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FREEDOM OF CONTRACT AND THE REMEDY OF FORCED HIRING: A COMPARATIVE ASSESSMENT OF GERMAN AND AMERICAN ANTI-DISCRIMINATION LAW

*Caroline R. Fredrickson**

- (1) *All people are equal before the law.*
- (2) *Men and women have equal rights.*
- (3) *No one may be disadvantaged or preferred based on sex, origin, race, speech, homeland and national origin, beliefs, religious or political opinions.¹*

INTRODUCTION

Enacted in 1949, the post-war German Constitution, or “Basic Law,”² drew on Germany’s prior constitutions in the democratic tradition, but also departed significantly from that history by incorporating elements designed to prevent any future subversions of the democratic order. The new Constitution accomplishes this goal by barring amendments that would erode the fundamental principles of the new political system, meaning, in part, the social welfare state, democracy and the rule of law. It also prohibits amendments that would undermine the Constitution’s guarantee of basic rights and respect for human dignity.³ The Basic Law

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¹ GRUNDGESETZ [Constitution] [GG] art. 3 (F.R.G.).

² This article will use the terms “Basic Law” and “Constitution” interchangeably.

³ Article 79(3) specifically prohibits amendments to Articles 1 and 20 of the Basic Law. Article 1 establishes that respect for human rights is a fundamental element of civil society and provides that the fundamental rights enumerated in the Basic Law “shall be binding on the legislature, the executive, and the

establishes a social welfare state committed to human rights and equality of opportunity.

Although originally drafted to be a transitional document pending the unification of Germany,⁴ the Basic Law was not discarded in 1990 with the peaceful revolution in the East; instead, the reunited German people chose to retain and reaffirm this trusted document.⁵ This decision is understandable in light of the Federal Republic of Germany's brilliant transformation into a peaceful and prosperous nation governed by the rule of law which has forgotten neither working people, nor the indigent and unemployed.

The German Constitution provides that the rights contained therein may be enforced through judicial proceedings.⁶ Unlike many provisions in the United States Constitution, which the Supreme Court has determined to be nonjusticiable,⁷

[e]very provision of the [Basic Law] is a legally binding norm requiring full and unambiguous implementation. . . .
In brief, any law, administrative regulation, legal

judiciary as directly enforceable law." GG art. 1. Article 20 subjects legislation to the "constitutional order" and binds the "executive and the judiciary to law and justice." GG art. 20. That provision further states that Germany is a "democratic and social federal state," and that sovereignty rests with the people. GG art. 20.

⁴ See GG art. 146.

⁵ See, e.g., Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik ueber die Herstellung der Einheit Deutschlands, Aug. 31, 1990, F.R.G.-G.D.R., art. 8, 1990 Bundesgesetzblatt [BGB1] II 889 (Treaty Between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity).

⁶ See GG art. 1(3).

⁷ A claim is "nonjusticiable" if the subject matter is considered inappropriate for judicial consideration. *Baker v. Carr*, 369 U.S. 186, 198 (1962) (explaining that in a determination of nonjusticiability the Court must inquire if "the duty asserted can be judicially identified and its breach judicially determined and whether protection for the right asserted can be judicially molded"). Claims brought under the Guarantee Clause of the United States Constitution, requiring that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government," have consistently been found by the Court to be nonjusticiable. U.S. CONST. art. IV, § 4. E.g., *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (refusing to consider a claim that a law enacted under Oregon's initiative law-making process violated the Guarantee Clause).

relationship, or political practice that cannot be justified in terms of the Basic Law is by definition unconstitutional and, in the German variant of the constitutional state, it must be so declared if the order of legality and legal certainty—among the highest values of the German *Rechtsstaat*—is to be maintained.⁸

Thus, the fundamental rights contained in the Basic Law are not simply hortatory, but actually operate as enforceable law. Moreover, much of the Basic Law applies not only to state action, but also to private dealings, requiring citizens to respect each other's rights or face possible legal process.⁹ For example, Article Nine, which protects freedom of association, including the right to join a union, may be enforced against private employers.¹⁰ The guarantee of equal treatment contained in Article Three, however, has not been interpreted as applying to the private sector.¹¹ But a close reading of the text of Article Three reveals no evidence of a legislative intent to differentiate between the legal force of the right of equal treatment and the other rights enumerated in the Basic Law. Indeed, the plain language of Article Three would suggest that it should apply to private affairs.

