

§ 3 Sources of German law

I. The Basic Law (constitution)

- Basic Law for the Federal Republic of Germany of 1949
 - originally only the constitution of West Germany, since 1990 of whole Germany
- the highest source of law within the German legal order
- constitutional principles and fundamental rights are *directly binding law*
 - with strong influence not only on the making but also on the interpretation and application of all ordinary law
 - consequently, you cannot be a good expert in any field of law without knowing well the relevant constitutional law...
- courts must check the constitutionality of ordinary laws before applying them and refer laws they consider unconstitutional to the Federal Const. Court for concrete constitutional review
 - often conflicts can be avoided by *interpreting* the ordinary law "in the light of" (in conformity with) *the Constitution*
- see also the constitutions of the 16 German Länder

II. Statutory law

- the main source of German law
- federal laws and Land laws
- interpretation and application always in the systematic context and in line with the Basic Law, the Land constitution (in case of Land law) and European Union law
- up-to-date consolidated versions of federal laws published in the comprehensive internet database "Gesetze im Internet" (includes some English translations)
 - traditionally, German lawyers work with the frequently updated red lose-leaf collections of laws of the publishing house C.H. Beck, esp. the Habersack (previously Schönfelder) for civil and criminal law, and the Sartorius for public law

III. Ordinances and by-laws

- *ordinances* (regulations) [Rechtsverordnungen] are legal norms issued by a federal or Land government or minister, or by local admin. authorities
- in Germany only by virtue of regulatory powers delegated by the legislator (cf. art. 80 BL)
- binding to the citizen in the same way as statutory law
- *by-laws* [Satzungen] are legal norms issued by self-government entities on the basis of a general legal authorisation for the autonomous regulation of their own affairs
 - e.g. by communes, counties, universities, chambers

IV. Customary law

- legal norms based on a long-lasting general practice (longa consuetudo) plus the general opinion that this practice is legally required (opinio iuris)
- nowadays extremely rare, due to the large quantity and density of written norms

V. Non-German law applicable in Germany

1) European Union law

- the European Union has its own legal order, distinct from those of its member states
- big parts of this law, esp. substantial law in the Founding Treaties, EU regulations and EU decisions, are directly applicable in the member states

2) Customary public international law

- the general rules of public international law have been incorporated into the German law as integrated part of federal law with primacy over statutory law (art. 25 BL)
- international treaties, however, are only binding internally after transformation into German law (→ dualist approach)

VI. No source of law but practically important: jurisprudence

- no doctrine of precedent (*stare decisis*) in German law
- court decisions represent *jurisprudence*, not "*case-law*"
 - only the interpretation of the existing, not the making of new law
 - courts not allowed to "make" new law but to further develop the existing law (cf. § 5 IX)
- nonetheless, court decisions must be studied and beared in mind, since in legal practice, courts, public authorities and other legal practitioners show a strong tendency to adhere to established jurisprudence

VII. The hierarchy of laws

- within the same legal order, legal norms inconsistent 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 inconsistent with EU law is only inapplicable (→ *primacy in application*)