

# § 1 General Introduction

## I. Why studying comparative public law?

### 1) Why studying foreign public law at all?

- for a *better understanding* of the own public law (constitutional and administrative law), its particularities (and the alternatives), its strong and weak points and the perspectives of its development
- as a *source of inspiration*: legislators, courts and authorities in different countries often face similar problems in the field of public law, and legal solutions developed in one country may be useful in others too (you do not need to reinvent the wheel...)
  - example: the creation of constitutional courts, inspired by the German model
  - example: the development of an advanced fundamental rights doctrine by East European constitutional courts, inspired by the jurisprudence of the German Federal Constitutional Court and the European Court of Human Rights
  - example: the development of a sophisticated doctrine of important institutions of administrative law, in particular the dominating institution of the administrative act [= admin. decision] in many countries, inspired by the French or the German administrative law
- for a *better critical analysis of the domestic constitutional and administrative jurisprudence*: courts in other countries may have found better solutions or shown a more sophisticated reasoning for the same problem
  - often relevant for questions of constitutional principles or fundamental rights or individual elements of legality of administrative action
- *not only the success stories* but also the failures of foreign constit. law are interesting: you must not repeat the mistakes of others...

### 2) Why studying German public law?

- because German public law is a particularly highly developed continental legal system, with many interesting, innovative concepts and practical experience with them
- a long history of *constitutional, legal and jurisprudential reception*: many countries have adopted with great benefit concepts and institutions from countries with a more developed constit. law
  - e.g. reception of elements of German fundamental rights doctrine in European and Asian countries
  - e.g. reception of elements of general administrative law, especially administrative procedure law in European countries
- in the field of constitutional law, legal *reception is easier* than in most other fields of law
- in the field of administrative law, comparison of laws is *more interesting than in other fields of law* (e.g. family law) because admin. law is less dominated by the national cultural background but more influenced by the principles of rule of law, good governance and efficiency

### 3) How to get the most out of studying German public law

- focus on the systematics, the general approaches and concepts, not on the details
- focus on the *general understanding and handling* of the law, in particular the fundamental approach of German lawyers to *systemise and dogmatise the law*, categorise legal norms, elaborate basic principles and definitions and develop fine distinctions
- focus on the sophisticated *legal methodology*, in particular the methods of legal interpretation, analogy, subsumption and theoretical reflection and the techniques of practical case-solving: they are of universal relevance and can be used with great benefit also in Kazakhstan

## II. The concept of public law

### 1) Law, customs and morality

- legal norms are not the only rules in society, but the only ones that are generally and absolutely binding and enforced by the state
- rules of morality complement them, but in the modern, pluralistic society they are not legally binding and can only be enforced by *social sanctions*

### 2) Public law and private law

- private law regulates the legal relationships between individuals
- public law regulates the relationship of the individual to the state and other holders of public authority as well as the relationship between the public institutions and bodies

### 3) Formal law and substantive law

- substantive law: those legal norms which regulate the content, the creation, termination, modification or transfer of rights and legal obligations.
- formal law: those legal norms that serve to enforce the substantive law

### 4) Objective law and subjective rights

- subjective right: a special legal power, usually in form of a personal right, granted to the individual by the law for the protection and enforcement of his legitimate interests
  - example: the fundamental rights under the constitution, which the citizen can enforce by legal action before the courts (and in Germany even by individual constitutional complaint before the constitutional court)
  - must be distinguished from mere interests benefiting from the law

## III. The spectrum of public law

- see Diagram 1

### 1) National, international and supranational public law

### 2) Constitutional law, administrative law and other fields of national public law

### 3) General administrative law and special administrative law

### 4) Substantive administrative law, administrative procedure law and administrative court procedure law

## IV. General characteristics of German public law

### 1) A public law in continental European legal tradition

- no "case-law" like in common law countries, but only jurisprudence
  - jurisprudence is the interpretation of the law, not part of the law itself
  - however, in practice, jurisprudence is also important (and must be studied by the students), in particular the jurisprudence of the Federal Constitutional Court

### 2) A public law orientated towards the rule of law and human rights

- a reaction to the atrocities and arbitrariness of the rule of National Socialism and the Second World War
- all exercise of public power is strictly bound to the law (art. 20(3) BL) (see § 5 of this course)
- the fundamental rights under the Constitution are directly binding law (art. 1(3) BL) (see § 7 IV of this course)

- a commitment taken seriously in practice and shaping all theoretical and practical legal work in all areas of law

### **3) A public law strongly building on judicial control**

- due to a comprehensive and effective guarantee of fundamental rights (art. 1 - 20 BL), a fundamental constitutional principle of rule of law (art. 20(3) BL) and a *fundamental right of the citizen to have recourse to the courts against any violation of his rights by public authority* (art. 19(4) BL)
- a high readiness of the citizens to bring legal disputes before the court
  - in particular more trust in the courts than in the self-control of the executive in Germany
- a high degree of professionalism, integrity and actual independence of the judges
  - judges highly qualified, almost no risk of corruption
  - judges not only de iure but also de facto independent
  - administrative judges particularly known for their intellectual independence and often critical approach

### **4) National public law under the influence of European Union law**

- the domestic law of the European Union member states is in many aspects influenced or even shaped by binding standards and requirements of European Union law
- this has significantly shaped the domestic law: the phenomenon of the *Europeanisation of administrative law and constitutional law*