Despite the promise of equal treatment contained in Article Three and various statutes, women and minority groups have little protection from discrimination in their basic rights. In particular, women and minorities are often disadvantaged in the working world—employers do not hire, promote, or pay them equal wages, and employers suffer few penalties for their discriminatory behavior. Commentators contend that an employer cannot be required to offer a job to an applicant as a remedy for its discriminatory failure to hire, even when this person was the most qualified

⁸ Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 848 (1991).

⁹ *Id.*

¹⁰ GG art. 9(3). Article Nine of the Basic Law states, in pertinent part, that: "The right to form associations for the protection and furtherance of working and economic conditions is guaranteed for all people and all professions. Agreements that would limit or impede this right are null and void." *Id.*

¹¹ See Ingo von Muench, *Introductory Comments to Articles 1-19, in GRUNDGESETZ-KOMMENTAR* 35 (Ingo von Muench ed., 2d ed. 1981).

applicant and was rejected solely on the basis of sex, race, national origin or ethnicity.¹² In fact, German law provides no real penalties for such practices.¹³ German legal scholars have articulated only one justification for the disparate treatment accorded equal opportunity law compared to other constitutional protections: freedom of contract.¹⁴

Freedom of contract is considered by some to be the bedrock of a liberal free market society, giving individuals and business entities the privilege to choose their contracting partners, the ability to mutually determine the content of agreements and to construct privately negotiated penalties for noncompliance with contractual duties.¹⁵ In Germany, the concept of freedom of contract ceased to have much force long ago. For example, German labor law seeks to rectify the power imbalances in the bargaining relationship between worker and employer through, *inter alia*, mandated workplace safety measures,¹⁶ minimum vacation time,¹⁷ maximum work hours¹⁸ and limitations on employers' ability to dismiss workers.¹⁹

The worker *qua* worker is not only well-protected, but also powerful, exercising astonishingly broad rights to influence his or her conditions of work as well as some areas of company policy.²⁰ In no other country in the world have workers acquired the extensive participatory rights that they have won in Germany. By failing to provide remedies for discrimination in hiring, however,

¹² See, e.g., MANFRED WEISS, FEDERAL REPUBLIC OF GERMANY 62 (1994).

¹³ *Id.* at 62-63. See *infra* pp. 15-16.

¹⁴ See, e.g., WEISS, *supra* note 12, at 47.

¹⁵ E.g., Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 953-55 (1984).

¹⁶ See, e.g., Gesetz ueber Betriebsaerzte, Sicherheitsingenieure und andere Fachkraefte fuer Arbeitssicherheit [Law Governing Workplace Doctors, Safety Engineers and Other Workplace Safety Specialists], 1973 BGBI. I 1885.

¹⁷ See Mindesturlaubsgesetz fuer Arbeitnehmer [Minimum Vacation Law for Employees], 1963 BGBI. I 2.

¹⁸ See Arbeitszeitordnung [Regulation Concerning Work Hours], 1938 Reichsgesetzblatt [RGBI] I 447.

¹⁹ See Kuendigungsschutzgesetz [Termination Protection Law] [KSchG], 1969 BGBI. I 1317.

²⁰ See *infra* pp. 24-25.

the German welfare state has not protected workers against exclusion or unfair treatment based on the irrelevant characteristics of race, ethnicity or gender. The German courts and academic commentators argue that freedom of contract justifies this oversight.²¹

Part I of this article will provide a brief synopsis of the concept of freedom of contract in the labor relationship, using developments in the United States to provide a contrast to the German approach. In part II, this article will consider what role the concept of freedom of contract plays in contemporary German labor law. In particular, it will examine the application of freedom of contract in the formation, content and termination of employment relationships, demonstrating that the doctrine has little, if any, force outside the area of anti-discrimination measures. This article concludes that traditional arguments advanced by German jurists legitimating disparate treatment of women and minorities by reference to freedom of contract cannot be reconciled with other areas of German jurisprudence and should be rethought.

