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Sourcebook on
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SOURCEBOOK ON GERMAN LAW

Second Edition

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PREFACE TO THE SECOND EDITION

Over seven years have now passed since the first edition of this book and many changes have taken place in the Basic Law, the Civil Code and Criminal Code. These have, where relevant, been incorporated into this edition. I would also have liked to replace the cases with more modern ones, but this proved too ambitious for the time available, so I have had to content myself with including a few new ones at the expense of the old. The new ones are not all modern, but some reflect such topical subjects as mass slaughter of animals, the use of drugs, the legacy of East Germany, and computers and the internet. Also, instead of serving up the standard diet of cases from the Federal Constitutional Court and the Bundesgerichtshof, I have included two cases from the Federal Administrative Court and one from an Oberlandesgericht. The cases which appear for the first time in this edition are referred to as: the cattle slaughter case; the cannabis application rejection case; the right to give the opposite view cases; the land purchase mistake case; the computer non-disclosure case; the shooting at the disco case; the internet auction case; the kite case; and the referendum mistake case.

The European Union also has a higher profile; one of the new cases is partly based on EU law, and some of the amendments to the Civil Code are in pursuance of EU Directives. Perhaps all the amendments to the Civil Code look on to a day when parts of private law will be codified at a European level and the most modern parts of the national codes will exert the most influence on the ultimate wording of such a document.

Material on German law has become more freely available and some book sources are mentioned in a further reading list at the end of the book. Articles on German law can be identified through the database Legaltrac, so I have only made a passing reference to some articles where I have attempted to explore a theme more deeply. Websites are an increasingly useful source, and a substantial number of translations of German cases now appear on the website of the Institute of Global Law, University College, London: www.ucl.ac.uk/laws/global_law. Other sources worth mentioning (some in English and some in German) include in particular: www.jura.uni-sb.de; www.kanzlei.de; www.iecl.iuscomp.org/gla; <http://dejure.org>.

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May 2002

PREFACE TO THE FIRST EDITION

'Positive law lives in the general consciousness of a people and hence we have to call it people's law.'

von Savigny

My initial idea in writing this book was to produce a selection of original German legal material together with some commentary on it, one particular source of inspiration being the *Sourcebook on French Law* by Rudden. There were a number of reasons why this was not achievable, the most important of which were:

- 1 I thought it was desirable to include material which gave an introduction to five basic areas of law: the constitution, human rights, contract, tort and crime.
- 2 In view of the fact that the French language is much more widely known than German, a full translation of the material seemed necessary.
- 3 German case decisions are usually much longer than French ones.
- 4 In view of the pressure on space created by these factors, extracts from academic writings could not realistically be included, and commentary had to be brief and selective.

Like any book containing cases and materials, coverage of the law has to be patchy and incomplete, even in areas included in some detail. The purpose of the book, however, is to facilitate study of some specific areas in greater depth than a textbook would permit, perhaps with the aid of other sources, either German or, where available, English (such as the incomparably wider and deeper treatment of tort in the German *Law of Torts: A Comparative Introduction* by Markesinis (3rd edn, Oxford: Clarendon); inevitably, there is some duplication of tort cases between that book and this one).

I have also had in mind the needs of students who are intending to study German law in Germany under programmes such as ERASMUS and SOCRATES, and who ought to be familiar with the language as well as the content of German law before they start.

Some cases represent significant legal developments and others are just illustrations. Apart from their substantive law content, some present images of post-war Germany: the aftermath of the Third Reich (the film director case; the publication of a letter case); features of post-war West Germany such as the economic miracle (the investment aid act case) and student unrest (the newspaper delivery obstruction case); the pathway to reunification (the all Germany election case) and its consequences (the shootings at the Berlin wall case; the East German politicians trial publicity cases); and Germany's place in the new world order (the Bosnia flight exclusion zone case). Some cases present interesting

comparisons in different kinds of legal reasoning; contrast the moral argument in the base motive case with the historical and sociological content of the housework day case; the analysis of old case law in the rough ill-treatment case with the analysis of statutory purpose in the arrested admiral case; the bold academic theorising in the Hamburg parking case and the conceptual arguments in the neglected assistance case with the application of the provisions of the Code in the cases concerning declarations of will. Cases like the film director case, and the shootings at the Berlin wall case are jurisprudential studies in themselves.

