Eichberger[1] Karlsruhe, 20 December 2016

A. The rule of law and constitutional justice in the modern world

I. The different concepts of the rule of law

1. What are the relevant sources of law (e.g. the Constitution, case-law, etc.) which establish the principle of the rule of law in the legal system of your country?

The German "rule of law" concept is characterised by three basic rules which are all based on the fundamental norm of Art. 20 of the Basic Law (Grundgesetz – GG). The concept is flanked by four additional principles that have been developed by case-law on the basis of different Basic Law norms.

The three basic rules are:

- Binding nature of statute (*Gesetzesbindung*). This basic rule requires all state organs and private persons to comply with the provisions of the German legal order. It arises from the rule of law principle of Art. 20 GG and specifically for state organs also from Art. 20, sec. 3 GG and Art. 1 sec. 3 GG.
- Precedence of statute (*Gesetzesvorrang*) – This basic rule specifies that statutes adopted by Parliament take precedence over all other sub-statutory norms and government decisions, and supersede them in case of doubt.
- Requirement of a statutory provision (*Gesetzesvorbehalt*) – According to this rule, decisions or sub-statutory provisions that interfere with fundamental rights as well as decisions or sub-statutory provisions that are especially important for the exercise of those rights must be based on a parliamentary statute.

These three basic rules are flanked by four additional rule of law principles:

- Protection of legitimate expectations (*Vertrauensschutz*) – This principle only allows a retroactive amendment of the legal situation that has adverse effects for a citizen subject to narrow prerequisites, and protects the citizen's expectation that the legal system will be reliable.
- Proportionality (*Verhältnismäßigkeit*) – Under this principle, interferences with fundamental rights – whether by the legislature or the administration – must not involve burdens on the citizen or third parties that are unreasonable when measured against the public benefit being sought through that interference.
- Effective protection of legal interests (*effektiver Rechtsschutz*) – Under German law, this principle refers to the guarantee that any sovereign act that interferes with a citizen's rights can be subjected to a substantive review by an independent court.

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- Independence of the courts (*Unabhängigkeit der Gerichte*) – This principle guarantees that disputes are decided by personally and factually independent judges.

The above guarantees can be attributed most readily to the principle of the *Rechtsstaat* that informs the entire system of the German state. The principle of the *Rechtsstaat* as a whole, together with the individual guarantees just listed above, are all based on and guaranteed by the Basic Law (*Grundgesetz* – GG), the German Constitution. For example, Art. 20 sec. 3 GG requires that the legislature shall be bound by the constitutional order, and the executive and the judiciary by law and justice. Art. 1 sec. 3 GG determines that all three branches of government – meaning the executive and the judiciary, but explicitly also the legislature itself – are bound by the fundamental rights. Art. 19 sec. 4 GG guarantees effective protection of legal interests against all acts of public authority, and Art. 79 sec. 3 GG, known as the "eternity clause" (*Ewigkeitsklausel*), declares inadmissible amendments, inter alia, to the principle set out in Art. 1 sec. 3 GG according to which all branches of government are bound by the fundamental rights, or amendments to the principle of the *Rechtsstaat* under Art. 20 GG, which comprises the principles of the "rule of law". The legislature may not abandon these principles when amending the Constitution.

In addition to this express guarantee in the Basic Law, the principle of the *Rechtsstaat* and its various manifestations have in particular been affirmed, specified with regard to manifold constellations of cases, and thus fleshed out in numerous decisions of the Federal Constitutional Court (*Bundesverfassungsgericht*) throughout more than 60 years of case-law. Decisions of the Federal Constitutional Court are binding on everyone. Other than that, however, case-law does not have a generally binding effect in Germany.

2. How is the principle of the rule of law interpreted in your country? Are there different concepts of the rule of law: formal, substantive or other?

Based on the understanding that the "rule of law" is an umbrella term for a variety of legal principles, there is no independent, general concept of this principle (formal, substantive or other). Instead, each individual principle of the Basic Law is shaped by the case-law of the Federal Constitutional Court.

All in all, among the manifestations of the principle of the *Rechtsstaat* as listed above (under 1.), precedence of statute and the requirement of a statutory provision are more of a formal nature, while the others are more of a substantive nature. However, there is no strict distinction at the level of individual principles, so that ultimately, there are overlaps between formal guarantees and substantive ones in all cases.

For example, the principle of the requirement of a statutory provision formally mandates that state actions interfering with fundamental rights have a statutory basis. Yet the required precision of the respective statutory authorisation depends on the fundamental right concerned and on the intensity of the potential interference, while the requirements for a permissible scope of interferences with fundamental rights are determined by the principle of proportionality in particular.

3. Are there specific fields of law in which your Court ensures respect for the rule of law (e.g. criminal law, electoral law, etc.)?