I. FREEDOM OF CONTRACT: THEORY AND HISTORY

A. *The American Notion of Freedom of Contract*

In nineteenth century America, judges and politicians extolled the virtues of freedom of contract with great fervency.²² As the free market philosophy became dominant, antiquated theories of human relationships were rejected.²³ In law, this development is

²¹ See, e.g., MANFRED LOEWISCH, *ARBEITSRECHT* (3d ed. 1991); see also HERBERT BUCHNER, MUENCHNER HANDBUCH ARBEITSRECHT (Reinhard Richardi & Otfried Wlotzke eds., 1993); Interview with judges of the Federal Labor Court, in Kassel, Germany (Mar. 1-3, 1994).

²² See Justice Rufus Peckham's discussion of freedom of contract in *Allgeyer v. Louisiana*, 165 U.S. 578, 583-93 (1897).

²³ See ARCHIBALD COX ET AL., *LABOR LAW CASES AND MATERIALS* 4-11 (11th ed. 1991); ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR* 159-60 (1991) ("Increasingly . . . men and women refused to accept the formal hierarchical practices that had defined traditional master-servant relations . . .").

often characterized as the transformation from status to contract.²⁴ Birth, it was thought, should not play a decisive role in situating someone in the social order. Rather, people ought to be free to choose the particular relationships that they wish to have, for whom they wish to work, which applicants they prefer to hire and how the association between the parties will unfold. Each market participant has the liberty to negotiate for what he or she wants. Supporters of this philosophy argue that it serves several goals. First, and perhaps most important, they argue that unfettered bargaining safeguards individual liberty, which is an essential value in civil society.²⁵ Second, freedom of contract invigorates the economy;²⁶ the market functions most efficiently when people can pursue their interests without being hindered by the heavy hand of the state. Thus, liberty of contract, according to its followers, is both a virtue in itself as well as a utilitarian good, guaranteeing the most efficient creation and distribution of wealth.²⁷

Adherents of the free market philosophy in the nineteenth century maintained that freedom of contract applied to all contracts, including those between companies, between companies and customers, and between employers and employees.²⁸ Even in the early twentieth century, these advocates continued to insist that freedom of contract existed in all contexts, including the employment relationship,²⁹ despite inhumane working conditions and starvation wages in many industries. Federal and state courts also adhered to this strict notion of freedom of contract. Consequently, many worker protection laws were struck down by judges who repeatedly cited the Due Process Clauses of the Fifth and Fourteenth

²⁴ See MARK A. ROTHSTEIN ET AL., *CASES & MATERIALS ON EMPLOYMENT LAW* 13-28 (2d ed. 1991); STEINFELD, *supra* note 23, *passim* (1991).

²⁵ See Epstein, *supra* note 15, at 953-55.

²⁶ See Epstein, *supra* note 15, at 951, 963-77.

²⁷ For a thorough exposition of this philosophy, see Epstein, *supra* note 15, at 953-76.

²⁸ See generally DAVID RICARDO, *THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* (J.M. Dent & Sons 1987) (1817).

²⁹ See Justice Peckham's discussion of freedom of contract in the employment context in *Lochner v. New York*, 198 U.S. 45, 53-61 (1905).

Amendments as the constitutional basis for freedom of contract.³⁰ For example, the courts invalidated laws requiring the regular payment of wages in cash,³¹ establishing maximum work hours³² and setting minimum wages.³³ Federal and state court judges also rigorously supported employers' efforts to rid the workplace of labor organizations.³⁴

The Supreme Court's decision in *Lochner v. New York*³⁵ offers a notable example of judicial deference to freedom of contract.³⁶ In *Lochner*, the Supreme Court voided a New York law that set the maximum working time for bakers at ten hours per day and sixty hours per week. Citing the Fourteenth Amendment, the Court found that the law interfered with the constitutionally protected liberty of contract.³⁷ According to the Court, "[t]he right to purchase or to sell labor is part of the liberty protected by this amendment."³⁸ The majority admitted, however, that liberty of contract is not unconstrained. The police power, noted Justice Rufus Peckham, allows the state to impose certain conditions on the making of a contract, such as forbidding agreements that have an illegal act as their objective.³⁹ In articulating the scope of the police power, the Court stated:

³⁰ The Fifth Amendment prohibits the federal government from depriving any person of "life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Fourteenth Amendment applies the requirement of due process to the states. U.S. CONST. amend. XIV, § 1.

