PARKER SCHOOL STUDIES
IN FOREIGN AND COMPARATIVE LAW

Charles Szladits' GUIDE TO FOREIGN LEGAL MATERIALS: GERMAN

Second Revised Edition

by
TIMOTHY KEARLEY
WOLFRAM FISCHER

PARKER SCHOOL STUDIES
IN FOREIGN AND COMPARATIVE LAW

Charles Szladits' GUIDE TO FOREIGN LEGAL MATERIALS: GERMAN

Second Revised Edition

by

TIMOTHY KEARLEY

Director of the Law Library and Professor of Law
Paul M. Hebert Law Center
Louisiana State University

WOLFRAM FISCHER

Jur. Staatsexamen Free University of Berlin
J.D., LL.M. Illinois
Attorney: Cleary, Gottlieb, Steen & Hamilton
Washington, D.C.

Published for the
PARKER SCHOOL OF FOREIGN AND COMPARATIVE LAW
COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK

by
OCEANA PUBLICATIONS, INC.
DOBBS FERRY, NEW YORK

ISBN: 0-379-11755-x

Manufactured in the United States of America

PREFACE

The present work is a guide for the common-law lawyer, and other English-speaking researchers, to the use of West German legal materials. It is a second edition of Part 2 of Charles Szladits' *Guide to Foreign Legal Materials: French, German, Swiss* (1959). Professor Szladits had planned to be the senior co-author of this second edition, but his sudden illness and subsequent death prevented his participation. The new authors have attempted to remain true to the purpose and form of his original work. Hence, as in the prior edition, the bibliographic section is preceded by a brief description of the sources, their character, and their position in the legal system. This is followed by a brief glimpse at court organization. In addition, it was decided to add to this edition a short description of legal education and the legal profession in West Germany in order to provide a more complete picture of the legal system there. The introductory description of the sources of law is followed by a discussion of the repositories of law, that is, of the written works that contain the sources and information about them.

The bibliographic part deals, in separate chapters, with bibliographies; encyclopedias, dictionaries and other legal reference works; laws (statutes and regulations); case law (reports); and doctrinal writings (manuals, textbooks, etc.). The chapters on laws and case law are the most comprehensive, while the others are more selective. The vast expansion of legal literature in the Federal Republic of Germany since the first edition of this book was published nearly thirty years ago has necessitated a greater selectivity in this edition, although the total number of items mentioned in it is greater than in its predecessor. (The great increase in the number of law students, lawyers, and law faculty, combined with the country's affluence, has allowed law publishers to sell many more law books than they have in the past.) All major branches of the law are included here, however: private and commercial law, procedural and penal law, public and administrative law, and even the more theoretical subjects such as legal history and legal philosophy. A few subtopics, such as traffic law, which are of interest only to local practitioners, were omitted, as were some specialized fields of administrative law and social welfare law, such as the law of primary and secondary education and of pensions. The sheer mass of detail in such fields would have overburdened the work with subjects generally of little significance for the foreign researcher. The basic information on these topics can be found in the more general works within the scope of our selection.

Legal materials of the German Democratic Republic (G.D.R. or East Germany) are not covered in the present work. The vast, and seemingly permanent, divergence of the legal system and legal materials of the G.D.R. from those of the Federal Republic makes pointless the inclusion in this edition of East German materials. The law and legal literature of socialist nations has become a special field of study. It must suffice here to note a few works which can serve as introductions to the law of the German Democratic Republic. In English there are: Daniel Meador, *Impressions of Law in East Germany: Legal Education and Legal Systems in the German Democratic Republic* (Univ. Press of Virginia, 1986, 320 p.), which includes appendices listing (in English translation) the titles of the main East German legal texts, summaries and commentaries; and Martin Posch, "German Democratic Republic" in *International Encyclopedia of Comparative Law*, volume I (National Reports) G/H (Mohr/Siebeck, Sijthoff, 1972-) which has a selective bibliography at pages G-31 to G-32. The two best German introductions, published in the Federal Republic, are: Georg Brunner, *Einführung in das Recht der DDR* (2nd ed., Beck, 1979, 224 p.), which discusses the publication of the G.D.R.'s laws at pages 15-16; and Erika Lieser-Triebnigg, *Recht in der DDR: Einführung und Dokumentation* (Verlag Wissenschaft und Politik, 1985, 271 p.), which includes a bibliography and excerpts (in German) of some East German laws.