There are no fields in which the Constitutional Court is specifically active. Rather, the principal task of the Federal Constitutional Court is precisely to safeguard the guarantees of the Basic Law, and thus of course also the principles which, considered as a whole, form the concept of the "rule of law". For that reason, the case-law of the Federal Constitutional Court shapes all conceivable fields of law. However, there are areas that are particularly sensitive from the point of view of fundamental rights, and in view of which the Federal Constitutional Court has thus derived very strict requirements from the individual manifestations of the rule of law, particularly with regard to the specificity of the statutory provision and in terms of compliance with the principle of proportionality. Examples for such areas include penal enforcement, law on adult guardianship, law on parent and child matters, the right of assembly, or the area of data collection and processing by the state.

4. Is there case-law on the content of the principle of rule of law? What are the core elements of this principle according to the case-law? Please provide relevant examples from case-law.

On this point, see the comments on Questions 1 to 3. For example, under the principles listed under Question. 1, the Federal Constitutional Court has decided:

- Precedence of statute: The supremacy of statute over sub-statutory provisions and over administrative directives must be ensured. For example, the Federal Constitutional Court objected to a provision in the rules of professional conduct for lawyers set out in a sub-statutory charter, which prescribed additional procedural requirements for the success of a legal remedy that were not provided in the relevant procedural code that had the rank of statute (cf. *Entscheidungen des Bundesverfassungsgerichts,* Decisions of the Federal Constitutional Court – BVerfGE 40, 237 <248 and249>).
- Requirement of a statutory provision: According to the Federal Constitutional Court's established case-law, the parliamentary legislature itself must regulate those rules that are essential for the fulfilment of fundamental rights (for example, the official duties of a civil servant in connection with that person's freedom of religion and ideology, specifically the ban on a teacher's wearing a headscarf at school and while teaching; BVerfGE 108, 282 <340>).
- Protection of legitimate expectations: The Federal Constitutional Court has held in established case-law, citing the principle of the protection of legitimate expectations, that laws having "true" retroactive effect – meaning those that interfere with matters that have already been concluded – are generally impermissible (cf. BVerfGE 45, 142; 72, 200; 132, 302; 135, 1).
- Proportionality: The principle of proportionality serves as the practically most important requirement for restrictions of fundamental rights. Any interference is subject to review of its suitability, necessity and proportionality. For example, from this principle the Federal Constitutional Court has derived general requirements for the state's investigative and surveillance powers that interfere profoundly in the private sphere (BVerfGE 100, 313; 107, 299; 129, 208; 120, 274; 133, 277).

- Effective protection of legal interests: According to the case-law of the Federal Constitutional Court, irreparable decisions, such as those that may result from the immediate enforcement of a sovereign measure, must be prevented as far as possible (cf. BVerfGE 35, 263 <274>). For example, in the case of an expropriation and resettlement for an opencast lignite mine, the Court first and foremost required timely protection of legal interests, which in any case would also include an overall assessment of the concerns arguing for and against the project and ensure a factually realistic chance of preventing the project in the event that it is unlawful (BVerfGE 134, 242 <299 et seq. paras. 190 et seq.> and <310 et seq. paras. 220 et seq.>).
- Independence of the courts: Pursuant to the case-law of the Federal Constitutional Court, this implies that judges are not bound by instructions in performing their judicial activity (BVerfGE 3, 213 <224>; 87, 68 <85>) and that they generally cannot be reassigned or dismissed against their will during their term of office (BVerfGE 87, 68 <85>).

5. Has the concept of the rule of law changed over time in case-law in your country? If so, please describe the changes referring to examples.

The understanding of the principles which, considered as a whole, form the concept of the “rule of law” is characterised by great continuity. No major changes have taken place since the Basic Law entered into force; the existing principles have simply been further developed in the case-law of the Federal Constitutional Court.

For example, a certain degree of further development can be identified in the field of the right to be heard. In an Order of 30 April 2003 – 1 PBvU 1/02 – (BVerfGE 107, 395) the Federal Constitutional Court held that it violates the principle of the *Rechtsstaat* in conjunction with the right to be heard if rules of procedure do not provide a remedy in the regular courts a situation in which a court violates the right to be heard in a way that is material to the decision. In response, the legislature introduced appropriate forms of procedure, known as the *Anhörungsrüge,* i.e. a complaint seeking remedy for a violation of the right to be heard. In cases in which a legal remedy against a court’s decision is not available, and after the final decision has been handed down, the *Anhörungsrüge*, addressed to the *iudex a quo*, is available if the person concerned believes that the court has violated his or her right to be heard.

