§ 3 The legal sources of administrative law

I. Introduction

1) Legal sources, legal norms and legal orders

- the term legal source refers to the origin (authority of the author and form), from which the law derives its force
- legal norms are usually (→ not in French law) defined as abstract and general rulings, in contrast to the specific and individual rulings of an administrative decision
- a legal order [= legal system] is the entirety of the law of a (sovereign) state

2) National law [federal law], regional law [Land law] and European Union law

- in a federal state, the federal law (national law) and the law of the Länder/federated states (regional law) are different parts of the same legal order
  - in case of conflict, usually federal law takes precedence over Land/state law (cf. art. 31 BL)
- the European Union has its own legal order, distinct from those of its member states
  -in case of conflict, Union law prevails (→ primacy of Union law)

3) The hierarchy of norms

- within the same legal order, legal norms inconsistant with higher-ranking law are void (→ *primacy in validity*); this applies in particular to the primacy of the Constitution
- law of the EU member states insonsistant with Union law is only inapplicable (→ *primacy in application*)

4) The speciality of norms (lex specialis principle)

- lex specialis derogat lex generalis
- often relevant in the special sub-fields of admin. law (e.g. general police and regulatory law and environemental law)
- problem: transfer of doctrine from the more general to the more special sub-field of law?

II. The highest legal source: the Constitution

- constitutional principles and fundamental rights are *directly binding law*
- strong impact on interpretation and application of all other norms in the field of admin. law
- each public servant obliged to check constitutionality of sub-constitutional norms before applying them and to refuse application of (evidently) unconstitutional norms
- conflicts may be avoided by *interpretation* of norms *"in the light of" the Constitution*

III. International treaties

- e.g. human rights treaties, international investment agreements

1) In countries following the monist approach

- e.g. France, most East European countries, Vietnam; DISPUTED for Indonesia
- automatically binding within the domestic legal system after ratification
- higher rank than statutory law but below the Constitution

2) In countries following the dualist approach

- e.g. UK, USA, Germany, Malaysia
- binding within the domestic legal system only after transformation into national law (which, however, usually is effected in or together with the ratifying law)
- same rank as statutory law, which, however, may be interpreted "in the light of" the treaties

IV. Statutory law

- the distinction between laws in the "formal sense" (statutory laws) and "material sense" (all legal norms) in German law
- the requirement of a ***legal basis*** ["Ermächtigungsgrundlage"] for every encroachment on the fundamental rights of the citizen (***principle of statutory reservation***, core element of the rule of law)
  - in Germany, a legal basis is required for even all decisions essential for the exercise or the realisation of the f.r. ("Wesentlichkeitstheorie" of the Federal Constitutional Court)
- interpretation and application in the systematic context and in line with the Constitution and other higher-ranking law
  - no schematic, "literal" application!
  - in particular considerate use of norms granting discretionary power

V. Statutory instruments, statutory regulations, ordinances

- legal norms issued by the executive (government, president, ministers/ministeriums, administrative authorities)
- issued by virtue of originary regulatory powers under the Constitution (eg by the French Prime Minister, cf. art. 37 Const. 1958) or regulatory powers delegated by the legislator (e.g. by the German Federal Government, cf. art. 80 BL); in the latter case usually just regulation of details
- heterogeneous terminology, varying from country to country
- binding to the citizen in the same way as statutory law
- review of legality by the administrative and/or the constitutional courts

VI. By-laws

- legal norms issued *by self-government bodies* who are *legal persons* under public law for the autonomous regulation of their own affairs
  - e.g. by communes, counties, universities, chambers, public service broadcasters
  - adopted usually by their representative body (city/county council, faculty council, senate)
- examples: by-laws on local rates, the use of public facilities and garbage disposal, the local development plan (land use plan), autonomous regulations of universities and faculties
- self-government bodies act on the basis of a *general legal authorisation to pass by-laws* in their self-government aiffairs; however, the essential decisions with regard to the fundamental rights are taken by the legislator

VII. Customary law

- requires long-lasting general practice (*longa consuetudo*) and the general opinion that this practice is legally required (*opinio iuris*)
- nowadays in countries with a highly developed legal system *extremely rare*, due to the large quantity and density of written norms but also to the rapidly changing circumstances and the heterogeneous opinions in a pluralistic society
- unless the constitution provides otherwise, customary law cannot replace the necessary statutory basis for encroachments on fundamental rights

VIII. General principles of administrative law

- important in French admin. law and European Union law, little important in German law, where the quality as distinct source of law is CONTROVERSIAL
- *unwritten* parts of law *inherent* in any legal system based on the rule of law and *"discovered"* (not made!) by the courts in the way of *judicial further development of law*
- examples: principles of administrative procedure, protection of legitimate expectations, principles of state liability
- nowadays often superseded by codified law, which in turn is often based on them

IX. No source of law in a continental legal system: court decisions

- since there is no doctrine of precedent (stare decisis)
- court decisions represent *jurisprudence, not "case-law"*
  - nonetheless, they must be studied and beared in mind
- courts not allowed to "make" new law but to further develop the existing law

X. No source of law: administrative provisions

- internal regulations within the executive power binding only the authorities
  - often interpreting or concretising legal norms or guiding the exercise of discretionary power
- not a legal basis for measures encroaching on the fundamental rights of the citizen
- irrelevant for scholars and students because not binding them - also not in the interpretation of the law
- disrespect in an individual case does not violate as such the rights of the citizen but may be illegal for breach of the principle of equal treatment