³¹ See, e.g., *Johnson v. Goodyear Mining Co.*, 59 P. 304, 307 (Cal. 1899).

³² *Lochner v. New York*, 198 U.S. 45 (1905).

³³ *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

³⁴ See *Vegeahn v. Gunther*, 44 N.E. 1077 (Mass. 1896); WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991). Appendix A to Forbath's book contains a list of the protective labor laws struck down in the nineteenth and early twentieth centuries.

³⁵ 198 U.S. 45 (1905).

³⁶ Also illustrative of the judicial deference to freedom of contract is the Court's decision in *Adair v. United States*, 208 U.S. 161 (1908). In *Adair*, the Supreme Court struck down a law that banned so-called "yellow dog" contracts whereby employers required prospective employees to sign away their right to join a union.

³⁷ *Lochner*, 198 U.S. at 53.

³⁸ *Id.*

³⁹ *Id.* at 53-54.

Those powers . . . relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere.⁴⁰

Nonetheless, the Justices found that a law setting maximum work hours was not a valid exercise of the state's police power. The Court asked whether the statute was

a fair, reasonable, and appropriate exercise of the police power of the State, or . . . an unreasonable, unnecessary, and arbitrary interference with the right of the individual . . . to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family.⁴¹

Regarding its position as self-evident, the Court stated that "[t]here is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker."⁴²

As the twentieth century advanced, however, ever more legal scholars and politicians continued to attack the sanctity of freedom of contract as it applied to the wage relationship. Workers, they insisted, cannot exercise liberty of contract as individuals because their severe inequality in bargaining power compels them to accept most terms proposed by a potential employer.⁴³ These commentators argued that the sale of labor is qualitatively different from a sale of commodities.⁴⁴ Not only does the employer exercise a psychological domination over the employment relationship based on hierarchical superiority, but the employer also has an almost

⁴⁰ *Id.* at 53.

⁴¹ *Id.* at 56.

⁴² *Id.* at 57.

⁴³ *See id.* at 66 (Harlan, J., dissenting); STEINFELD, *supra* note 23, at 157-58 (quoting MAX WEBER, *ECONOMY AND SOCIETY* 729-31 (Guenther Roth & Claus Wittich eds., Ephram Fischhoff et al. trans., Univ. Cal. Press 1978) (4th ed. 1956)).

⁴⁴ *See* Robert L. Hale, *Bargaining, Duress and Economic Liberty*, 43 COLUM. L. REV. 603, 626 (1943).

existential control over the worker.⁴⁵ Unlike the decision to buy a car or trade securities, the decision to sell one's labor derives from pure need.⁴⁶ The employer's ability to coerce grows exponentially with an applicant's proximity to hunger and homelessness, giving the boss a potentially tyrannical hold over the worker. Only the presence of unions could make the uneven negotiating strength between employer and employee equal. Without the right to unionize, it was argued, workers' freedom of contract remained a cloak for exploitation.⁴⁷

Only during the presidency of Franklin Delano Roosevelt did the views of these commentators find support in the federal courts. From the *Lochner* decision to the mid-1930s, the Supreme Court had invalidated a series of protective labor laws relying on its usual and now quite familiar argument.⁴⁸ In 1937, however, the Court changed its course. Two crucial cases in that year served as the watershed of a new era in American jurisprudence with respect to the regulation of labor relations.⁴⁹ In *NLRB v. Jones & Laughlin Steel Corp.*,⁵⁰ the Supreme Court upheld the National Labor Relations Act ("NLRA").⁵¹ Congress enacted the NLRA in 1935 to ensure workers the right to negotiate collectively and to require employers to recognize and bargain with their employees' chosen representative. In addition, in *West Coast Hotel Co. v. Parish*,⁵² the Court determined that minimum wage laws could be compatible

⁴⁵ *Id.* at 627 (stating that the employer brings a greater degree of compulsion to the bargaining table than the employee).