Furthermore it can be observed that the principle of protection of legitimate expectations has also been subject to continuous development in terms of the permissibility of retroactive statutes. For several decades already, the case-law of the Federal Constitutional Court has ruled that instances of so-called “true” retroactivity of a law – i.e., cases in which a law’s effects date back to a moment before it was promulgated, and thus cause an adverse change in a legal position of the past – are permissible only in very narrowly limited exceptional cases. By contrast, the Court’s case-law tends to take an increasingly liberal stance on the permissibility of so-called “quasi” retroactive laws, which take effect only after they are adopted, but still result in a future deterioration in legal positions already established in the past. This rather liberal view is intended to maintain the democratically legitimated legislature’s latitude for action, while guaranteeing at the same time that citizens’

legitimate expectations are adequately protected. The Federal Constitutional Court has often decided on this matter in the context of tax law (BVerfGE 127, 1, 127, 31; 127, 61; 132, 302; 135, 1), but has, for example, also dealt with investment protection questions in a judgment pronounced in December 2016, ruling on the accelerated phase-out of the peaceful use of nuclear energy upon a law enacted after the reactor disaster in Fukushima.

6. Does international law have an impact on the interpretation of the principle of the rule of law in your country?

The Federal Constitutional Court takes account of the case-law of the Court of Justice of the European Union and the European Court of Human Rights, and maintains a lively dialogue with those courts. Further details can be found in the answer to Question 9.

II. New challenges to the rule of law

7. Are there major threats to the rule of law at the national level or have there been such threats in your country (e. g. economic crises)?

a) Basically, ever since the Federal Republic of Germany was founded, there has been no major threat to the rule of law or the ways in which it is manifested in the German legal system.

At most, the insufficient staffing of certain areas of the judiciary over many years now – when measured against the numbers of proceedings – poses a certain structural threat, because the excessive work load means that criminal courts and public prosecutors' offices in particular cannot always pursue cases with the necessary speed.

Particularly in recent years, in the field of criminal justice, which is especially sensitive from the point of view of fundamental rights, it has repeatedly been necessary to revoke arrest warrants ordering pre-trial detention or the continuation of that detention when a case against the defendant could not be concluded within a reasonable time for reasons beyond the defendant's control, simply because the court lacked the personnel and financial resources necessary in order to handle the matter properly (cf. in general on this requirement BVerfGE 36, 264; Chamber Decisions of the Federal Constitutional Court, *Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK 12, 166; from the ordinary courts' case-law from recent years, cf., e.g., Cologne Higher Regional Court, *Oberlandesgericht* – OLG, Order of 1 June 2015 – III-2 Ws 299/15 –, juris; OLG Hamburg, Order of 10 February 2015 – 1 Ws 14/15 –, juris; OLG Hamm, Order of 3 April 2014 – III-1 Ws 137/14 –, juris).

In practice, courts and public prosecutors' offices have tried since the 1970s to handle especially the more extensive criminal proceedings by way of a form of plea bargain known as *Verständigung*, and to thus master the work load (which could reach the point of overload). This was done through agreements reached among the courts, public prosecutors' offices, defence counsels, and the defendant, often outside trial. As a rule, if the defendant confessed, further gathering of

evidence was waived, so that the plea bargain resulted in a significant shortening of the proceedings. Initially there was no statutory provision governing this approach. In 2009, however, the legislature adopted the Plea Bargaining Act (*Verständigungsgesetz*) (cf. *Bundestag* document, *Bundestagsdrucksache* – BTDrucks 16/12310).

The Federal Constitutional Court has viewed plea bargaining in criminal proceedings as generally permissible, but has insisted on adequate precautions to ensure that the constitutional requirements are met. For example, the Court held that criminal proceedings cannot deviate from the objectives of the best possible investigation of the substantive truth and of a legal assessment by an independent, neutral court. For that reason, the Federal Constitutional Court defined formal and substantive requirements and limitations for plea bargaining in criminal proceedings (BVerfGE 133, 168), because before, such requirements and limitations had often not been observed in legal practice.

b) However, in a number of decisions delivered in the context of the economic and European financial crisis, the Federal Constitutional Court has urged compliance with the bounds under national constitutional law and also compliance with the rules of Union law in the individual measures taken to manage these crises (cf. BVerfGE 131, 152; 132, 195 <ESM preliminary injunction>; 134, 366 <OMT – referral to the European Court of Justice>; 135, 317 <ESM judgment>; Order of 21 June 2016 – 2 BvE 13/13 et al. – *Neue Juristische Wochenschrift* – NJW 2016, 2473 <OMT judgment>). These cases primarily concerned maintaining the constitutionally required ability of the German parliament to influence also measures adopted in crises, as well as compliance with the legally determined competences and powers of the Union organs, and of the European Central Bank in particular. Overall, all Federal Constitutional Court decisions handed down in this context concerned the effort to maintain the character of the European Union and its Member States as a community of law, even in times of crisis.

