The Sources of Administrative Law –

Pleading for a more systematically and comparative conception

Eberhard Schmidt-Aßmann, Heidelberg

A chapter on the sources of law is a traditional element of nearly all administrative law textbooks in Italy as well as in Germany and in other European countries: The constitution, the legislation by parliaments, the regulations of the government, by-laws of local communities, general principles of law and (not fully accepted) customary law are standard topics, the literature is dealing with.

No doubt, it is an important subject, in close relation to the *legality of the administration* as one of the core principles of public law. But the question is: Is the conception, the sources of administrative law are traditionally treated in our law books, fit for the challenges the public administration is confronted with today?

My answer is: Not really. Let me mention four critical points:[1]

- The traditional doctrine is *fragmentary*: Important rules like technical standards or the rulemaking of international organizations are not part of the system.

- The traditional doctrine is too *inflexible*: It is based on a hierarchical scheme which is still important, but is not the only scheme for ranking the sources of law.

- The traditional doctrine is too *hermetic*: Especially this part of the administrative law system has to be conceptualized in close contact with legal philosophy, structural theory of law and legal methodology on the one hand and on the other hand with international law and private law.

- The traditional doctrine is *insufficient* to understand the political preconditions of rule-making: Who are the actors standing behind the different types of sources, what influence do they have on the public

[1] See *Ruffert*, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (eds.), Grundlagen des Verwaltungsrechts, – GVwR – 2nd Edition, 2012, Volume I § 17 par. 8 ff.; *Schmidt-Aßmann*, Verwaltungsrechtliche Dogmatik, 2013, p. 32 ss.

administration and what is about the democratic legitimacy of this influence and about safeguards against bias?

The whole conception is dominated by the idea of the *national state* and its internal and external *sovereignty*. By criticizing this I am not arguing that a modern administrative law has to be conceptualized fundamentally new from a governance perspective or a global law perspective. I still believe that the national state and the national administration are the basis of our public law system: it's the national administration the people in most cases of their daily life are confronted with and it's the national state, they are expecting to protect them and to provide the necessary public services.

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 state and its administration are 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.

A modern conception of the sources of law has to integrate all this in the traditional doctrine. That does not mean a radical change. The classical instruments (parliamentary legislation, governmental regulations and by-laws of local communities) are still the core of the system. But the complexity of the system itself is much higher. What we need is a fundamental reform.

This reform has to take a *systematically approach*! A systematically approach enables us to identify the interrelations of rules in their polycentric universe and to deal with their political and legal implications.

I would like to explain this in two parts:

(1) The first part will deal with the *system in the whole*. We will ask: Which are the main topics a modern conception of the sources of law has to explain. By doing so we define sources of law as general provisions only, not including single acts – although this separation is disputable and there are some good reasons to conceive even single acts as sources of law.

(2) The second part will concentrate on the *rule-making of the administration*. This is an integral section of the traditional doctrine, too. But we have to take in account a fundamental difference between administrative rules and the other sources of law: the latter group is steering the administration from outside, while rule-making of the administration means steering from the inside, following the typical administrative rational. The structure of the interests is totally different from those the other sources are standing for.

I. Systematical approach: Four fundamental steps

The systematical approach consists of four questions we have to answer step by step: "Describing", "Profiling", "Ranking" and "Arranging". What do these keywords mean?

1. Describing

The first step is to get a solid knowledge, what different phenomena of norms are influencing the public administration today:[2]

- Not only national and EU norms, but also international treaties, secondary rule-making by international organizations, judge-made law of international courts and other judiciary bodies like WTO panels.

- Not only public law, but also private law, as far as the public administration is entitled to use it.

- Not only the law of public authorities, but also the law of standard setting bodies in technical or economic questions, as far as they are influencing public decisions.

"Describing", the first step of the systematic approach, has to take a broad perspective. At this step it is not decisive, if the norm has a legal binding effect. "Memoranda of understanding", "agreements", "guide-lines" or even programs might be the object of our research, too.

Doctrinal work is bound to reality! All these norms have to be compiled, described and analyzed in their functions: How do they look like? From whom do they originate? Which structure of interests do they represent? To know all this is the necessary basis for the next step: profiling.

2. Profiling

Profiling brings the different types of rules in legal forms.

