

# § 1 General Introduction

## I. Why studying German private law?

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

- for basic orientation & understanding in case one needs to deal with it later in one's career
- for a *better understanding* of one's own private law, its particularities (and the alternatives), its strong and weak points and possible perspectives of its development
- as a *source of inspiration*: legislators, courts and lawyers in different countries often face similar problems in the field of private law; ideas and legal solutions developed in one country may be useful in others too (lawyers do not need to reinvent the wheel...)
  - examples: new types of contracts or new types of companies, often inspired by models in other countries
  - however, foreign solutions cannot simply be transferred but *need to be adapted* to the peculiarities of one's own private law
- for a *better critical analysis of the domestic jurisprudence, doctrine and practice*: courts, scholars or practitioners in other countries may have found better solutions or shown a more sophisticated reasoning when dealing with the same problem
- *not only the success stories* but also the failures of foreign law are interesting: you must not repeat the mistakes of others...

### 2) Why studying particularly German private law?

- because German private law is a particularly highly developed continental legal system, with many interesting, innovative concepts and practical experience with them
  - therefore, *legal reception* of important elements of the German Civil Code in Switzerland, Greece, Portugal, Japan, Korea and Taiwan
- because of its strong *systematic, dogmatic & methodological approach* (see infra, § 3)
  - German laws and lawyers systematise and structure everything
  - German courts and scholars have built up and are cultivating a highly developed legal doctrine
  - legal methodology is sophisticated and diverse, and applied not only in theory but also in legal practice
  - the advantages of this approach can be used by foreign lawyers to improve the quality of their own legal system
- because German law *can be exaggerated in its complexity and intricacy* and in these cases serves as example of how better not to do
  - intellectual efforts and benefits are not always balanced - is it worth it?
  - controversial example: the principle of abstraction between obligation and disposal transaction with its complicated consequences (see infra, § 6 III)

## II. The concept of private 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
  - they may, however, influence the interpretation of indefinite legal concepts in legal norms, such as good faith (*bona fide*) or common decency (*bona mores*)

### 2) Public law and private law

- private law (= civil law) is the law that regulates the relationships between legal entities (individuals or legal persons) that are legally (not necessarily economically) equal and act in theory (not necessarily in real life) self-determined

- 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
- private law also applies to the relationships of citizens with the holders of public authority when these act under private law
  - since in these case the partners also act as equals (e.g. when the city government buys a computer)
  - but if the use private-law legal forms to perform public tasks (e.g. to operate the local public swimming pool), the private law is partly superimposed by mandatory public-law standards (so-called "administrative private law")
- the delimitation between private law and administrative law can be delicate
  - see on this problem Slide 8 from the course German Public Law

### 3) 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: claims, property

## III. General characteristics of German private law

### 1) A private 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), especially important decisions of the Federal Court [Bundesgerichtshof]

### 2) A private law mainly based on Roman law

- the German Civil Code is predominantly based on the Roman law, as codified in the Corpus iuris civilis of the Roman emperor Justinian of 529 to 534
  - especially on the Pandects/Digests (included excerpts from writings of classical Roman scholars)

### 3) A private law under the influence of the Constitution (see also infra, § 8)

- under the Basic Law for the Federal Republic of German of 1949, constitutional rights and principles unfolded a growing influence in all fields of law, including private law
- *fundamental rights are directly binding law* (art. 1(3) BL)
  - consequently, all private law must be interpreted and applied strictly in line with them
  - constitutional complaints of citizens have caused the Federal Constitutional Court to annul decisions of the Federal Court for violation of fund. rights
- resistance against the primacy of fundamental rights over private law among some private law scholars until the 1980s

### 4) A private law under the influence of European Union law

- the *Europeanisation of private law* - adaptation of national private law to far-reaching European legal requirements
- many new clauses or even sections of the German Civil Code serve the implementation of EU directives
- unlike in the field of administrative law no strong resistance against this development

## IV. The spectrum of German private law

### 1) Private law, civil law and "Bürgerliches Recht"

- *private law* [Privatrecht] and *civil law* [Zivilrecht] are synonyms, covering the whole area as described above (II.2)
  - caution: in common law countries, the term "civil law" is also used as a synonym for continental law!
- *Bürgerliches Recht* [literally translated "citizens' law"] is a specific German term for that part of private law that affects everyone in everyday life in their private legal relationships with others and is regulated in the German Civil Code and a few supplementary laws
- besides, there is "*special private law*" [Sonderprivatrecht] that applies only to certain persons or areas of life and is regulated in special legislation
- court proceedings in private law are governed by *civil procedural law*

### 2) Overview over the whole spectrum of private law

see Diagram 1

### 3) The focus of this course on the "Bürgerliches Recht"

- on its general part (§§ 4 to 7) and the law of obligations, esp. contract law (§§ 8 - 12)

## V. The problem of studying German private law in English

- see also Slide 1 from the course Introduction to the German Legal System
- in the field of private law, legal terms are even more deeply rooted in the traditional national legal culture and therefore more heterogeneous than in other fields of law
  - common law and German private law have developed *totally different legal concepts and terms that often do not correspond* to each other and thus cannot be translated correctly or without further explanation
  - moreover, the legal terminology can be different in English and American law
- this can cause considerable confusion
  - different English translations of German Civil Code provisions can read like translations of different laws
  - subtle conceptual nuances are lost in translation
  - different English publications on German private law topics can read like dealing with different countries