine the cassation appeal.

Resolutions of the SAC are of a “generally binding” nature. Administrative courts are bound by the resolutions in all cases where the interpreted provision is to be applied; however, they are relatively bound to do so, as there is a formal procedure that allows them to deviate from the opinions expressed in the resolutions.

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

Additional comment:

Direct application of the Constitution – so called 'self-application' and 'co-application' of the Constitution together with the laws (statutes) – allows administrative courts to pass a judgment: 1) in the situation when the court has doubts if provision of the law to be applied in a specific case is constitutional; 2) in the case of a legal loophole created as a result of the legislator's omission.

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)?*

Among the supreme courts and tribunals in Poland, it exists since 1982 (with effect from 1986) the Constitutional Tribunal.

The Polish Constitutional Court adjudicates on cases concerning (Article 188 of the Constitution of the Republic of Poland of 2 April 1997):

- 1) the conformity of statutes and international agreements to the Constitution;
- 2) the conformity of statutes to ratified international agreements whose ratification required prior consent granted by statute;
- 3) the conformity of legal provisions issued by central state authorities to the Constitution, ratified international agreements, and statutes;
- 4) constitutional complaints;
- 5) disputes over powers between central constitutional state authorities;
- 6) the conformity to the Constitution of the purposes or activities of political parties.

The Polish Constitutional Court also settles disputes over authority between central constitutional organs of the State (Art. 189 of the Polish Constitution).

The answers to the questions 6 a and 6 b require additional comments.

Although the Supreme Administrative Court cannot replace the role of the Constitutional Court in terms of authorization to repeal a piece of ordinary legislation if it is found unconstitutional with the *erga omnes* effect it is accepted in accordance to well established case-law that the administrative court, including the Supreme Administrative Court is authorised not to apply in pending case with *inter partes* effect the legislation it found unconstitutional.

It must be noted that court acts differently when the law (act of parliament) or subordinate executive regulation seems to be unconstitutional.

In the jurisprudential practice, there are situations in which administrative courts review the constitutionality of provisions contained in regulations. The basis for such actions is Article 178(1) of the Constitution, from which it follows that courts are not bound by regulations of the sub-statutory rank regardless of their universally binding character. Due to the incidental nature of such control, court rulings declaring a regulation unconstitutional cannot have universally binding effect. The very competence of the courts to review such legal norms and to refuse to apply them is not controversial, its existence is supported by the case-law of the Constitutional Tribunal and the previous, well-established case law of the administrative courts.





According to Article 193 of the Constitution, any court – in consequence also administrative court – may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court.

In its jurisprudence, the Supreme Administrative Court has also repeatedly presented the position that in the event of justified doubts as to the conformity of the statute (act of parliament) with the Constitution, the procedure of the referral of legal questions to the Constitutional Tribunal should be initiated under Article 193 of the Constitution (judgments of the Supreme Administrative Court: of 20 December 2005, case no. I GSK 1098/05; of 12 July 2006, case no. II OSK 548/06; of 10 May 2012, case no. I OSK 2149/11; of 8 December 2015 r., case no. II GSK 1594/15).

Referral of a legal question to the Constitutional Tribunal shall be admissible in the situation when the court, deciding a particular case, has doubts as to the constitutionality: the conformity of statutes and international agreements to the Constitution, the conformity of a statute to ratified international agreements which ratification required prior consent granted by statute, the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes and the answer to the legal question determines the outcome of the case pending before the referring court.

The Supreme Administrative Court also pointed out that in a situation where the court hearing the case comes to the conclusion that there are doubts as to the compliance of a provision of a statute (act of parliament) with the Constitution, the rule should be to submit a legal question to the Constitutional Tribunal, but when a provision is not clearly consistent with the Constitution, the court has the power to directly apply the Constitution, which may consist of pro-constitutional application of a provision of the law, remaining contrary to the Constitution, which is the basis of the decision being under judicial review (e.g. judgment of the Supreme Administrative Court of 15 July 2015, case no. I OSK 214/14).

A legal question is subsidiary and is admissible after exhausting other possibilities, inter alia, the use of interpretative rules allowing to remove constitutional doubts, inter alia via pro-constitutional interpretation. When applying a pro-constitutional interpretation of a provision, the courts take into account, to the greatest extent possible guarantee of rights and freedoms and their broadest realisation in the process of law application, making use of case-law of the Constitutional Tribunal.

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**
- 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 [especially in tax law cases]**

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
- [very] 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).





Although Article 51 CFREU is analysed in the jurisprudence of the Polish administrative courts (mainly because of the charges formulated by a claimant) there is no case which will lead to a precedent judgment. In all cases in which Article 51 CFRU is being analysed, courts try to interpret national legislation in the line with the EU law. If they find any inconsistency, then a way for asking preliminary questions is being adopted. The number of cases in which Article 51 CFREU is revoked remains limited.

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 no precedents concerning Article 52 CFREU. Although this provision is cited in justifications of courts' judgments, it is not used in a way to justify a precedent ruling. Mostly Article 52 CFREU is revoked by a claimant. Then, a court has to come back to this charge and clarify, why it has not been violated. The number of cases in which Article 52 CFREU is revoked remains limited.

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.

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.*

The Supreme Administrative Court often applies the fundamental rights provisions of the Constitution in the light of the ECHR, its case law and CFREU. It is natural that if the Polish administrative court refers to the freedoms and rights of man and citizen regulated by the Constitution and these rights have their counterparts in international human rights conventions or CFREU the Polish administrative court will also refer to these international standards in its ruling. For example, in the judgment of the Supreme Administrative Court of 2 October 2012, case no. II OSK 1024/11, it was indicated that in the Polish legal order there is a concept of providing an individual with double protection in administrative and administrative court proceedings, i.e. through the right to a trial (defence of a legal interest in proceedings regulated by the provisions of procedural law, with a guarantee of the right to defend oneself by way of legal remedies) and through the right to a court (the right of an individual to challenge actions of the public administration in order to have the dispute about their legality resolved by an independent, impartial court). The sources of this protection should be sought in supra-statutory norms, i.e. Article 2 of the Constitution of the Republic of Poland, Article 6(1) of the ECHR and Article 6(3) of the Treaty on European Union, as amended by the Treaty of Lisbon.