(a) For some types there are already such forms, constituted for instance by the EU-Treaties or by constitutional provisions. This is right for example for delegated and for implementing legislation according to Art. 290 and 291 TFEU. It is right for the parliamentary legislation and for the regulations of the government at the national level. Especially the Italian Constitution offers a lot of provisions for different forms and types of sources of law: "fonti

[2] Cf. *Schuppert*, Governance und Rechtsetzung, 2011, p. 133 ss. and p. 200 ss.; *Wolff/Bachof/Stober/Kluth*, Verwaltungsrecht I, 12th ed. 2007, §§ 24 ss. *Härtel*, Handbuch Europäische Rechtsetzung, 2006, §§ 6 ss.

legislative", "fonti secundarie: regolamenti". In all these cases we have a relative clear notion of the elementary procedural requirements the promulgation of these sources of law has to fulfil (particularly publication). We know their binding effects; we know how to abrogate or to amend theses norms. We know the consequences of illegality (per se nullity or claim for nullification) and we know how to challenge them (directly or indirectly) in court.

(b) But there are other sources of law which are missing a clear profile. Take decrees ("Verwaltungsvorschriften", "circolari"), by which a minister is steering the decisions of the subordinate authorities. They are not delegated rulemaking but internal rules. Doubtless, they are sources of law, because the relations between different parts of the administration are today suggested to be relations of law. But the binding effect of internal rules is limited. The minister or any other public body normally is not entitled to impose duties on private persons by issuing decrees. But some decrees contain technical norms (e.g. standards limiting emissions in environmental law). The minister issued them after consulting experts. They are helpful to understand the meaning of very broad terms of the law, for instance the precautionary principle. In Germany these decrees are known as "norm-concretizing" decrees and there is jurisdiction, that they have a semi-binding effect even for courts, allowing courts to accept them as prima-facie-evidence.

(c) What these examples underline is the following: Traditional distinctions like "external" and "internal" or "binding" and "not binding" are too rough. They 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 "ranking" is suggested to be the core issue of the sources of law-system. To know which norm has priority over other norms and acts indeed is a precondition of legal certainty and of high value for the rule of law in the whole. For practical reasons it is necessary to follow general rules for solving this intricate question.

The traditional doctrine follows a hierarchical scheme: the constitution has priority over parliamentary acts, legislation over governmental rule-making, states law over the law of local communities, general rules over single administrative acts. For some relations the hierarchical scheme is fixed in the

constitution.[3] Most of them are results of doctrinal scholarship more or less adopted by the legislation and the administrative practice as plausible solution or even as a rational principle for structuring the legal order itself. Hans Kelsens "Reine Rechtslehre" and Adolf Merkls "Stufenbau der Rechtsordnung" are especially in this field of administrative law a convincing paradigm of high esthetical beauty.[4]

Nevertheless we have to ask, if the hierarchical scheme can be still the dominant principle of a modern doctrine of the sources of law. A closer look reveals that hierarchy fits best to centralized national states, but becomes weaker and weaker, when polycentric political systems are at stake. And even in centralized states hierarchy sometimes is difficult to obtain.

(a) Take for example *the general principles of law*! Is their rank lower, higher or equal to acts of parliament? It depends on the basis they have: as far as they are part of fundamental rights (like the principle of proportionality), they have priority over parliamentary law – as far as not in a democratic system parliament should not be able to abolish but to modify them.

(b) To determine the interrelation between national and *international law* is even more difficult. According to an older states-centred doctrine it is the national constitution, which has to decide this question. But today we have the idea of a core of ius cogens in public international law, which claims superiority to national law irrespective of a special constitutional provision. International treaties in Germany have to be incorporated in the German legal order by an act of parliament and they share the rank of this act – no higher rank. That means every lex posterior might come to another solution and by doing so might violate the contractual duties, Germany has to fulfill according to the international law. To avoid this result, the lex posterior has to be interpreted in favour of the international law ("völkerrechtsfreundliche Auslegung").

There is a rather flexible jurisdiction of the Federal Constitutional Court, to harmonize national German and international law, not claiming the superiority of one regime, but balancing both.[5] This is especially true for the European Human Rights Convention and the decision of the Strasburg Court: these decisions have a "leading function". German courts have to put them in consideration and they have to argue, if in a special case they would not follow them. It is a doctrine of a "moderate superiority" (of German law to international treaties), modified in a more communicative style.