8. Have international events and developments had a repercussion on the interpretation of the rule of law in your country (e. g. migration, terrorism)?

a) Terrorism

The attacks of 11 September 2001, and the threat from Islamic terrorism that has persisted since then, have resulted in a tightening of security laws also in the Federal Republic of Germany, and this has necessarily curtailed civil liberties. The security laws adopted in that regard have particularly had to do and still deal with the covert collection of personal data and – depending on the power in question – further interference with the fundamental right of the inviolability of the home, secrecy of telecommunications, and the right to informational self-determination, as well as the fundamental right to confidentiality and integrity of information technology systems. In addition to numerous security laws of the German *Laender*, federal level laws which must be mentioned in this respect particularly include the statutory authorisation of precautionary storage of telecommunications traffic data under a law dating from 2008 (the Act for the Amendment of Telecommunications Surveillance and Other Measures of Undercover Investigation and for the Implementation of Directive 2006/24/EC – *Gesetz zur Neuregelung der Telekommu-*

nikationsüberwachung und anderer verdeckter Ermittlungsmaßnahmen sowie zur Umsetzung der Richtlinie 2006/24/EG) and the Federal Criminal Police Office Act (*Bundeskriminalamtsgesetz*) of 2009.

The Federal Constitutional Court viewed both laws as a violation of fundamental rights.

In a judgment of 2 March 2010 – 1 BvR 256/08 (BVerfGE 125, 260), the Court declared the Act on the precautionary storage of telecommunications traffic data unconstitutional in its entirety, and voided the provisions accordingly. The Court noted that precautionary storage of data is not *per se* incompatible with the Basic Law, yet it set strict requirements for the storage and security of data, and required that the immediate use of the data by authorities be restricted to precisely specified cases of serious criminal offences and serious danger. In October 2015, a new Act for the Introduction of a Storage Obligation and a Maximum Storage Period for Telecommunications Data (*Gesetz zur Einführung einer Speicherpflicht und Höchstspeicherfrist für Verkehrsdaten*) was enacted. Constitutional complaints have now been lodged against that act, too, but the Federal Constitutional Court has not yet handed down a decision on the complaints.

The Court held that the authorisation of the Federal Criminal Police Office (*Bundeskriminalamt*) to carry out covert surveillance measures for the purpose of protecting against threats from international terrorism is in principle compatible with the fundamental rights. However, the Court stated further that the specific design of these powers does not satisfy the principle of proportionality in several regards. As a consequence, it objected to a number of the law's provisions (Federal Constitutional Court, Judgment of 20 April 2016 – 1 BvR 966/09, 1 BvR 1140/09).

b) Migration

In the 1980s, a debate arose as to whether the second sentence of Art. 16 sec. 2 GG f.v. should be amended. The debate was triggered by a steep rise in the number of asylum seekers in comparison to previous decades. The vast majority of asylum applicants were not recognised as victims of persecution on political grounds within the meaning of the second sentence of Art. 16 sec. 2 GG f.v. The debate gained further momentum in the 1990s, when large numbers of people fled to Germany from the civil war in Yugoslavia. Up to that time the Basic Law contained only one sentence concerning the right of asylum, namely the second sentence of Art. 16 sec. 2 GG f.v. ("Persons persecuted on political grounds shall have the right of asylum"). But the asylum law reform of 1993 revoked Art. 16 sec. 2 GG sentence 2 f.v. and inserted a new Art. 16a GG, whose wording in section 1 is identical to the second sentence of Art. 16 sec. 2 GG f.v., but whose subsequent sections two and three limit the possibility of invoking the fundamental right of asylum for persons who already enjoy protection from persecution elsewhere, or who are not affected by persecution at all. This was accompanied by means to facilitate the associated procedure and enforce measures to terminate residence. The Federal Constitutional Court ruled that these amendments are constitutional (BVerfGE 94, 49).

The refugee situation in Europe, and especially in Germany, which has again become extraordinarily pressing since the beginning of 2015, is being discussed widely and controversially in politics and society. However, the Federal Constitutional Court has not yet been involved and has not yet had to deal with concrete proceedings. Apart from that, questions of immigration, registration, and recognition procedures for refugees have now largely been harmonised under Union law.

9. Has your Court dealt with the collisions between national and international legal norms? Have there been cases of different interpretation of a certain right or freedom by your Court compared to regional / international courts (e. g. the African, Inter-American or European Courts) or international bodies (notably, the UN Human Rights Committee)? Are there related difficulties in implementing decisions of such courts / bodies? What is the essence of these difficulties? Please provide examples.

The Federal Republic of Germany has ratified a large number of international treaties and is a Member State of the European Union. This results in commitments under international and Union law. Collisions arise now and then in this regard, especially because of a difference in understanding and a divergent interpretation of parallel provisions and concepts in the legal systems. Also the Federal Constitutional Court has dealt with such questions a number of times. In these cases, thus far, the Court and the competent international courts or organs have always been able to arrive at solutions for questions of collision, taking due account of all involved and mutually interlinked legal systems. This can be illustrated in somewhat greater detail on the basis of a very recent decision. Furthermore, a brief overview, including references to individual decisions, is provided.