⁴⁶ *See id.* at 626.

⁴⁷ *Cf.* Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 481-87 (1909) (discussing the importance of labor legislation, including "legislation forbidding employers from interfering with the membership of their employees in labor unions," to bring about equality).

⁴⁸ *See, e.g.,* Railroad Retirement Bd. v. Alton R.R. Co., 295 U.S. 330 (1935); Connally v. General Constr. Co., 269 U.S. 385 (1926); Adkins v. Children's Hosp., 261 U.S. 525 (1923); Truax v. Corrigan, 257 U.S. 312 (1921); Coppage v. Kansas, 236 U.S. 1 (1915).

⁴⁹ *See* COX ET AL., *supra* note 23, at 88-89.

⁵⁰ 301 U.S. 1 (1937).

⁵¹ Act of July 5, 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-69 (1988)).

⁵² 300 U.S. 379 (1937).

with the constitutional guarantee of liberty. In upholding the Washington State law, the Court developed a new approach to the Fifth and Fourteenth Amendments' guarantees of Due Process:

The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.⁵³

Interestingly, the arguments advanced by the Supreme Court in *Lochner* and *West Coast Hotel* are remarkably similar—they both agree that liberty is subject to certain constraints within a civil society. The cases differ, however, in evaluating the validity of certain restrictions: that is, whether regulation of working conditions constitutes a reasonable means to protect the “health, safety, morals and welfare of the people.”⁵⁴ In *West Coast Hotel*, the Court handed over the preeminent role in determining the limits of reasonable regulation to the elected representatives of the people and rejected the powerful supervisory role accorded the judiciary by its earlier decisions.⁵⁵ In a democratic society, the Court opined, unelected judges should not have such expansive powers to contravene the people’s will to protect health, safety, morals, or welfare in its chosen manner.⁵⁶

Once the Supreme Court had condoned the NLRA’s requirement that an employer bargain with the elected representative of its

⁵³ *Id.* at 391.

⁵⁴ *Id.*

⁵⁵ *Id.* at 393-99. The Court stated that, “[i]n dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion.” *Id.* at 393.

⁵⁶ *See id.* at 398.

employees, freedom of contract became an increasingly shaky theoretical justification for refusing to enter into a contract on the basis of sex or race. Thus, in the area of racial and gender discrimination, the Court came to accept a positive right to contract. Consequently, when an employer or property owner refuses to enter into a contract with someone due to race or sex, the Court has found the forcible conclusion of a contract, in the private as well as the public sphere, to be an acceptable remedy. For example, in *Runyon v. McCrary*,⁵⁷ the Court held that the Civil Rights Act of 1866⁵⁸ barred a private school from refusing to accept African American children as students. Arguing against this compelled conclusion of a contract, the dissent contended that Congress enacted the Civil War Era law only to prohibit government incursions on free contracting and not to provide a positive right to execute an agreement.⁵⁹ The majority rejected the dissent's argument, noting that White children would have been allowed to study at the school, and therefore, to guarantee the "same right to contract" was to ensure that the minority students could attend the school.⁶⁰

Similarly, Title VII of the Civil Rights Act of 1964⁶¹ proscribes discrimination in employment and foresees, as a possible remedy, the hiring of the victim by the perpetrator.⁶² Prior to its

⁵⁷ 427 U.S. 160 (1976).

⁵⁸ The Civil Rights Act of 1866 guarantees to all citizens the same right to make and enforce contracts as White citizens. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981 (1988)). See generally Caroline R. Fredrickson, *The Misreading of Patterson v. McClean Credit Union: The Diminishing Scope of Section 1981*, 91 COLUM. L. REV. 891 (1991).