[3] E.g. Art. 31 of the German Constitution: "Bundesrecht bricht Landesrecht".
[4] Cf. *Merkl*, Allgemeines Verwaltungsrecht, 1927, p. 98 ss.
[5] *Schmidt-Aßmann*, Kohärenz und Konsistenz des Verwaltungsrechtsschutzes, 2015, p. 79 ss.

(c) This is true also for the relation between *EU-law and national law*.[6] EU-law claims superiority, founded on practical reason: otherwise the community would not function. For most cases this is a reasonable and acceptable solution. But to claim for an *absolute* superiority, like the European Court of Justice tries to do, is a misunderstanding of the multi-level-structure of the EU. The Union is not a state, especially not a centralized state. It is not built on the assumption of a strict hierarchical order. This is the reason, why the supreme courts of some member states stick to exception of superiority in a case, the EU-law would violate the core of their constitutional identity.[7]

What the doctrine of sources of administrative law needs today, is not the retrogression to the national state, but 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

My forth step "Arranging" seldom is mentioned in the context of the sources of administrative law. "Arranging" crosses the classical borders of doctrinal legal thinking. It asks how the administration has to deal with different types of norms to solve a special problem. Administrative law is not a theoretical construction only. It is a law providing instruments to fulfil administrative duties. This "enabling function" (*Schuppert*) is a consequence of the principle of efficiency.[8]

- Achieving results in the framework of the law at first means to pay attention to barriers each type of norms has in legal terms. In some situations it might be impossible to use some types. If it is necessary in a special situation to impose duties on individuals unilaterally, the administration has to use delegated legislation (regulations). Decrees or guide-lines are not sufficient to solve this problem. On the other hand they might be helpful in a more open situation, when they can be used in combination with voluntary arrangements to provide more flexibility.

- Arranging is a methodological difficult step. 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

[6] Cf. *Burchardt*, Die Rangfrage im europäischen Normenverbund, 2015 pass.
[7] *Burchhardt*, ibid. p. 269 ss.; *Schmidt-Aßmann*, Kohärenz und Konsistenz, p. 135 ss.
[8] Cf. *Schuppert*, Governance und Rechtsetzung, p. 99 ss.

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: options between a single case decision or a broader solution, between flexibility and stability, between a more cooperative and a more authoritarian style. Arranging is a form of institutional choice. Based on the other three steps it is informed about the legal and the political impacts, for instance the actors standing behind the different norms of an institutional arrangement.

Two different disciplines, legal scholarship and public administration as a part of political sciences, are coming together in this field. But for a modern conception it is necessary not only to inform, which sources of law are at hand, but also how to use them and how to combine different types to reach a special goal. In this respect we can learn from the administrative law theory in the USA.[9] The public administration has to calculate the advantages and disadvantages of its instruments. Lawyers are not real experts in this field, but they have some experiences with functions and dysfunctions of institutions and how they react under different conditions. They have to use these experiences. Methodologically it is part of the omnipresent duty of concretizing the principles of good administration (Art. 41 EU-Charta of fundamental rights). "Arranging" as the forth step means to integrate these principles in a modern doctrine of the sources of administrative law.

In some respect "Arranging" might be seen as a new dimension. But it is an integral part of the system – a system which tries to provide an idea of the complexity of norms, the public administration today is confronted with, and to use the interrelation between the different types of norms to solve practical problems.

II. Administrative rules as sources of law and as instruments

The second part of my presentation is about administrative rule-making especially. Administrative rules have a double function: on the one hand they are sources of law and on the other hand they are tools enabling the administration to fulfil its duties.

Two observations shall guide us: first the great variety of rules (1) and following their special rationality the necessity of special safeguards (2 and 3).

1. A great variety of rules

[9] Cf. *Breyer/Stewart/Sunstein/Vermeule/Herz*, Administrative Law and Regulatory Policy, 7th ed., 2011, p. 525 ss.