a) Public International Law

aa) On the occasion of a referral for judicial review from the supreme German tax court concerning the question of the permissibility of a provision in a German law that deviated from a double taxation treaty after the adoption of that agreement (a “treaty override”), in an Order of 15 December 2015 (2 BvL 1/12 – NJW 2016, 1295) the Federal Constitutional Court summarised the principles governing the relationship between German law and international law from the viewpoint of the German Constitution. It held that German law is generally determined by openness to international law. The principles of international law take precedence over statutory law, but rank below German constitutional law. International treaties that are subject to legislative consent have the same rank as German statutory law. It follows that under German constitutional law, in accordance with the principle of *lex posterior*, the German legislature may, under certain circumstances, generally deviate subsequently also from obligations under international law.

bb) In a case decided quite recently (Federal Constitutional Court, Order of 26 July 2016 – 1 BvL 8/15 – *Zeitschrift für das gesamte Familienrecht* – FamRZ 2016, 1738), the Federal Constitutional Court decided on the permissibility of coercive medical treatment for persons confined in psychiatric facilities under civil law. National law on guardianship provided that medical treatment could only be carried out against the natural will of persons under guardianship who, by reason of a mental illness or mental or psychological handicap, cannot recognise the necessity

of that treatment, or cannot act in accordance with that realisation, in the case of persons under guardianship who are confined in a closed facility. The Federal Constitutional Court had to decide in consideration of the constitutional duty to protect helpless persons whether the possibility to provide compulsory medical treatment has to be extended to further groups of persons. The Court concluded that for persons in need of aid who are under guardianship with regard to their healthcare, and who are threatened with serious damage to health but cannot recognise the necessity of a medical measure, or who cannot act in accordance with that realisation, the (national) constitutional duties of protection obligate the state to provide, as an *ultima ratio,* protection through medical treatment even against those persons' natural will, and thus also to permit compulsory medical treatment, subject to very narrowly defined preconditions.

Here the Federal Constitutional Court noted that the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which has the force of law in Germany and can also be referenced as an interpretative aid for the definition of the content and scope of fundamental rights (cf. BVerfGE 111, 307 <317 and 318>), generally objects to compulsory treatment.

Furthermore, the Committee on the Rights of Persons with Disabilities (Art. 34 CRPD), in its Concluding Observations on the Initial Report of Germany of 13 May 2015 (UN Doc. CRPD/C/DEU/CO/1), recommended eliminating all forms of substituted decision-making, and replacing it with a system of supported decision-making (ibid., nos. 25 and 26).

The Federal Constitutional Court resolved this conflict in its decision of 26 July 2016 – 1 BvL 8/15, by dealing first of all with the legal quality of these comments, reaching the conclusion that comments of a committee responsible for issuing such opinions should be given considerable weight in interpreting a human rights convention, but that they are not binding upon international and national courts under international law. In particular, these committees had no power to further develop international treaties beyond the agreements and practice of the state parties. In any case, the Court held, Art. 34 et seq. CRPD had not conferred a mandate on the committee to bindingly interpret the text of the treaty.

However, the Federal Constitutional Court went on to address also the content of the committee's opinions and concluded that those opinions do not object to compulsory medical treatment required under German constitutional law in emergency cases, because they did not discuss what approach to adopt in a medical emergency if the disabled person lacked a free will entirely. Ultimately the Federal Constitutional Court concluded that even in consideration of the committee's opinions, nothing under the text and spirit of the Convention on the Rights of Persons with Disabilities suggests that these persons should be abandoned to their fate, or that the Convention objects to compulsory treatment even under the strict conditions determined here for constitutional reasons. In particular, the Court noted that, according to the requirements of constitutional law as set forth above, and the applicable rules of the law on guardianship, national law accords with the CRPD in following the principle that the will - and, if necessary the supported will - of the disabled person takes precedence.

b) European Convention on Human Rights (ECHR) – European Court of Human Rights (ECtHR)

There have also been occasions in the past in which the Federal Constitutional Court, on the one hand, and the European Court of Human Rights, on the other, interpreted freedoms and their relationship to one another differently, especially in multipolar situations of fundamental rights.

Thus, in what is known as the “Caroline Decision” of 15 December 1999 (BVerfGE 101, 361), the Federal Constitutional Court interpreted the relationship between the right of personality and the freedom of the press in generally press-friendly manner, and thus accorded the press a rather extensive right to publish images of contemporary public figures. However, the ECtHR held that this decision violated the right to respect for private life under Art. 8 of the ECHR.

Nonetheless, this did not result in an irresolvable conflict. Instead, in several subsequent decisions, citing the Basic Law’s openness to international law, the Federal Constitutional Court emphasised the constitutional duty to consider the ECHR when applying German fundamental rights, as an aid in interpreting the definition of the content and scope of those rights, and furthermore to interpret statutory law in a manner consistent with human rights (BVerfGE 111, 307 – Görgülü; BVerfGE 120, 180 – Caroline II). Thus in its case-law, the Court addressed the decisions of the ECtHR and incorporated and took them into account in its interpretation and application of national (constitutional) law.