West Germany's computerized legal information retrieval systems will not be discussed here either since it is not now available in the United States and will not be for the foreseeable future. A good English-language description of the systems is available in Juergen Goedan, "Legal Comparativists and Computerized Legal Information Systems. General Problems and the Present German Status of Computerized Legal Information," 14 Int'l. J. Legal Info. 1 (1986).

It should be noted, though, that the breadth of coverage has been expanded in this edition, both as a reflection of the increased number of law titles published in the Federal Republic of Germany, and of the increased interest on the part of many lawyers and other researchers in West German legal and social institutions. New fields and new types of works have been included in this edition. It is worth mentioning that even new categories of literature have appeared since the first edition of this work was published, although it may be more accurate to say that new terminology has been used to describe similar types of law books as publishers have attempted to differentiate their products from those of

others. For example, in the past the *Kommentar* (article by article commentary on a code or law), the *Grundriß* (brief student-oriented introduction to a field or subfield, similar to a "Nutshell" in U.S. legal literature), and the *Lehrbuch* (systematic presentation of a field, not necessarily following the organization of the statute itself and in greater detail than a Grundriß, similar to a lengthy "Hornbook" in U.S. legal literature) were about the only categories of explanatory materials offered for West German law. Now, however, we also see the *Kurzlehrbuch,* the *Lernbuch,* the *Lehrheft,* and the *Einführung,* which are all essentially a species of *Grundriß* or *Lehrbuch*, depending on length, and the *Lehrkommentar*, the *systematische Kommentar*, the *Grundsatzkommentar,* and the *Problemkommentar*, which are basically the old *Kommentar* emphasizing certain themes or problem areas in a statute or code.

The one category of law book that may be truly new has no distinguishing label, and its members are sometimes hard to separate from the more traditional works mentioned above. The best term for it is probably "study aid" or "review book." Books in this category usually are issued under rubrics such as *Studienkurs, Grundkurs, Grundbegriffe,* or *Schwerpunkte.* Their distinguishing features are an emphasis on case analysis (something called a "Casebook" on constitutional law even appeared recently) and a focus on particularly troublesome aspects of a field; often they are intended to help students review for exams. Similar are *Skripten,* which are like bar review books in the U.S. and are used by students preparing in *Repetitorien* (review course) for their state exams.

In this book we will emphasize traditional, scholarly works over those intended for practitioners and we will exclude items designed solely as student study aids or review materials. In subject areas likely to be of interest to practicing attorneys outside of West Germany, such as commercial law, more practitioner-oriented works will be included. Also, only the more important West German looseleaf works will be noted due to their scarcity in libraries outside of Europe.

The works included are inclusive to December 31, 1987. A final chapter on the use of foreign works contains pointers on the most likely difficulties to be encountered in dealing with foreign law. The work also contains appendices that provide a list of the legal abbreviations used in the work and the addresses of the publishers. One of the main aims of the Parker School of Foreign and Comparative Law is to provide American lawyers with the tools necesssary in pursuing the study of foreign and comparative law. A guide to foreign legal materials, it was

felt, would fall within this scope. Numerous changes in the law, the myriad of new publications, and the appearance of new fields of law have made a second edition necessary. The second edition is based on Charles Szladits' original work as rewritten and expanded by Wolfram Fischer, who revised the first part, and Timothy Kearley, who revised the second part.

The bibliographic information for each entry includes the following: author's first and last name; title; edition; publisher; year of publication; number of volumes, if more than one; number of pages; and series statement, if any. If the work is edited, the editor's first initial and last name follows the title; publisher's addresses are provided in Appendix II, and if a work consists of more than two volumes, the number of pages is not given. In addition, citations to any book reviews on the work that were found in the 1986 and 1987 issues of *Juristenzeitung, Juristische Schulung, Monatschrift für Deutsches Recht,* and *Neue Juristische Wochenschrift* (plus, for specialized titles, a handful of other specialized journals) are added in brackets after the bibliographic information as a help especially for potential purchasers. (New editions appear so often for works in certain fields that the statement "or later edition" should be added to any order based on the references given here.) A sample entry is as follows: Kurt Schellhammer and Rüdiger Söhnen, *Zivilprozeß* (2nd ed. C.F. Müller, 1984, 841 p.) (*C.F. Müller Großes Lehrbuch*) [JuS 1987/4, XXI; NJW 1986, 174].

Special thanks are due to Ms. Leta Hunt for her preparation of the final manuscript on a word processing system, to Ms. Karen Dudas for her editorial assistance, and to Ms. Linda Freisler for her research and proofreading assistance. Professor Kearley would also like to express his appreciation to the Fulbright Program and the University of Illinois for the financial assistance they provided to help support his research in West Germany and the U.S. and to the staff of the law library of Albert-Ludwigs-Universität Freiburg for their help and hospitality.