The great variety is a matter of quantity as well as of quality.[10] To quote Bernhard Schwartz:[11] "Rulemaking power is an outstanding feature of the modern administrative agency". Look in the law gazettes and official journals: compared with the parliamentary legislation there are far more regulations, decrees, by-laws, guidelines, instructions to officials, declarations, statements and "communications".[12] For practitioners they all might be even more important than the acts of parliament. In any case practice has to be informed about their existence, their different shape and how they are influencing the decisions of the administration and of private bodies. A *numerus clausus* of administrative rules does not exist.

(a) Hence there is a lot of work in describing and profiling all the different types of administrative rule-making. To give an overview by mentioning five examples:

- Rule-making by the government and rule-making by different administrative bodies.

- Delegated legislation and autonomous rule-making.

- Formal rules like regulations, by-laws and decrees, but also informal rules like recommendations, guidelines, standards and codes of conduct.

- Rules addressing third parties (subordinated agencies, local communities, private persons) and rules programming a future policy of the authority itself (concepts).

- Rules, issued by the administration unilaterally, but also rules, which are issued by cooperating with private parties for instance in technical or social matters.

This "*Cooperative rule-making*" for some lawyers seems to be a contradiction per se, because setting rules is suggested to be the monopole of states. But there is no clause in the constitution (neither the Italian nor the German) prohibiting the participation of private parties in administrative rule-making. Cooperative rule-making is a reality. The problem is not to declare it illegal in the whole. The problem is to structure the cooperation ex ante in a way, that the procedure is transparent and all parties involved have a fair chance to participate.[13] (We will come back to this point soon).

(b) In this context the term "*soft law*" should be mentioned. Soft law is an often described phenomenon today, particularly in Global Governance, but at

[10] *von Bogdandy*, Gubernative Rechtsetzung, §§ 19 ss.; *Ruffert*, in: GVwR Vol. I § 17 par. 58 ff.; *Hill/Martini*, in: GVwR Vol. II § 34 par. 18 ff. and 49 ff.
[11] *Schwartz*, Administrative Law, 3rd ed. 1991, p. 167; similar *Wade/Forsyth*, Administrative Law, 7th ed. 1994, p. 859: "There is no more characteristic administrative activity than legislation".
[12] Cf. *Härtel*, Handbuch Europäische Rechtssetzung, § 13 mn. 24 ff.
[13] For details cf. *Becker*, Kooperative und konsensuale Strukturen in der Normsetzung, 2005, §§ 8-10.

the national level, too.[14] Nevertheless I am not sure, if the term is helpful to conceive a modern sources of law-doctrine. A definition of soft law does not exist. Soft law means rules without a binding effect.[15] But which binding effect is at stake? The traditional one in the sense that "binding" is in any respect compulsory – or a more flexible one? In the first part of the contribution we have seen, that sources of law have different binding effects. There is a broad spectrum: from a direct legal binding to indirect ways of influencing. This has to be analyzed norm by norm. The term "soft law" is too rough for this norm by norm analysis.

We are confronted with the fact that the public administration always acts partly formal and partly informal. The informality itself is not a homogeneous phenomenon. It means:

- Either "informal" in the way the rule is issued by avoiding the normal procedural provisions.

- Or "informal" in the binding effects, using indirect measures to influence the behaviour of third parties (convincing arguments, financial incentives, social pressure).

Soft law is a sector of this practice. It is neither a new phenomenon nor per se illegal. Informality is a resource for flexibility.[16] What is necessary is to define the safeguards and restrictions to balance the steering capacity of a norm and the interests of the parties affected by it.

2. Safeguards: especially the rule-making procedure

These safeguards are widely discussed as the administrative rule-making procedure. Different from the parliamentary legislation, which is bound to few procedural requirements only (mainly constitutional provisions), there is a bulk of procedural law the administrative rule-making has to pay attention to. This is especially true for the local and regional rule-making, for by-laws and for the urban planning. Moreover you can find procedural provisions for the rule-making in special sectors like energy law and environmental law. Take as an example the procedure introduced by the EU-Directive 2001/42/EC on the assessment of the effects of certain plans and programs on the environment.[17] And there are detailed provisions for the rulemaking of special EU-agencies also, like for the European Aviation Safety Agency

[14] Cf. *Knauff*, Der Regelungsverbund: Recht und Soft Law im Mehrebenensystem, 2010.
[15] Cf. *Knauff*, Regelungsverbund, p. 228: Verhaltensbezogene Regelungen von Hoheitsträgern, die „ihre Steuerungswirkungen auf außerrechtlichem Wege erzielen".
[16] Cf. *Craig*, Administrative Law, 7th ed., 2012, p. 468. "We should not therefore deprecate the use of such rules".
[17] Directive 2001/42/EC, 27. 6. 2001, OJ L 197, p. 30.