A discussion with the ECtHR also arose – to mention a further example – in the context of the permissibility of preventive detention for criminals who had served their sentences but were still found to be dangerous, or who could not be sentenced to imprisonment for lack of criminal accountability. The ECtHR had proceeded on the basis of a different concept of punishment than the Federal Constitutional Court, and thus arrived at other consequences for human rights than the Federal Constitutional Court had derived from the Basic Law for preventive detention, which - in the Federal Constitutional Court’s opinion - did not constitute a punishment. The Federal Constitutional Court subsequently concurred with the ECtHR’s view, but at the same time pointed out that there are constitutional limits that could not be exceeded (cf. BVerfGE 128, 326; 131, 268>). Accordingly the discussion between the two courts on this point has been concluded for the moment.

c) Union law

As far as the relationship between the Federal Constitutional Court and the European Court of Justice (ECJ) is concerned, a question that has arisen for years, and is increasingly recurring at present, relates to the conditions under which the implementation and application of Union law by national organs – whether the legislature or the executive – should be measured against national fundamental rights, and when they should be measured against the Charter of Fundamental Rights. To date, however, there have been no differences of opinion as to content in the interpretation of freedoms.

III. The law and the state

10. What is the impact of the case-law of your Court on guaranteeing that state powers act within the constitutional limits of their authority?

Insofar as acts of the authorities are to be reviewed by the Federal Constitutional Court, redress must normally first be sought in the regular courts – generally the administrative, social or financial courts. Only after these proceedings in the regular courts have been completed can the Federal Constitutional Court's jurisdiction be invoked by way of a constitutional complaint against a judgment (Art. 93 sec. 1 no. 4a GG), arguing that there has been a violation of fundamental rights. Accordingly, the Federal Constitutional Court is not a supreme court of appeal on points of law, but essentially reviews only whether the application of statutory law is based on a fundamentally incorrect view of the meaning of a fundamental right, and especially of the scope of its protection (for fundamental considerations on this point, see BVerfGE 18, 85 <90 and 91, 93>).

If statutes are to be challenged directly, the Basic Law and the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG) offer the procedural options of lodging a constitutional complaint (against a legislative act) (Art. 93 sec. 1 no. 4a GG and §§ 13 no. 8, 90 et seq. BVerfGG), and specific judicial review (Art. 100 sec. 1 GG und §§ 13 no. 11, 80 et seq. BVerfGG). These proceedings provide the Federal Constitutional Court with a means to carry out an immediate review of adherence to the limits the legislature is subject to under the Constitution. Other types of proceedings such as abstract judicial review proceedings, or *Organstreit* proceedings (dispute between constitutional organs) are available in order to further ensure that the Federal Constitutional Court, precisely in its capacity as a court for state matters – can ensure that organs of the state comply with the Constitution.

In sum, the case-law of the Federal Constitutional Court exerts substantial influence on state entities' compliance with constitutional limits. However, this influence – as far as administrative activity is concerned – is of a rather indirect nature because of the precedence of recourse to the regular courts for the protection of legal interests, while the Federal Constitutional Court is the defining instance in legislative matters and in disputes between organs of the state.

11. Do the decisions of your Court have binding force on other courts? Do other ordinary courts follow / respect the case-law of your Court in all cases? Are there conflicts between your Court and other (supreme) courts?

According to general procedural principles, the decisions of the Federal Constitutional Court – like those of any other court in the Federal Republic – are binding on the parties to the proceedings, but only within the bounds of the decisions' substantive authority as *res judicata*. Moreover, under § 31 BVerfGG, decisions of the Federal Constitutional Court also have a broader binding effect. Under that provision, decisions of the Federal Constitutional Court are binding on the constitutional organs of the Federation and *Laender*, as well as all on courts and public authorities. The resulting specific binding effect of the Federal Constitutional Court's decisions goes beyond the binding force under general procedural principles in a va-

riety of regards. First of all, this effect is not limited to a decision's substantive authority as *res judicata*, but also comprises the fundamental reasons of the decision (fundamentally, BVerfGE 40, 88 <93 and 94>). Furthermore, it is not limited to the parties; rather, because of its broad range of addressees, it also ultimately has a comprehensive binding effect on the public authority.

Finally, under § 31 sec. 2 BVerfGG, certain decisions of the Federal Constitutional Court have the force of law; this concerns decisions adopted under § 13 no. 6 and no. 6a (abstract judicial review), no. 11 (specific judicial review), no. 12 (proceedings on whether a rule of public international law is part of federal law and whether it directly creates rights and obligations for individuals) and no. 14 (proceedings on whether law continues to be valid as federal law). This binding effect goes beyond both the effect under general procedural principles and the effect under § 31 sec. 1 BVerfGG. The relevant difference is that the force of law brings about a general applicability of the decision that demands compliance not just by the parties or organs of the state but also from private individuals.

