



**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 Court of the Republic of Slovenia

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

3000 – 3200 (Supreme Court in its entirety), 600 – 900 (Administrative Department of the Supreme Court; there are five departments in total: administrative, civil, criminal, commercial, and labour and social rights).

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

All substantial decisions on the merits of the case (sixty percent of all decisions), are accessible to the public through online publication on a specialized search engine managed by the Supreme Court. Purely procedural decisions without general importance (e. g. unreasoned decisions on the leave to revision) are not published.

Additionally, a selection of 50 to 70 pivotal decisions from the entire Supreme Court and 5 to 10 key decisions from the Administrative Department of the Supreme Court are featured in a specialized written publication.

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.

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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)?

Constitutional court of the Republic of Slovenia in cases of acts of Parliament. In cases of secondary legislation the Supreme Court has the power to set them aside in concreto (with precedential effect).

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. **If the Constitution should have/has an overriding effect because of conflict with ordinary legislation the case is referred to the Constitutional court to declare the legislation unconstitutional. After this the case is decided by the Supreme court.**





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. . **The human rights established by the ECHR have the same protection as those regulated by the Constitution; if they should have/have an overriding effect because of conflict with ordinary legislation the case is referred to the Constitutional court to declare the legislation unconstitutional. After this the case is decided by the Supreme court.**

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.

In the case ECLI:SI:VSRS:2019:II:IPS.231.2017 the plaintiff sought compensation for damages suffered in a hot air balloon accident. The Slovenian law governing contractual relationships in aviation stipulates a limitation period for asserting compensation claims of two years, from the date the aircraft arrived or should have arrived at its destination. The damages claimed by the plaintiff continued to accrue beyond the two-year limit





(various medical treatment costs). The Supreme Court ruled that adhering to the limitation period would deprive the plaintiff of the right to an effective legal remedy under Article 47 of the Charter of Fundamental Rights of the European Union. Compliance with such a limitation would jeopardize the effective enforcement of EU law rights. Therefore, based on Articles 47 and 51 of the Charter of Fundamental Rights of the European Union, the Supreme Court decided that filing a lawsuit for the recovery of specific damages constitutes an interruption of the limitation period, even for any subsequently arising similar damage.

In the case ECLI:SI:VSRS:2019:X.IPS.34.2019 the plaintiff sought to obtain participation status in the administrative procedure of obtaining a building permit, claiming that the planned construction (building) would negatively affect her property (a red-listed beech tree). Her participation in the procedure was denied by the decision of the administrative authorities, later confirmed by the Administrative Court of first instance, on the grounds that the plaintiff had not demonstrated, with a sufficient standard of proof, the adverse impact of the construction on her property (with the proof standard of conviction – i.e. preponderance of the evidence). The Supreme Court, considering Article 47 of the Charter and the case law of the CJEU (e.g. C-664/15, *Protect Natur*), which requires broad public access to judicial protection in environmental matters (to ensure an effective remedy before a court), changed the previous judicial practice in Slovenia and lowered the required standard of proof when demonstrating the impact on one's own property when deciding on the recognition of participation status in the administrative procedure.

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.

In the case ECLI:SI:VSRS:2021:I.UP.23.2021 the Supreme Court, in interpreting Articles 4 and 19 of the Charter in a case concerning the expulsion of a foreigner from the country, stated that, in accordance with Article 52 of the Charter, the rights under the ECHR and the case law of the ECtHR must also be considered. In no case should the level of protection of rights under the Charter be lower than the level guaranteed by the ECHR. The Supreme Court then examined the case law of the ECtHR regarding the non-refoulement principle and applied it in assessing the circumstances of the case. No violation was found.

In the case ECLI:SI:VSRS:2022:X.IPS.29.2021 the plaintiff's right to vote was completely revoked on the grounds that she is unable to understand the meaning, purpose, and effect of elections due to a severe mental disability. The plaintiff claimed that, based on the International Convention on the Rights of Persons with Disabilities, she has an unrestricted recognized right to vote, as confirmed by the opinions of the United Nations Committee on the Rights of Persons with Disabilities. In its assessment, the Supreme Court considered Article 39 of the Charter, the case law of the CJEU (e.g. C-406/15, *Milkova*; C-395/15, *Daouidi*), and, based on Article 52 of the Charter, also the ECHR and the case law of the ECtHR (e.g. *Caamaño Valle v. Spain*). It follows from them that the International Convention on the Rights of Persons with Disabilities is not directly applicable and that both the Charter and the ECHR allow for restrictions on the right to vote in certain cases and under certain conditions. The Supreme Court applied these positions in the present case and found no violations in the revocation of the plaintiff's right to vote.

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.

Yes. The Supreme Court holds a position that international human rights conventions establish the absolute minimum legal protection for individual rights.

In the case ECLI:SI:VSRS:2023:I.UP.208.2022 concerning a lawsuit against the decision to deny international protection to the applicant, the administrative court of first instance did not conduct a main hearing, referring to the Charter and the ECHR, which, under certain conditions, allow for the non-conduct of a hearing in a judicial review procedure. The Supreme Court ruled that conducting a main hearing, as a right associated with ensuring a fair judicial process and effective judicial protection, is justified in the constitutional framework of the Republic of Slovenia, which is in no way restricted by either the Charter or the ECHR. Hence, the Supreme Court concluded that invoking international human rights conventions with the aim of lowering the level of protection of the constitutionally guaranteed right to a court hearing in Slovenia is fundamentally misguided. Certainly, neither the purpose of the mentioned acts nor the aim of jurisprudence of international courts based on these is to lower the level of protection of human rights in the member states of the European Union or the Council of Europe to what is required only by these international legal acts. It is deemed that the protection guaranteed by the Charter and ECHR, in line with their interpretations in judgments of the CJEU or the ECtHR, in principle determines only the absolute minimum of legal protection of individual rights applicable to all member states or contracting parties.

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 very often applies the constitutional rights with regards to international human rights conventions.

In the case ECLI:SI:VSRS:2020:X.IPS.22.2020 the Supreme Court, based on the ECHR and decisions of the ECtHR (e.g., Mirovni inštitut v. Slovenia), has developed a judicial practice defining the right to a court hearing





as an independent human right originating from the Constitution of the Republic of Slovenia (as a part of the right to a fair judicial process). The complete assurance of this right is extended to judicial proceedings challenging administrative decisions (which, in Slovenia, differ to some extent from civil proceedings). The Supreme Court concluded that, given the significance of the hearing in court proceedings, any deviation from its conduct constitutes a substantive infringement of the human right enshrined in the Constitution of the Republic of Slovenia. As such, it must be subject to a reasoning that is strictly compliant with the Slovenian constitution and, as an exception, be restrictively interpreted in judicial practice.

