



**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.*

High Court of Cassation and Justice of Romania

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

In 2022 – 14.142

In 2021 – 15.527

In 2020 – 15.404

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

In 2022 - RIL (Appeal in the Interest of the Law): 27; HP (Preliminary Ruling on Questions of Law): 103. After reasoning, the judgments are published in the Official Gazette of Romania and on the website of the High Court.

In 2021 – RIL (Appeal in the Interest of the Law): 28; HP (Preliminary Ruling on Questions of Law): 87. After reasoning, the judgments are published in the Official Gazette of Romania and on the website of the High Court.

In 2020 – RIL (Appeal in the Interest of the Law): 32; HP (Preliminary Ruling on Questions of Law): 102. After reasoning, the judgments are published in the Official Gazette of Romania and on the website of the High Court.

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.*

-

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 Romania is a political-jurisdictional public authority, the guarantor of the supremacy of the Constitution and the only authority of constitutional jurisdiction, independent from any other public authority, which is subject only to the Constitution and its own law of organization and functioning.

The Constitutional Court reviews the constitutionality of laws, international treaties, Parliament regulations and Government ordinances.

This review of constitutionality may be exercised either before the laws are promulgated or after their entry into force, following the admission by an ordinary court of a request for referral to the Constitutional Court by a party to the dispute before it.

The High Court of Cassation and Justice has the right to refer the matter to the Constitutional Court for a review of the constitutionality of laws prior to promulgation.

According to the Fundamental Law, justice is carried out through the High Court of Cassation and Justice and the other courts established by law. The High Court of Cassation and Justice ensures the interpretation and the uniform application of the law by the other courts, according to its competence. Thus, the constitutional role of the courts is to interpret and apply the laws, while the High Court also has the role of unifying the jurisprudence of national courts.

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

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).

Yes. There have been situations where individuals have made reference to various provisions of the Charter, although the dispute was not within the scope of European Union law. In these decisions, the High Court has recalled the scope of the Charter, whose provisions become applicable only when the national court applies European Union law to the dispute.

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).

Yes. There are numerous cases where the High Court has applied the principle of proportionality. The most recent examples are those in which the High Court applies the recent rulings of the CJEU in case C-40/21 concerning actions seeking the annulment of the assessment report drawn up by the ANI (National Integrity Agency), in which the European Court ruled that an analysis must be carried out, including from the perspective of the principle of proportionality of the penalty.

The High Court also frequently uses the reference that the Article 52(3) of the Charter makes to the European Convention on Human Rights and to the identity of the content and scope of the rights enshrined in the two instruments.

In accordance with Article 52(6) of the Charter, the High Court also takes account of the explanations drafted to guide the interpretation of 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 High Court of Cassation and Justice has sometimes applied the fundamental rights enshrined in the Constitution, as interpreted by the Constitutional Court, in a way that ensures a higher level of protection of individual rights than that provided for in international human rights conventions.

This analysis is usual in the judgments of the Romanian Constitutional Court, when it examines exceptions of unconstitutionality, and in support of them it invokes, in addition to the provisions of the Constitution allegedly violated, articles of conventions - in particular of the European Convention on Human Rights. In this case, the Constitutional Court analyses and refers in the grounds of its judgments to the level of protection of the fundamental rights guaranteed by the Constitution, expressly stating, where appropriate, that the standard of protection is superior to that of the international convention invoked by the party, since the convention ensures a minimum standard, lower than that of national law.

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, this happens frequently. For example, the content of the right to defence, as regulated by Article 24 of the Romanian Constitution, is frequently explained in the light of principles drawn from ECHR case law and sometimes Article 48 of the Charter. Similarly, when the content of Article 21 of the Constitution on free access to justice is made explicit, reference is made to ECHR case law on Article 6 ECHR. When reference is made to the presumption of innocence, reference is automatically made to ECHR case law.

The concept of the rule of law is applied by the supreme court by reference to the relevant case law of the CJEU, etc.