The regular courts, up to and including the Supreme Federal Courts, comply with the Federal Constitutional Court's case-law almost without exception. Insofar as divergences from the Federal Constitutional Court's case-law emerge in individual cases in the regular courts' case-law – whether out of conviction or for reasons of negligence – such differences can be corrected by way of a constitutional complaint.

12. Has your Court developed / contributed to standards for law-making and for the application of law? (e.g. by developing concepts like to independence, impartiality, acting in accordance with the law, non bis in idem, nulla poena sine lege, etc.)

The Federal Constitutional Court specifies the formal and substantive standards that result from the Basic Law with reference to the adoption and application of laws. In addition to providing greater specificity about the legislative rules for jurisdiction and procedure, the case-law of the Federal Constitutional Court offers a wide range of content-based standards for and the adoption and application of laws. These standards have largely been developed on the basis of fundamental rights, rights equivalent to fundamental rights, and other principles of the Basic Law.

For example, the case-law of the Federal Constitutional Court has yielded differentiated rules for resolving the tension between a concerned individual's reliance on the continued existence of a legal position on the one hand, and the legislature's interest in amending the law on the other hand (see BVerfGE 132, 302 <317 et seq. paras. 41 et seq.>; 135, 1 <12 et seq.>; cf. also the comments on no. 4 above). Its case-law furthermore offers standards to be observed in adopting the bases for police authorisation to interfere with the general right of personality guaranteed under Art. 2 sec. 1 GG in conjunction with Art. 1 sec. 1 GG (Federal Constitutional Court, Judgment of 20 April 2016 – 1 BvR 966/09, 1 BvR 1140/09 –, juris).

13. Do you have case-law relating to respect for the rule of law by private actors exercising public functions?

From the German vantage point, this question focuses first on the constitutional limits for transferring sovereign authority to private actors, and also on the legal bounds set for private actors who exercise sovereign authority.

One aspect of the first question is governed by Art. 33 sec. 4 GG. That article requires sovereign authority on a regular basis to be entrusted, as a rule, to members of the civil service who stand in a relationship of service and loyalty defined by public law. In this regard, the Federal Constitutional Court found in a Judgment of 18 January 2012 (2 BvR 133/10 – BVerfGE 130, 76) that Art. 33 sec. 4 GG also applies to the exercise of sovereign functions in the form of organisations governed by private law, so that the state cannot evade the special reservation to civil servants of the exercise of sovereign powers by carrying out its tasks through a private organisation. However, the reservation of functions to members of the civil service applies only for the exercise of sovereign authority, and also only to the extent that the functions are transferred on a regular basis. Deviations from the principle expressed in Art. 33 sec. 4 GG accordingly must thus be based on a specific objective reason. Where a transfer of sovereign authority in the strict sense is not involved, the Constitution does not object to public tasks' being performed by private actors. This may then take place in the form of legal entities organised under private law and operated entirely or predominantly by the state, or by "genuine" private natural persons or legal entities. If private actors then exercise sovereign powers, in so doing they too are bound by the fundamental rights.

Finally, in a Judgment of 22 February 2011 (1 BvR 699/06 – BVerfGE 128, 226), the Federal Constitutional Court decided that entities governed by private law and that are owned both by private shareholders and the state (*gemischtwirtschaftliche Unternehmen*), and that are entirely or predominantly (i.e. holding more than 50%) owned by the state, are directly bound by Art. 1 sec. 3 GG to the fundamental rights; the same applies to private entities that are in the sole ownership of the state, as well as, most notably, public entities organised under private law, even when these various entities do not perform public functions. The specific case concerned the question whether Fraport AG, the company that operates Frankfurt Airport, could act like a private property owner towards a demonstration organised on its property, or whether it was rather bound by the fundamental rights of freedom of assembly and freedom of expression. The Federal Constitutional Court ruled that the latter is the case.

14. Are public officials accountable for their actions, both in law and in practice? Are there problems with the scope of immunity for some officials, e.g. by preventing an effective fight against corruption? Do you have case-law related to the accountability of public officials for their actions?

There are different regulatory regimes in Germany that tie into the responsibility of public officials. Disciplinary law provides a specific system of sanctions for civil

servants who violate their official duties. Third parties, in particular affected third parties, are not entitled to have those procedures initiated.

Civil servants themselves are protected against claims by private parties if they breach an official duty incumbent upon them in relation to third parties while performing their office (cf. § 839 of the Civil Code, *Bürgerliches Gesetzbuch* – BGB, Art. 34 sec. 1 sentence 1 GG). However, the civil servant's employer is liable for damages, subject to certain conditions. In cases of intentional wrongdoing or gross negligence by the civil servant, the employer may, however, hold the civil servant liable.

Criminal liability of civil servants is not excluded. On the contrary, holding the position of a civil servant constitutes an aggravating factor for some offences, while other offences are themselves even contingent on holding public office (cf. Chapter 30 of the Criminal Code, *Strafgesetzbuch* – StGB). German law provides immunity from criminal prosecution primarily for Members of the *Bundestag* and *Landtage* (the federal and *Land* parliaments) and for the Federal President.