(EASA) and for the European Securities and Markets Authority ESMA.[18] Typical procedural elements of these special regulations are: publication of drafts, reports, consultation, participation of interest-groups, information on the decision and monitoring.

On the higher levels of administrative rule-making and in general (the states´ level and the EU-level) the situation is ambivalent: There are procedural obligations for instance to inform the parliament, parliamentary committees, other ministries or states. Take for example article 290 and 291 TFEU.[19] But what is missing in most states and at the EU-level, is a set of procedural standards including the consultation of the public and the participation of interest-groups or parties particularly affected.

This is not a deficit of the legislation only. It is a deficit of the academic literature, too. Most European text books on administrative law, while dealing with the sources of law, do not mention the procedural dimension of the administrative rule-making. Some even try to reserve the term "procedure" to single-case decisions and contracts. This is the position of the German "Verwaltungsverfahrensgesetz" (1976) and more or less of the Italian "Legge sul Procedimento Amministrativo" (1990).[20] Administrative rules are not qualified as decisions of the administration, but as "sources of law". This traditional misconception hides their conflict regulating impact and declares them to be neutral and apolitical, which is a camouflage.

Different the Anglo-American approach! There is a lot of literature about the administrative rule-making procedure in the US, commentating, evaluating and criticizing the Administrative Procedure Act of 1946 and its different types of formal, informal and negotiated rule-making procedures (§§ 553, 556-557 and §§ 561-570 USC).[21] Administrative rule-making, that means particularly its procedural requirements, are an important chapter of any textbook in the US and the UK.[22] Its political dimension is not suppressed, but widely discussed and it becomes evident, that there should be a special regime for balancing the wide discretion of the rule-making authority and the interest of the public to control it. To put it more systematically, let me quote Paul Craig:[23] "There are four broad mechanisms for the control of

[18] Art. 19, 52 Regulation (EC) 216/2008 of the European Parliament and of the Council of 20th February 2008, OJ L 79/1 and Art. 10-13 Regulation (EU) 1093/2010 of the European Parliament and the Council of 24th November 2010, OJ 331/12.
[19] Cf. *Gaitzsch*, Tertiärnormsetzung in der Europäischen Union, 2015, p. 176 ss.
[20] Art. 13 legge 7 agosto 1990, no 241; cf. d*e Pretis*, in: von Bogdandy/Cassese/Huber (eds.), Handbuch Ius Publicum Europaeum, Vol. V, 2014, § 78 par. 77 ss., 92.
[21] *Pünder*, Exekutive Normsetzung in den Vereinigten Staaten von Amerika und der Bundesrepublik Deutschland, 1995.
[22] Cf. *Breyer/Stewart/Sunstein/Vermeule/Herz*, Administrative Law and Regulatory Policy, 7th ed., 2011, p. 501 ss.; *W. F. Fox Jr.*, Understanding Administrative Law, 1992, §§ 36 ss.
[23] *Craig*, Administrative Law, p. 433.

rulemaking: consultation, publication, legislative scrutiny and judicial review".

3. The Model Rules of the Research Network on European Administrative Law (ReNEUAL)

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. In 2013 the Network published a set of Model Rules on EU Administrative Procedure in six books. Book II addresses the "Administrative Rule-making" at the EU level (Commission and Agencies). Its objective is (I quote) "to ensure that the constitutional principles of participatory democracy and transparency as well as principles of EU administrative law, in particular, the 'duty of care' (full and impartial assessment of all relevant facts), are observed in procedures leading to the adoption of non-legislative acts of general application. The purpose of the model rules proposed is to ensure a higher degree of legitimacy of rule-making activities, in accordance with Article 11(1) TEU. Greater transparency of input into the procedure as well as the possibility for public debate and deliberation on alternatives will ensure more fully that all the relevant facts and legally protected interests are taken into account, which will contribute to the overall quality of rule-making".[24]

(a) The proposal consists in a "notice and comment"-procedure, similar to the so-called informal rule-making regulated by § 553 of the US-APA:

- It starts with the obligation of the authority to inform about its rule-making intention. That means to make public the title, the main objectives and the legal basis of the proposed rule (II 2).

