The Sources of Administrative Law – Pleading for a more systematically and comparative conception

Abstract

The traditional doctrine, the sources of administrative law are treated in our law books, is not really fit for the challenges the public administration is confronted with today. It is *fragmentary* because important rules like technical standards or the rulemaking of international organizations are not part of the system, and it is too *inflexible* because it is based on a hierarchical scheme which is still important, but is not the only scheme for ranking the sources of law. The whole conception is dominated by the idea of the *national state* and its internal and external *sovereignty*. But the national state in Europe is a Member State of the European Union and an actor in dense international and transnational relations, acting in close contact to other public and private entities, transnational enterprises and standard setting bodies. The administration is confronted with a *polycentric universe of rules* – of different origin, different legitimacy and different steering capacity. For some of these rules it is even unclear, if they are part of the law, "soft law" or whatever.

(I) What is necessary today is a modern conception which has to be based on a *systematically approach*. It should be developed in the four steps "Describing", "Profiling", "Ranking" and "Arranging":

1. *Describing* means to get a solid knowledge, what different norms are influencing the public administration in its daily work? Describing has to take a broad perspective. At this step it is not decisive, wither the norm has a legal binding effect or not. "Memoranda of understanding", "agreements" and "guide-lines" might be the object of our research too.
2. *Profiling* brings the different types of rules in legal forms. The traditional distinctions like "external" and "internal" or "binding" and "not binding" are not sensible enough for profiling the different phenomena of norms. Completing the traditional system we have to shape subtypes and to develop doctrines to balance on the one hand the steering capacity, different sources have in practice and on the other hand a minimum of procedural and substantial safe-guards, which are necessary to keep them acceptable for the rule of law. This balancing should be guided by the *"principle of adequacy"*: the higher the steering capacity the higher the safe-guards for instance in terms of neutrality, consultation and judicial review.
3. *„Ranking*", the third step, is suggested to be the core issue of the sources of law-system. The traditional doctrine hierarchical scheme is still helpful, but not in the sense of an absolute superiority. What the doctrine of sources of administrative law needs today, is a setting of instruments providing

coherence within the polycentric system of norms? The core hierarchy might serve as a first orientation. But there are other topics mitigating its results according to the real political powers standing behind the rules. This setting is not too difficult to develop. Elements are for instance the "margin of appreciation", "interpretation in conformity" and procedures like "preliminary rulings". We have to put together all these elements to reach not a maximum of unity but a sufficient level of coherence.

4. „Arranging"asks how the administration has to deal with different types of norms to solve a special problem. It is based on solid legal knowledge about the preconditions, the profile and the consequences of the different types of norms, including their interpretation in a multi-level context. But it needs more than this. It needs the analysis of the interests, which are involved and creativity to handle different norms as options.

(II) In its second part the article deals with the *administrative rule-making* particularly. It analyzes typical rationales of these sources of administrative law and argues for more procedural and substantive safeguards against bias and arbitrariness. In this respect European countries should learn from the administrative law of the US. At the moment – thanks to the initiative of the Research Network on European Administrative Law (ReNEUAL) – a change of the traditional perspective seems to become possible.

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