

# § 9 Introduction to German administrative law

## I. Administrative law as part of public law

- see Diagram 1

## II. The distinction of administrative law from private law

### 1) An important basic distinction

- important for determining the legal standards applicable to certain activities
  - the *Administrative Procedure Act* only applies to administrative activities under public, not under private law
  - the central form of action of the *administrative act* is only available for action under public law
  - there are special rules for *contracts under public law* that differ from those for contracts under private law
- important for determining the liability rules applicable to certain activities
- important for choosing in case of dispute the right recourse to the admin. or ordinary courts
  - cf. sect. 40 CACP, sect. 13 Courts Constitution Act

### 2) The general distinction (see already supra, slide 1, p. 2)

- private law regulates the legal relationships between individuals
- administrative law regulates the relationships between individuals and administrative authorities as well as those between the administrative and state authorities and bodies
- authorities may use private-law legal forms to perform public tasks, but in this case the private law is partly superimposed by mandatory public-law standards
  - so-called "administrative private law" ["Verwaltungsprivatrecht"]
  - example: private-law contracts for the admission to the public swimming pool
  - in this case, the authority is still bound to fund. rights and rule of law principles

### 3) Theories for the delimitation in difficult cases

- *subordination theory*: legal provisions regulating a relationship of super- and subordination between the authority and the citizen fall under admin. law
- *subject theory*: legal provisions entitling or obliging in any conceivable case a public authority in a specific sovereign function fall under admin. law
- *interest theory*: legal provisions serving the public interest fall under admin. law, those serving the private interest of the individual fall under private law

## III. The history of German administrative law (overview)

### 1) References for self-study

- see for a short, targeted presentation: Florian Becker, The Development of German Administrative Law, *George Mason Law Review* 24 (2016-17), p. 453
- see for a detailed presentation: Michael Stolleis, Public Law in Germany. A Historical Introduction from the 16th to the 21<sup>st</sup> Century, 2017, in particular chapters 3, 4, 8, 11, 12, 14, 15, 17

### 2) Some milestones important for the understanding of modern admin. law

- strong tradition of rule of law (→ Rechtsstaat) since the late 18<sup>th</sup> century
- Allgemeines Landrecht für die Preußischen Staaten [General Land Law for the Prussian States] of 1794
  - a late-absolutist natural law-orientated codification
- introduction of independent administrative courts in the 19<sup>th</sup> century
- limiting the police to the mission to prevent threats for public security and order: the Kreuzberg judgement of the Prussian Higher Administrative Court of 1882

- strong influence of the French law-inspired scholar OTTO MAYER on the development of modern German administrative law
  - textbooks Theorie des Französischen Verwaltungsrechts, Strasbourg 1886, and Deutsches Verwaltungsrecht, vol. 1, Leipzig 1895
  - famous dictum "*Verfassungsrecht vergeht, Verwaltungsrecht besteht*" ["const. law passes, admin. law persists"], 1924
  - important, French-law inspired contribution to the development of the doctrine of the admin. act [Verwaltungsakt]
- total decline of rule of law and human rights under the totalitarian regimes of the National Socialists (1933 - 1945) and Communists (East Germany, 1945 - 1989)
- effective implementation of the rule of law and protection of the fundamental rights under the Basic Law of 1949
  - famous dictum "*Verwaltungsrecht ist konkretisiertes Verfassungsrecht*" of the President of the Federal Administrative Court [Bundesverwaltungsgericht] FRITZ WERNER, 1959
- establishment of the Federal Administrative Court [Bundesverwaltungsgericht], 1952
- Code of Administrative Court Procedure [Verwaltungsgerichtsordnung], 1960
- Administrative Procedure Act [Verwaltungsverfahrensgesetz], 1976
- modern codification and frequent reforms of public security and order (police) law, since the late 1960s
- regulation of more and more areas of special administrative law in highly specialised laws, since the 1970s
- Europeanisation of administrative law
  - with initial resistance from some admin. law scholars in the 1990s

## IV. Legal sources of administrative law

### 1) Federal law, Land law and European Union law

- in a federal state, the federal law and the law of the federated states (in Germany: Land law) are different parts of the same legal order
  - in case of conflict, in Germany federal law takes precedence over Land law (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)

### 2) The types of legal sources

#### a) The highest legal source: the Basic Law

- constitutional principles and fundamental rights are *directly binding law*
  - with strong influence on the interpretation and application of all other norms in the field of admin. law
- civil servants must check the constitutionality of sub-constitutional norms before applying them and refuse to apply (evidently) unconstitutional norms
  - usually conflicts can be avoided by *interpreting* the sub-constitutional norms "*in the light of*" (in conformity with) *the Constitution*

#### b) International treaties

- e.g. human rights treaties, international investment agreements
- Germany follows *dualist approach*:
  - treaties only binding internally after transformation into German law
    - this is, however, usually effected by or together with the ratification law
  - treaties have same (not higher!) rank as German statutory law
    - however, conflicts are minimised by interpreting German law "in the light of" the treaties

**c) Statutory law**

- distinction between laws in the "formal sense" (statutory laws) and "material sense" (all legal norms)
- requirement of a *legal basis* [Ermächtigungsgrundlage] for every encroachment on fundamental rights (*principle of statutory reservation*, core element of the rule of law)
  - even for all decisions that are essential for the exercise or realisation of the f.r. (theory of essentiality ["Wesentlichkeitstheorie"] of the Federal Constitutional Court)
- 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
  - no schematic, "literal" application of statutory law!
  - in particular considerate use of norms granting discretionary power

**d) Ordinances (regulations)** [Rechtsverordnungen]

- legal norms issued by the Federal Government or a federal minister, a Land government or Land minister; also by local administrative 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
- subject to abstract constitutional review by the Federal and Land Constit. Courts (art. 93(1) no. 2 BL and corresponding Land law), Land ordinances also to judicial review by the higher admin. courts (sect. 47 CACP)

**e) By-laws** [Satzungen]

- 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 affairs; however, the essential decisions with regard to the fundamental rights are taken by the legislator

**f) Customary law**

- requires long-lasting general practice (*longa consuetudo*) and the general opinion that this practice is legally required (*opinio iuris*)
- cannot replace the necessary statutory basis for encroachments on fund. rights
- nowadays in Germany as in most 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

**g) General principles of administrative law?**

- important in French admin. law and European Union law but little important in German law, where their quality as distinct source of law is **CONTROVERSIAL**
- nowadays usually superseded by codified law, which in turn is often based on them

**h) No source of law: court decisions**

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

**i) 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
- cannot be a legal basis for encroachments on fund. rights
- irrelevant for judges, scholars and students because not binding them - not even in the interpretation of the law
- disrespect in an individual case does not violate as such the rights of the citizen but can be illegal for breach of the principle of equal treatment (cf. art. 3(1) BL)

**3) The hierarchy of norms**

- 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*)

**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 public security law and environmental law)
- problem: transfer of doctrine from the more general to the more special sub-field of law?