⁵⁹ *Runyon*, 427 U.S. at 193-94 (White, J., dissenting).

⁶⁰ See *id.* at 170-74. In reaching its decision, the Court relied, in part, on *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), in which 42 U.S.C. § 1982 (1988) was also found to bar discrimination in the rental of property by private citizens. *Id.* at 170-71.

⁶¹ Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to e-17 (1988)).

⁶² 42 U.S.C. § 2000e-5(g) (indicating that remedies "may include . . . reinstatement or hiring of employees"). Other possible methods of compensation are damages, back pay, or reinstatement in the case of discriminatory termination. *Id.*

passage, Title VII was criticized as potentially impairing freedom of contract.⁶³ But that attack earned no support from other legislators and did not undermine the passage or enforcement of the law. Thus, in the thousands of cases alleging discrimination since the enactment of Title VII, judges have considered forced hiring as a possible remedy for the denial of a job solely based on race, sex, national origin, or religion.

B. The German Notion of Freedom of Contract

In the late twentieth century, few legal commentators, in the United States or elsewhere, would describe the bargaining relationship between individual employees and employers as an exchange between equal parties. This changed appreciation of the employment relationship has taken hold in Germany most profoundly. An authoritative introduction to labor law issued by the German government, declares that the role of labor law is to protect the employee.⁶⁴ As the government notes:

Historical experience teaches that without protection through labor legislation and collective bargaining agreements, the individual employee was in an inferior position with respect to the employer and was often exposed to unfair and inhumane working conditions, inadequate protection from workplace accidents, overly long working hours, etc. Today, the labor relationship is restricted through laws, collective bargaining agreements and works agreements.⁶⁵

As in the United States, industrialization in nineteenth century Germany altered the traditional relationship between shop owner and worker. Replacing the paternalistic bonds between master and servant, the liberal market economy adjudged the labor relationship a pure exchange of goods—an exchange of labor for wages.⁶⁶

⁶³ 110 CONG. REC. 1620 (1964).

⁶⁴ GUENTER HALBACH ET AL., *UEBERSICHT UEBER DAS RECHT DER ARBEIT* [Review of the Right to Work] 53 (4th ed. 1991).

⁶⁵ *Id.*

⁶⁶ See Reinhard Richardi, *Introduction* to *ARBEITSGESETZE* at x-xi (Deutscher Taschenbuch Verlag 1993).

Working conditions deteriorated under continuing pressure from job applicants who were ready to underbid their competitors in order to feed their families.⁶⁷ Nineteenth century lawmakers in Germany slowly, however, began to concern themselves with the abhorrent situation of working people—although perhaps not solely out of humanitarian concerns.⁶⁸ The Parliament introduced voluntary works councils in 1891.⁶⁹ Contemporaneously, a new social insurance law provided workers with some financial security if accidents or sickness arose.⁷⁰ These reforms were limited,

⁶⁷ HALBACH ET AL., *supra* note 64, at 27.

⁶⁸ See WEISS, *supra* note 12, at 26.

⁶⁹ Works councils originated in the workshop committees of the nineteenth century. Existing in isolated workplaces and on a strictly voluntary basis, these shop committees originally performed less the role of employee representation than that of employee oversight. In 1889, striking miners unsuccessfully demanded the establishment of obligatory committees empowered to present worker complaints as well as to influence management in a small number of areas. Following a coal strike in the Ruhr region in 1905, Prussia, which at that time comprised most of Germany, made the committees compulsory in mines with over 100 employees. These committees, however, found little support among the workers because their primary duty was to foster good relations in the workplace and they were easily dissolved by the authorities. BETRVG: BETRIEBSVERFASSUNGSGESETZ KOMMENTAR FUER DIE PRAXIS 106-07 (Wolfgang Daeubler et al. eds., 3d ed. 1992). During World War I, the requirement of shop committees was extended to industries producing essential products in an effort to minimize dissatisfaction among workers which might, in turn, hamper the war effort. In 1920, the Weimar Republic established works councils with consultative powers *vis a vis* management, nationwide. See *id.*; Clyde W. Summers, *Worker Participation in the United States and the Federal Republic: A Comparative Study from an American Perspective*, 5 RECHT DER ARBEIT 257, 260 (1979).