I owe a great debt to a number of people without whom this book would not have been possible, in particular: my brother-in-law and sister-in-law Wolf and Geraldine Paul, who (respectively) helped me with some difficult pieces of German and some particularly intractable software problems; and typed some parts of the manuscript; my wife Daphne, and my children David, Geoffrey, Rosemary and Emma who put up with a lot while the book was being written and still (in the case of the first three) gave some help with the typing; my parents-in-law, Mr and Mrs Barber, who prepared the index; Jürgen Meinz of the Beamtenfachhochschule at Hof who gave some helpful advice about contents; Cavendish who went to great pains introducing order into an initially chaotic manuscript in a short space of time; Professor Cooper, my Head of Division, who provided support and assistance while the book was being written; Sara Navas, who typed a large part of the manuscript. The responsibility for any errors remains solely mine.

I would also like to thank JCB Mohr (Paul Siebeck) (in respect of the decisions of the Bundesverfassungsgericht) Verlag CH Beck (in respect of the cases contained in the *Neue Juristische Wochenschrift*) and Carl Heymanns Verlag KG (in respect of the decisions of the Bundesgerichtshof) for their kind permission for the reproduction of cases in this book.

Raymond Youngs
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1994

TABLE OF ABBREVIATIONS

AcP	Archiv für die civilistische Praxis Archive for Civil Practice
AGBG	Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen General Conditions of Business/Contract Act
AK-GG	Kommentar zum GG, Reihe Alternativ-kommentar Commentary on the BL, alternative commentary series
AMG	Arzneimittelgesetz Medicines Act
AO	Abgabenordnung Internal Revenue Code
AP	Arbeitsrechtliche Praxis Labour Law Practice
ArbRecht	Arbeitsrecht Employment law
AT	Allgemeiner Teil General Part
AVV, AVwV	Allgemeine Verwaltungsvorschrift General Administrative Order
AZO	Arbeitszeitordnung Working Hours Order
BAG	Bundesarbeitsgericht Federal Labour Court
BAnz	Bundesanzeiger Federal Advertiser
BayObLG	Bayerisches Oberstes Landgericht Bavarian Upper State Court
BB	Betriebs-Berater Business Adviser

BDiszG	Bundesdisziplinargesetz Federal Disciplinary Act
BFSG	Gesetz über die Bundesanstalt für Flugsicherung Federal Institute for Flight Safety Act
BG	Bürgerliches Gesetzbuch Civil Code
BGBI	Bundesgesetzblatt Federal Law Gazette
BGH	Bundesgerichtshof Federal Supreme Court
BGH LM	see LM
BGHR	BGH-Rechtsprechung Strafsachen Federal Supreme Court case law – criminal cases
BGHSt	Entscheidungen des Bundesgerichtshofs in Strafsachen Decisions of the Federal Supreme Court in criminal cases
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen Decisions of the Federal Supreme Court in civil cases
BStBl	Bundessteuerblatt Federal Tax Gazette
BTDrucks	Bundestag-Drucksachen Federal Parliament – Printed Material
BtMG	Betäubungsmittelgesetz Narcotics Act
BVerfG	Bundesverfassungsgericht Federal Constitutional Court

Table of Abbreviations

BVerfGE	Entscheidungen des Bundesverfassungsgerichts Federal Constitutional Court Decisions
BVerfGG	Gesetz über das Bundesverfassungsgericht Federal Constitutional Court Act
BVerwG	Bundesverwaltungsgericht Federal Administrative Court
BVerwGE	Entscheidungen des Bundesverwaltungsgerichts Federal Administrative Court Decisions
BWahlG	Bundeswahlgesetz Federal Elections Act
CoR	Computerreport Computer Report
DB	Der Betrieb Business (a legal journal)
DDR	Deutsche Demokratische Republik German Democratic Republic
DJT	Deutsche Juristentag German Lawyers Conference
DR	Deutsches Recht (Zeitschrift) German Law (Journal)
DRiZ	Deutsche Richterzeitung German Judicial Journal
DVBl	Deutsches Verwaltungsblatt German Administrative Gazette
EGBGB	Einführungsgesetz zum Bürgerliches Gesetzbuch Introductory Act to the Civil Code