Timothy Kearley — Wolfram Fischer

Urbana and Washington, D.C.
June 1, 1988

POSTSCRIPT

The authors believe that recent, and ongoing revolutionary changes occurring in the German Democratic Republic (GDR), and the concomitant movement toward German unification, call for some comment here.

First of all, these events seem to indicate that we were right, for the wrong reason, not to cover East German legal materials. We were well within the bounds of the prevailing wisdom when we wrote of "[t]he vast, and seemingly permanent, divergence of the legal system and legal materials of the GDR from those of the Federal Republic...." Of course, it now seems very likely that the GDR's legal system and legal materials will undergo drastic alterations in the near future. It also seems more likely than not that its laws and legal system will come to resemble those of the Federal Republic of Germany, even if there is no complete merger of the GDR into the FRG. In any event, whatever we would have included about East German legal materials is almost certain to have had a very short useful life.

Secondly, we feel the need to add in a small way to the information given on pages 1-3, and elsewhere in the text concerning the post-war legal status of the two Germanies and Berlin, the nature of their post-war relationship and related features of the Federal Republic's Basic Law. One good source of information on these subjects is Ernest Plock, *The Basic Treaty and the Evolution of East-West German Relations* (Boulder, CO: Westview, 1986) (*Westview Special Studies in International Relations*). This work primarily focuses on the character and results of the "*Grundvertrag*," or Basic Treaty, of 1972, which established the institutional basis for cooperation between the two Germanies; however, its first chapter, "The Background to the Basic Treaty, 1949-1969" (pp. 11-52) provides a good, concise explanation of the legal and political nature of the post-war German arrangement. It examines the way in which both the FRG and the GDR have conceptualized the legal status and relationship of the two Germanies. Another work that should be mentioned is *The Federal Republic of Germany at Forty,* ed. by P. Merkel (New York: N.Y.U. Press, 1989). Although most of its contributors address political rather than legal issues, two contributions are worthy of note here. Chapter one, "The German Question, Yesterday and Tomorrow" (pp. 19-34), surveys the legal and political aspects of Germany's post-war division in the light of developments through 1988, and chapter 6, "The

Basic Law of the Federal Republic of Germany: An Assessment After Forty Years" (pp. 133-159), offers a good, up-to-date, English-language review of that document's development and current status.

Finally, we would like to point out two ways unification could be achieved from the Federal Republic's perspective, under its Basic Law. (These comments summarize a report from *Deutschland Nachrichten,* February 23 1990 at p. 2, a publication of the German Information Center, New York.)

Article 23 of the Basic Law states that "[f]or the time being, this Basic Law shall apply in the territory of the Länder of ... [names omitted]. In other parts of Germany it shall be put into force on their accession." Saarland was taken into the Federal Republic in 1957 under this provision. Hence, most West German public law experts agree the GDR could apply to enter into the Federal Republic under Article 23, with only ordinary federal legislation being required to accomplish the accession. However, East Germany's "Round Table," the recently created advisory body made up of all DDR parties and opposition groups, has gone on record against achieving unification by this device.

On the other hand, Article 146 states that "Basic Law shall cease to be in force on the day on which a constitution adopted by a free decision of the German people enters into force." Proceeding under this article would seem to require a constitutional assembly whose draft is approved by both German parliaments and by a referendum of the whole German people. Americans, who have recently been debating the merits and demerits of another Constitutional Convention of their own, can easily understand why most West German politicians and political commentators would prefer using Article 23 over Article 146 to achieve unification.

Although these recent changes, and the normal course of legal change, have dated some of the references in the book, we believe that the information we have provided will still help guide the researcher to the West German legal materials he or she needs.