⁷⁰ In 1883, the German government instituted compulsory sickness insurance that was financed primarily by employees and provided meager benefits. One year later, the German government introduced compulsory accident insurance. Unlike sickness insurance, employers paid for accident insurance, but due to the significant limitations on its use, its relevance for workers was questionable. In 1889, the government completed its major social welfare initiatives by implementing old-age and invalid insurance. Again, severe limits on the use of this insurance made the laws largely ineffective. See GORDON A. CRAIG, *GERMANY 1866-1945*, at 150-52 (1978); GERHARD A. RITTER, *SOCIAL WELFARE IN GERMANY AND BRITAIN, ORIGINS AND DEVELOPMENT* 103 ff. (Kim Traynor trans., 1983); Juergen Tampke, *Bismarck's Social Legislation: A Genuine*

however, and it was only during the Weimar Republic that the position of German workers began to improve substantially.⁷¹ Maximum hour limits, protection for working mothers, restrictions on termination, as well as worker representation through the works council and supervisory board were all implemented at this time.⁷² Although most of these laws were abrogated by the National Socialists, they were quickly reintroduced and supplemented after World War II.⁷³ Thus, like their American counterparts, German legislators and legal commentators came to accept that the concept of freedom of contract has distinct limits. Principles other, and sometimes more important, than freedom of contract were determined to merit consideration in resolving social conflict.

In discussions about discrimination in the hiring of women or members of ethnic or racial minority groups, however, freedom of contract resurfaces in German jurisprudence as a justification for imposing limits on equality. As scholars pronounce without criticism or explication, contractual liberty takes precedence over the constitutional right of equal treatment.⁷⁴ Additionally, because legal scholars—whose opinions are exceedingly influential on the German judiciary—find the hiring process to be especially sacrosanct, the application of the constitutional guarantee of equal treatment to the formation of the work relationship is therefore limited.⁷⁵

Breakthrough?, in THE EMERGENCE OF THE WELFARE STATE IN BRITAIN AND GERMANY 71-83 (W.J. Mommsen & Wolfgang Mock eds., 1981).

⁷¹ HALBACH ET AL., *supra* note 64, at 28. The Weimar Republic governed Germany from 1919 to 1933. CRAIG, *supra* note 70, at 396.

⁷² See BETRVG: BETRIEBSVERFASSUNGSGESETZ KOMMENTAR FUER DIE PRAXIS, *supra* note 69, at 107-08; HALBACH ET AL., *supra* note 64, at 28.

⁷³ See HALBACH ET AL., *supra* note 64, at 29; Richardi, *supra* note 66, at xi-xii; Summers, *supra* note 69, at 260.

⁷⁴ LOEWISCH, *supra* note 21, at 59; *see also* BUCHNER, *supra* note 21, at 509.

⁷⁵ LOEWISCH, *supra* note 21, at 59; BUCHNER, *supra* note 21, at 509.

II. FREEDOM OF CONTRACT IN GERMANY: WORKERS, WOMEN AND FOREIGNERS

Unlike the constitutional guarantee of equal treatment in Article Three of the Basic Law, the principle of freedom of contract is not explicitly set forth in the Constitution. Rather, freedom of contract is derived from the constitutional right to choose and exercise a profession contained in Article Twelve.⁷⁶ Implicit in Article Twelve, according to German scholars, is an employer's right to retain some control over the operation of his or her business, including the making of contracts.⁷⁷ Limitations on Article Twelve's guarantee, however, are permissible under the Basic Law when justified by a need to protect the general welfare, when the means chosen are narrowly tailored and necessary to serve that end, and when the justification outweighs the severity of the incursion.⁷⁸ This balancing test grants German legislators a great amount of freedom to pursue regulatory goals in the area of employment and social relations.⁷⁹

Preventing discrimination in the hiring process, however, seems to fall outside the general power to legislate in the public interest and is trumped by Article Twelve.⁸⁰ Thus, an employer's idiosyncratic hiring decisions cannot be challenged. The employer can make the job dependent on test results, the outcome of an investigation, or any other measures that have no bearing on the job in question. In such cases, the employer's motive is irrelevant.⁸¹ To justify such behavior, judges argue that forced hiring would violate

⁷⁶ Article 12 reads, in pertinent part, as follows: "All Germans have the right to choose their profession, workplace and place of employment. The exercise of a profession can be regulated by law." GG art. 12. *See also* BUCHNER, *supra* note 21, at 500; WEISS, *supra* note 12, at 62.