EGStGB	Einführungsgesetz zum Strafgesetzbuch Introductory Act to the Criminal Code
Erste IHDV	Erste Verordnung zur Durchführung des Gesetzes über die Investitionshilfe der gewerblichen Wirtschaft First Regulation for Administration of the Investment Aid for Industry Act
EStG	Einkommensteuergesetz Income Tax Act
EuGH	Europäischer Gerichtshof European Court of Justice
EuGRZ	Europäische Grundrechte Zeitschrift European Human Rights Journal
FS	Festschrift Celebratory or commemorative Publication
GA	Goltdammers Archiv Goldammer's Archives
GBI	Gesetzblatt Statutes Gazette
GewO	Gewerbe Ordnung Business Order
GG	Grundgesetz Basic Law
GmbH	Gesellschaft mit beschränkter Haftung Private limited company
GSSt	Großer Senat Strafsachen Decisions of the Great Senate in criminal cases

Table of Abbreviations

GVBl	Gesetz- und Verordnungsblatt Statutes and Regulations Gazette
GVG	Gerichtsverfassungsgesetz Organisation of the Courts Act
HATG	Hausarbeitstagggesetz Housework Day Act
HbgPresseG	Hamburg Pressegesetz Hamburg Press Act
HEZ	Höchststrichterliche Entscheidungen, Sammlung von Entscheidungen der Oberlandesgerichte und der obersten Gerichte in Zivilsachen Highest judicial decisions, collection of decisions of the upper State courts and of the highest courts in civil cases
HGB	Handelsgesetzbuch Commercial Code
HRR	Höchststrichterliche Rechtsprechung Case Law of Highest Courts
IHG	Gesetz über Investitionshilfe für gewerblichen Wirtschaft Investment Aid for Industry Act
IPbürgR	Internationale Pakt über bürgerliche und politische Rechte International Convention on Civil and Political Rights
JR	Juristische Rundschau Legal Review
JuS	Juristische Schulung Legal Training
JW	Juristische Wochenschrift Legal Weekly Journal

JZ	Juristenzeitung Jurists Gazette
KG	Kammergericht Supreme Court
KK	Karlsruher Kommentar (zur Strafprozeßordnung) Karlsruhe Commentary (on the Criminal Procedure Code)
KRG	Kontrollratgesetz (Allied) Control Council Act
KritV	Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft Critical Quarterly Journal for legislation and jurisprudence
KunstUrhG	Kunst Urheber Gesetz Artistic Copyright Act
LebMG	Lebensmittelgesetz Food Act
LG	Landgericht State Court
LitUrhG	Gesetz betreffend das Urheberrecht an Werken der Literatur und der Tonkunst Literary Copyright Act (Act concerning copyright in works of literature and music)
LK	Leipziger Kommentar Leipzig Commentary
LM	Lindenmaier-Möhring, Nachschlagewerk des Bundesgerichtshofs Lindenmaier-Möhring, Reference book of the Federal Supreme Court
LuftVG	Luftverkehrsgesetz Air Traffic Act

Table of Abbreviations

LuftVO	Luftverkehrsordnung Air Traffic Order
LZ	Leipziger Zeitschrift für Deutsches Recht Leipzig Journal for German Law
MDR	Monatsschrift für deutsches Recht Monthly Journal of German Law
MMR	Multimedia und Recht Multimedia and the law
MRK	Menschenrechtskonvention Convention on Human Rights
NJ	Neue Justiz New Justice
NJW	Neue Juristische Wochenschrift New Legal Weekly Journal
NRW	Nordrhein Westfalen North Rhine Westphalia
NStZ	Neue Zeitschrift für Strafrecht New Journal of Criminal Law
NVwZ	Neue Zeitschrift für Verwaltungsrecht New Journal for Administrative Law
NZWehr	Neue Zeitschrift für Wehrrecht New Journal for Defence Law
OG	Oberstes Gericht der DDR Supreme Court (of the DDR)
OHGSt	Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen Decisions of the Supreme Court for the British Zone in criminal matters
OLG	Oberlandesgericht Upper State Court

