

# § 1 Introduction

## I. Why studying comparative constitutional law?

- for a *better understanding* of the own constitutional law, its particularities (and the alternatives), its strong and weak points and the perspectives of its development
- as a *source of inspiration*: innovations and solutions in the constitutional law of one country may be useful in other countries too
  - example: creation of constitutional courts, inspired by the German model
  - example: development of an advanced fundamental rights doctrine by East European constit. courts, inspired by the jurisprudence of the German Federal Constitutional Court and the European Court of Human Rights
- for a *better critical analysis of the domestic constitutional jurisprudence*: constit. courts of other countries, facing the same problem and applying similar clauses, may have found better solutions or shown a more sophisticated reasoning
  - often relevant for questions of constitutional principles or fundamental rights
- a long history of *constitutional 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 American and German fundamental rights doctrine in European and Asian countries
  - legal reception easier in constit. law than in most other fields of law
- *not only the success stories* but also the failures of foreign constit. law are interesting (you must not repeat the mistakes of others...)

## II. Constitutional law and the world order of states

### 1) The world order of states

- the missing legal unity of the planet and the *principle of the territorial state*
- public international law as a rudimentary world order that builds on the prominent role of the territorial state
- not a matter of course but just the prevailing world order since the 17<sup>th</sup> century

### 2) Self-determination of peoples and sovereignty of the state

- In the world order of states, each people is free to follow its own political and ideological principles, giving effect to its own cultural characteristics, within its own state order (*right to self-determination*).
- In the world order of states, each state enjoys *sovereignty*. This is the *underived and independent legal capacity to act in internal and external affairs*, which is only subject to a few basic restrictions under public intern. law but otherwise *unlimited*. It includes the (quasi-) unlimited public power of the state, the control over all other public power exercised on its territory and a (quasi-) unlimited constituent power within the state.
  - recognised restrictions: prohibition of war, genocide, slavery, ethnical cleansing and other huge-scale extreme human rights violations

## III. Constitutional law and the level of development of the state

- An advanced constit. law is less shaped by the text of the constitution than by constit. jurisprudence and doctrine. Therefore, it presupposes a considerable number of highly educated experts well-aware of up-to-date standards and concepts of constitutionalism in the region and the world. These are often not available in developing or newly industrialised countries.

- most common solution: junior constitutionalists bringing *inspiration* to their countries *from* their *comparative constitutional studies and research abroad*

#### **IV. Constitutional law and the historical, cultural and religious backgrounds of the state**

- modern constitutions in states with a long constitutional tradition are often reactions to the failures of the previous constitutions and must be understood in that way.
- cultural and religious backgrounds of the state have an *impact* on the constitutional norms and their interpretation, but this *effect must be limited* and *does not exclude universal standards* or a critical comparative analysis
  - example: fundamental rights remain directly binding superior individual rights and *must not be diluted or "relativised"* with regard to so-called "Asian values", collective traditions or the dominance of a certain religion or cultural tradition in the country