IV. **The law and the individual**

15. Is there individual access to your Court (direct/indirect) against general acts/individual acts? Please briefly explain the modalities and procedures.

German law provides for the possibility of an individual complaint, known as a constitutional complaint. The constitutional complaint is by far the most frequent means of accessing the Federal Constitutional Court. More than 95% of all proceedings at the Federal Constitutional Court are constitutional complaints. "Any individual" claiming a violation of one of his or her fundamental rights or a right guaranteed under Art. 20 sec. 4, Arts. 33, 38, 101, 103 and 104 GG may lodge a constitutional complaint with the Federal Constitutional Court (§ 90 sec. 1 BVerfGG). However, if legal recourse to other courts exists, a constitutional complaint may only be lodged after all remedies have been exhausted (§ 90 sec. 2 sentence 1 BVerfGG). In principle, such a constitutional complaint may be directed against any act of sovereign authority. However, as a rule, although recourse to regular courts must first be sought, such recourse is unavailable against laws, so that these cases – subject to further conditions, particularly that the complainant be individually, presently and directly affected – can be submitted directly for review by the constitutional court. In general, a constitutional complaint must be lodged within one month (§ 93 sec. 1 sentence 1 BVerfGG). If a constitutional complaint is directed against a law, it may be lodged within one year of the law entering into force (§ 93 sec. 3 BVerfGG).

16. Has your Court developed case-law concerning access to ordinary / lower courts (e.g. preconditions, including costs, representation by a lawyer, time limits)?

For access to the other courts in disputes against public authority, the case-law of the Federal Constitutional Court is based upon the guarantee of effective protec-

tion of legal interests under Art. 19 sec. 4 GG, and in other legal disputes, upon a comparable guarantee of effective protection through the courts under Art. 20 sec. 3 GG in conjunction with Art. 2 sec. 1 GG. The guarantee of effective protection of legal interests, according to the case-law of the Federal Constitutional Court, comprises the right of access to the courts and the right to a generally comprehensive review of the facts and law concerned in the matter at issue. From this principle, the Federal Constitutional Court has derived numerous specific standards for access to the courts, and the intensity of review by the court. For example, access to the courts, and in those cases where a further instance is provided, access to a court of higher resort, may be made dependent on whether formal requirements are met, but these requirements may not impede that access unreasonably.

The costs of protecting legal interests play a role in the case-law of the Federal Constitutional Court in that the Court has derived from the Basic Law an entitlement to equality of protection of legal interests. Accordingly, the Basic Law requires that the respective situation of those with and without resources be largely harmonised in realising the protection of their legal interests (cf. BVerfGE 9, 124; 10, 264 <270>; 22, 83 <87>; 51, 295 <302>; 63, 380 <394>; 67, 245 <248>; 78, 104 <117 and 118>). This follows from Art. 3 sec. 1 GG in conjunction with the principle of the *Rechtsstaat* that is laid down in general terms in Art. 20 sec. 3 GG, and notably formulated in Art. 19 sec. 4 GG with regard to the protection of legal interests against acts by public authority. It is a core component of the principle of the *Rechtsstaat* that parties must not forcefully assert legal claims on their own. Instead, parties are required to have recourse to the courts (BVerfGE 54, 277 <292>). At the same time, this requires that the state provides courts and ensures that everyone can access the courts in essentially the same way. For that reason it is necessary to take precautions that provide even those without means with largely equal access to the courts (cf. BVerfGE 50, 217 <231>). Art. 3 sec. 1 GG ensures that adherence to this principle of equality of protection of legal interests receives protection as a fundamental right.

Furthermore, there is extensive case-law of the Federal Constitutional Court on essentially all matters of access to the courts. Overall, this case-law aims to leave it to the regular courts to resolve issues of the protection of legal interests. Only if access has been unreasonably impeded does this case-law intervene to correct the situation.

17. Has your Court developed case-law on other individual rights related to the rule of law?

Within the German legal tradition, some manifestations of the principle of the *Rechtsstaat* (see Question 1 above) also confer subjective rights on the individual. This is particularly the case for the principle of protection of legitimate expectations and the principle of proportionality. If the state interferes with fundamental rights through statute or through an individual act, it must also meet the principles of protection of legitimate expectations and proportionality. The person concerned can bring action in the regular courts to obtain compliance with these principles. Subsequently, that person can also assert them with a constitutional complaint. The Federal Constitutional Court has delivered extensive case-law in this respect.

18. Is the rule of law used as a general concept in the absence of specific fundamental rights or guarantees in the text of the Constitution in your country?

At a level below the general concept of the “rule of law”, the Basic Law offers a great many more specific principles which are nevertheless still general, and which are generally referenced when deciding individual cases. Consequently, as a rule, there is no need to have recourse to the concept of the “rule of law”.