OVG	Oberverwaltungsgericht Upper Administrative Court
PartG	Parteiengesetz Parties Act
PDS	Partei des Demokratischen Sozialismus Party of Democratic Socialism
RFH	Reichfinanzhof Reich Revenue Court
RG	Reichsgericht Reich High Court
RGBL	Reichsgesetzblatt Reich Laws Gazette
RGRK	BGB, Kommentar, herausgegeben von Reichsgerichtsräten und Bundesrichtern Commentary on the BGB by Reich Justices and Federal Judges
RGSt	Entscheidungen des Reichsgerichts in Strafsachen Decisions of the Reich High Court in criminal cases
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen Decisions of the Reich High Court in civil cases
RHG, RHaftPflG	Reichshaftpflichtgesetz Reich Liability Act
SED	Sozialistische Einheitspartei Deutschlands Socialist Unity Party of Germany (East German Communists)
SJZ	Süddeutsche Juristenzeitung South German Legal Gazette
StGB	Strafgesetzbuch Criminal Code

Table of Abbreviations

StGH	Staatsgerichtshof Constitutional Court (of an individual State)
StPO	Strafprozeßordnung Criminal Procedure Code
StR	Strafrecht Criminal Law
StrÄndG	Strafrechtsänderungsgesetz Criminal Law Amendment Act
StrRG	Strafregistergesetz Criminal Register Act
StV	Strafverteidiger (Zeitschrift) Defence Lawyer (Journal)
StVG	Straßenverkehrsgesetz Road Traffic Act
UWG	Gesetz gegen den unlauteren Wettbewerb Unfair Competition Act
UZwG	Gesetz über den unmittelbaren Zwang bei Ausübung öffentlicher Gewalt durch Vollzugsbeamte des Bundes Application of Force Act (Act concerning direct force exercised by public authority by an executive official of the Federation)
UZwGBw	Gesetz über die Anwendung unmittelbaren Zwanges und die Ausübung besonderer Befugnisse durch Soldaten der Bundeswehr und zivile Wachpersonen Application of Military Force Act (Act concerning the application of direct force and the exercise of special powers by soldiers of the Federal Army and civilian guards)

VDB	Vergleichende Darstellung des Deutschen und ausländischen Strafrechts, 1906 f Besonderer Teil Comparative presentation of German and foreign criminal law, 1906 f Special Part
VersR	Versicherungsrecht (Zeitschrift) Insurance Law (Journal)
VG/VGH	Verwaltungsgericht/ Verwaltungsgerichtshof Administrative Court
VerwRspr	Verwaltungsrechtsprechung Administrative law case law
VkBl	Amtsblatt des Bundesministers für Verkehr Official Journal of the Federal Minister for Transport
VVDStRL	Veröffentlichungen der Vereinigungen Deutscher Staatsrechtler Publications of the Associations of German Teachers of Public Law
VwGO	Verwaltungsgerichtsordnung Administrative Courts Order
WPflG	Wehrpflichtgesetz Military Service Act
WM	Wertpapiermitteilungen Security News
WStG	Wehrstrafgesetz Military Crimes Act
(Z)	Zivilsache(n) Civil case(s)
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht Journal of Foreign Public and International Law

Table of Abbreviations

ZBR	Zeitschrift für Beamtenrecht Journal for the Law relating to Officials
ZHR	Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht Journal of Commercial Law and Business Law
ZLR	Zeitschrift für Luftrecht Journal of Air Law
ZPO	Zivilprozeßordnung Civil Procedure Code
ZR	Zivilrecht Civil Law
ZRP	Zeitschrift für Rechtspolitik (Beilage zur NJW) Journal of Legal Politics (supplement to NJW)
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft Journal of Criminal Jurisprudence