

## § 2 German law as a continental-European legal system

### I. A legal system following the continental-European tradition

- a legal system building on *laws enacted by Parliament*, not case-law
- laws are usually more abstract and elaborate and less technocratic than in common law systems
- court decisions represent *jurisprudence, not case-law* (→ no rule of stare decisis)
  - they only express the court's *opinion*
  - they only have a persuasive, not generally binding authority
- nevertheless, jurisprudence plays an important role
  - in the interpretation and application of statutory law (esp. of → indefinite legal concepts)
  - in judicial further development of law (a continental counterpart to case-law)
  - legal practitioners often simply follow the jurisprudence of the relevant court
  - continental law students need to learn landmark decisions too...

### II. A legal system based on Roman law, own legal traditions and sophisticated legislation

- formative influence of the *Corpus Iuris Civilis* of 529 to 534 of the late Roman Emperor Justinian on the modern German private law
  - esp. of the *Digests/Pandects* (fragments of classical Roman legal literature) on the German Civil Code
- complementary influence of old German legal traditions
- German laws are often carefully prepared in a lengthy process and therefore particularly elaborate and systematic, with accurate legal terminology, and well-coordinated with others
- German law follows approach of **codification** (concentrating the legal norms of a field of law in one single, comprehensive, sophisticated and, as far as possible, exhaustive code of law)
  - first modern codification: General Land Law for the Prussian States [Allgemeines Landrecht für die Preußischen Staaten] of 1794
  - most famous codification: German Civil Code [Bürgerliches Gesetzbuch] of 1896
  - others: German Criminal Code [Strafgesetzbuch], German Commercial Code [Handelsgesetzbuch], Code of Social Law [Sozialgesetzbuch], Code of Civil Procedure [Zivilprozessordnung]
  - failed efforts: to create a German labour code and an environmental law code
  - no new codifications in the last decades

### III. A legal culture with a strong systematic and methodological approach

- clear, logical and dogmatically correct structure of the laws, esp. the codes of law
- working with the law by
  - (1.) identifying the relevant statute, then
  - (2.) identifying the relevant part, sub-part and sub-sub-part in the statute (by using the statute's table of contents), then
  - (3.) identifying therein the relevant legal provision but considering also its neighbouring provisions
  - (4.) interpreting the relevant legal provision, with due consideration of its function and systematic position and in context with other provisions
    - in particular: defining the legal terms in the provision
  - (5.) applying the provision (in particular subsumption)
- open and transparent (replicable) use of the entire broad range of legal methodology (cf. § 5)

- striving for precise and differentiated application of the law by strong emphasis on *distinction, differentiation and delimitation*
  - of legal terms, sub-terms, elements of legal terms, categories, case groups etc.
- systematic and methodological approach not only in theoretical discussions but also in the solving of individual legal cases in daily practice

#### IV. A federal legal system

- the Federal Republic of Germany as a *federal state* (art. 20(1) BL)
  - two independent levels of statehood within one sovereign state
  - special constitutional status of the Länder
  - competences distributed between Federation and Länder by the Basic Law
- federal law and Land law are both parts of the German legal order
  - all kinds of sources of law (cf. § 3) exist at both, federal and Land law level
- in case of conflict, *primacy of federal law* over Land law (art. 31 BL)
- most important fields of federal law:
  - private law (incl. labour, commercial, company, competition law)
  - criminal law
  - economic law
  - social (security) law
  - court organisation and procedure law
- most important fields of Land law:
  - public security and order law
  - local government law
  - school law
  - higher education law
- in some areas, esp. administrative law, a complicated combination of federal and Land law applies

#### V. A legal system more and more influenced by European integration

- European Union law is not part of German law but *directly applicable* within the German legal system like German law
  - exception: EU directives (need to be transposed into domestic law)
- in case of conflict, European Union law enjoys *primacy over the law of the member states*, even over national constitutional law
  - European Court of Justice, leading cases 6/64, Costa/ENEL, and 11/70, Internationale Handelsgesellschaft
- in the process of European integration, member state law has come under increasing pressure to adapt to the growing standards and requirements set by EU law
  - an unavoidable side effect of supranational integration
- this has led to a *Europeanisation of law* in most fields of law
  - Europeanisation of economic law (comprehensive harmonisation of national law)
  - Europeanisation of administrative law (met temporarily resistance from some admin. law scholars)
  - Europeanisation of private law (big influence on the law of obligations and international private law)
  - Europeanisation of data protection law (the EU's influential General Data Protection Regulation)
  - Europeanisation of constitutional law (Germany needed to amend art. 12a BL to allow women to serve at arms in the army)
- consequence: German lawyers often need to apply a combination of European, German federal and Land law
  - studying German law alone does not make you fit for working as a lawyer in Germany...

## VI. A legal system leaning on a demanding academic and professional legal education

- regulated in the German Judiciary Act [Deutsches Richtergesetz] and the legal education laws and ordinances of the Länder

### 1) Studying law in Germany

#### a) The studies

- comprehensive integrated studies of at least 4, usually 5 years, followed by a *combined university and state examination; no bachelor or master degree*
- structure: first basic studies [Grundstudium] with intermediate examination [Zwischenprüfung], then main studies [Hauptstudium] with option to choose a focus area [Schwerpunktbereich]
- new: studies must nowadays include a foreign-language law course or a law-oriented language course (sect. 5a(2) GJA)
- no tuition fees
- many students make use of the option to study one semester abroad in another European country under the European Union's *Erasmus+ programme*

#### b) The First Legal Examination [Erste Juristische Prüfung]

- previously conducted exclusively by the state and therefore called First Legal State Examination [Erste Juristische Staatsprüfung]
- a demanding examination at the end of the academic studies, comprising two parts:
  - aa) a state examination on a broad spectrum of compulsory subjects
  - bb) a university examination on the chosen focus area
- a strictly impartial state examination, conducted without university involvement by the Land judicial examination office [Justizprüfungsamt]
- the examination covers every topic taught during the whole studies, from the very first to the very last lecture
- high failure rates make lengthy thorough preparation necessary and result in strong psychological pressure on the exam candidates
- a long tradition of private revision courses [Repetitorien] offered on a commercial basis for easier and more effective exam preparation

### 2) The general legal traineeship [Rechtsreferendariat]

#### a) Two years of comprehensive professional training

- in all important fields of law: civil law, criminal law, administrative law
- at different training stations: with a judge, a public prosecutor, a law firm, an administrative authority and at an elective station
- the *elective station can also be spent abroad* (e.g. at a German Embassy, EU institution, intern. organisation, foreign public authority or law firm or a German chamber of industry & commerce abroad)

#### b) The Second Legal State Examination [Zweite Juristische Staatsprüfung]

- a second comprehensive and demanding examination
- the last step towards the "*qualification to hold judicial office*" ["Befähigung zum Richteramt", sect. 5 GJA], which provides general access to almost all legal professions and allows a free change of the legal profession at any time
  - only notaries and specialist lawyers require additional specialist training