- The preparation of the draft is in the responsibility of the authority, which has to examine all relevant aspects "carefully and impartially" (II 3 § 1 lit a). An impact assessment is necessary, which might include a cost-benefit analysis. The draft has to be accompanied by an explanatory memorandum, giving reasons for the choices made and their alternatives (II 3 § 1 lit. c). This is not new; today it is provided by an interinstitutional agreement.[25]

- The next step is the publication of the draft and the explanatory memorandum on a "central EU website for consultation", accompanied by an open invitation to any person to electronically submit comments. The comments are made public "in a way that allow public exchange of views" (II 4 § 4). This is the basis for "the possibility for public debate and deliberation" mentioned above.

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[24] Book II Rn. 1.

[25] Cf. *Meuwese*, Impact assessment in EU law making, 2008; *Härtel*, Handbuch Europäischen Rechtsetzung, § 13 Rn. 13 ff.; *C. Lund*, in: Verwaltungsrundschau 2011, p. 87 ss.

- After the consultation the authority shall adopt a reasoned report (consisting of an explanatory memorandum and materials). This report shall explain, whether and how comments were taken in account and shall be altogether sufficiently reasoned "to enable effective administrative and judicial review" (II 5). The report is not necessarily to be published as a part of the rule (cf. Art. 296 TFEU). But it needs to be "publically available and ought to be considered part of the final act".[26]

(b) All in all the Model Rules on EU administrative rule-making are a helpful contribution to a modern doctrine of the sources of law. They try to structure a process, which in many cases is highly political and of broad interest. However it can be questioned, if the procedure is to complicate and will hamper the administration in situations, where an immediate reaction is necessary. The Model Rules try to avoid this by introducing an expedited procedure as an exception enabling the administration to adopt an act, valid for at least eighteen months, without consultation (II 6).

But the problem of inflexibility is broader. In the USA an "ossification" of rule-making is criticized – as a consequence of extensive litigation by interest-groups which try to bring every step of the rule-making process before the courts.[27] In the European context this danger might be not as pressing as in the USA, because the European Courts are reluctant to intervene in political processes. At any rate it seems necessary to concede the authority a broad procedural discretion to regulate the details of the publication and the consultation.

However the procedural perspective is not the only safeguard against misuse of power. We have to keep in mind, that administrative rule-making in most cases has to be based on parliamentary delegation. And this parliamentary basis should be developed as a stronghold of substantive safeguards. The German Constitution is clear in this respect. It provides for all regulations ("Rechtsverordnungen"): "The content, purpose and scope of the power conferred shall be specified in the law" (Art. 80 Abs. 1 S. 2 Grundgesetz). The Italian Constitution has a similar provision especially for decreti legislativi (Art. 76). The same scheme can be found in Art. 290 TFEU for the delegated rule-making of the EU-Commission: "The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power". For the moment the necessity to circumscribe the delegation in substantial terms is not yet a common constitutional principle in Europe.[28]

; [26] Book II Rn. 50.
[27] Cf. *Pierce, Richard Jr.*, "Rulemaking Ossification is Real: A Response to Testing the Ossification Thesis", George Washington Law Review 80 (2012): 1493-1503.
[28] *von Bogdandy*, Gubernative Rechtsetzung, p. 261 ss.

But we should strengthen the idea that administrative rule-making is not only restricted by *procedural* but also by *substantial* safeguards.

III. Conclusions

The sources of administrative law are a field of high *practical importance.* But the practitioners in the administration and in the judiciary need orientation and help from the administrative law system. Conceptualizing this was and is mainly the responsibility of the scholarly work at the universities – that means our responsibility. There is a lot to do! As explained in both parts of my presentation: The four steps “Describing”, “Profiling”, “Ranking” and “Arranging” try to offer a scheme for this work. And a comparative law perspective (like the Model Rules and the US experience) might help to fill this scheme with creativity.