Timothy Kearley

Wolfram Fischer

March 5, 1990

INTRODUCTION

The legal systems of Continental Europe are frequently contrasted with the Anglo-American legal system as systems of codified law versus an uncodified or judicial system. This fundamental difference between these two great families of law has frequently been misunderstood and misinterpreted. It has invariably been overemphasized.[1] We all know that there is a fair amount of codified law or statute law in the Anglo-American legal systems and that legislation is assuming an increasingly important role. The reverse is also true, not all law being codified in the civil law systems. Differences in emphasis and in the relative importance of these various sources of law do exist, however, and it seems advisable to dispel some of the misinterpretations by presenting a brief survey of the sources of law and their relation to each other in West German law. Because of a different training, of a difference in "legal method," there is an unavoidable inclination on the part of the Anglo-American lawyer to evaluate the importance of code provisions, of decisions of a higher court or of writings and comments in the light of his own background knowledge. He may attach undue importance to some decisions "as precedents," and underrate the value of treatises or commentaries; he may look for cases where a clear statement in a commentary may be sufficient. He may also underrate the importance of cases and attach too exclusive force to code provisions. In this respect the views of the English and the American lawyer may differ because English legal training in the universities and the familiarity with Roman law render civil law more easily accessible to the English than to the American lawyer whose legal education is more vocational in nature. On the other hand the less rigid application of *stare decisis* in American courts may make it easier for American lawyers than for the English to appreciate Continental case law.[2] Although we cannot overcome here the difference in legal training, which is basic in the reading, interpretation and evaluation of legal materials, we can attempt to give some understanding of the difference in emphasis placed upon the various sources of law.

---

1. According to F.H. Lawson, the view that the civil law systems are essentially differentiated from the common law systems by their codified form needs to be reconsidered. Comp. *A Common Lawyer Looks at the Civil Law* (University of Michigan Law School, 1953, p. 47 et seq.)

2. The continental lawyer in contrast, will usually find himself at a loss among the innumerable precedents which are binding, but yet can be distinguished out of existence; he will try to find clear and precise statutory provisions and in reading statutes be lost in a mass of verbosity, and will vainly look for precise concepts among the legal synonyms, loosely phrased decisions and unsystematic textbooks and casebooks.

By sources of law to be discussed in the first part we mean, on the one hand, the agencies by which rules of conduct acquire the character of law, and on the other hand, also those rules, principles and concepts which the courts use in order to find the applicable norm. We do not mean here the literary sources from which we may acquire information of what the law is. Those will be described in the second, bibliographical, part.[3] Generally speaking, the main sources of law are: statute, customs, judicial decision and sometimes legal writings (books of authority), general principles of law (sometimes contained in adages, proverbs etc.) and principles of the "law of nature." We shall consider here to what extent codes and statutes, custom, judicial decisions and legal writings are sources of law. We shall limit this brief survey to the living law, and avoid the jurisprudential angle of this problem, although we shall try to point out the divergence between theory and practice in this field.

At the start we must point out a striking difference between the Anglo-American and the Continental legal systems. In Anglo-American law, the historical continuity of the laws is uninterrupted, no distinction is made between old and modern law, except by the legal historian. In most of the legal systems of Europe, on the other hand, there is a sharp dividing line between old and modern law, most of the old law being expressly abolished by the new codes adopted during the 19th century or after.[4] But this break does not mean that the whole content of the codes is new; many, if not most, of their rules and principles existed in the old

---

3. The latter will be considered under "repositories of law."

4. The old law of France was mainly based on local laws and customs although from the sixteenth century on the royal ordinances (*Ordonnances du roi*) gain more and more importance, mostly in the public law field. France was divided into two important sectors. The South, called pays *du droit êcrit* was the part where the Roman law, the "written law" in its Medieval form, was applied. Here, the Roman tradition prevailed over the laws of the Germanic invader. The North was the *pays de coutumes*, where the old customary law of the Germanic tribes and the local customs emanating from them were in force. (See Oliver-Martin: *Hist. du droit français*, Montchrestien, 1951, No. 78.) In Germany the old Germanic laws and the customs issuing from them were, in the course of the so-called reception of Roman law, superseded by a general customary law based on Roman law principles, as evolved in the universities, the so-called *usus modernus pandectarum*. This was called the *gemeines Recht* (i.e., the common law) which was the general law, but which could not be enforced against the laws of the various states (Landrecht), which latter had again to give precedence to the local laws (*Stadtrecht*).

In France, the law of 30 Ventose an XII [1804] which ordered the consolidation of all civil (private) law in the *Code civil des Français* also repealed (art. 7) all of the Roman law, the ordinances, the general and local customary laws, all statutes and regulations dealing with subjects which were covered by the new civil code.

law, but formally the old law was abolished and became merely historical.[5] These codes, therefore, may be considered as a starting point of present-day law. Except for this separation of old law from the modern, the main Continental legal systems differ in many ways. We propose here to consider West German law with regard to the weight and importance of the various sources of law.

5. The overwhelming majority of principles and rules embodied in the modern codes derived from several main bodies of rules: the local customs, the Roman law as it developed during the middle ages, Canon law and the natural law concepts of the 17th century (law of reason) which also introduced many teachings of Christianity into its system of a law of reason.

LIST OF PLATES

"Facing page" numbers are those on which the plate is noted.

TABLE OF CONTENTS