⁷⁷ *See, e.g.*, BUCHNER, *supra* note 21, at 500; WEISS, *supra* note 12, at 62.

⁷⁸ *See* BUCHNER, *supra* note 21, at 500 (citing Judgment of Jan. 23, 1990, 81 BVerfGE [Federal Constitutional Court] 156 ff).

⁷⁹ *See* BUCHNER, *supra* note 21, at 500.

⁸⁰ LOEWISCH, *supra* note 21, at 385-86. Thus, the employer is not legally prohibited from refusing to hire foreign workers. LOEWISCH, *supra* note 21, at 385-86; *see also* HALBACH ET AL., *supra* note 64, at 48-49.

⁸¹ LOEWISCH, *supra* note 21, at 385-86.

the principle of freedom of contract.⁸² Given the rampant incursions into contractual freedom in other areas of the law, this explanation is unpersuasive. In the following discussion, this article will examine the protection of freedom of contract in practice, and in the making, the content and the termination of contracts.

A. *Entering into a Contract*

According to German legal scholars, the Basic Law guarantees against infringement of the freedom to enter into a contract.⁸³ One may not, therefore, be forced to sign a contract.⁸⁴ Minimal research, however, reveals numerous exceptions to this guarantee.⁸⁵ Germany encroaches upon an employer's free choice in hiring in many ways, including prohibitions on anti-union discrimination,⁸⁶ the declaration of generally binding collective bargaining agreements⁸⁷ and the compelled hiring of injured miners and apprentices serving as members of the works council.

1. *Discrimination Against Union Members*

The Basic Law endorses freedom of association and coalition-building as a fundamental constitutional right. Article Nine ensures that workers may join unions for mutual aid and collective

⁸² Interview with judges of the Federal Labor Court, in Kassel, Germany (Mar. 1-3, 1994).

⁸³ BUCHNER, *supra* note 21, at 500.

⁸⁴ See BUCHNER, *supra* note 21, at 500-01.

⁸⁵ Outside the employment field, German law requires private companies holding monopoly control over important products to provide those products to all consumers. Insurance companies are the major target of this obligation. Moreover, quasi-public institutions, such as museums and hospitals, also must provide services to all. See INSTITUTE FOR THE RESEARCH OF MIGRATION AND RACISM, FEDERAL REPUBLIC OF GERMANY, COMPARATIVE ASSESSMENT OF THE LEGAL INSTRUMENTS IN THE VARIOUS MEMBER STATES OF THE EUROPEAN COMMUNITIES TO COMBAT ALL FORMS OF DISCRIMINATION, RACISM AND XENOPHOBIA AND INCITEMENT UND [sic] HATRED AND RACIAL VIOLENCE § 3 (1992) [hereinafter NATIONAL STUDY].

⁸⁶ See discussion of Article 9 *infra* part II.A.1.

⁸⁷ See discussion of Germany's Collective Agreement Act *infra* p. 22.

bargaining, and it prevents employers from discriminating against union members in the hiring process. By virtue of its status as a "protective law," Article Nine falls under section 823, paragraph 2 of the Civil Code.⁸⁸ This provision provides a claim in tort for damages caused by the violation of a protective law and may require the tortfeasor to make reparations by restoring the victim to the position that he or she would have been in had the illegal act not taken place.⁸⁹ Thus, in the case of failure to hire based on anti-union discrimination, an employer can be required to hire the victim.⁹⁰ If a job is not an acceptable remedy because of the worker's disinclination to work for a discriminatory establishment, the compensation may take the form of money damages, or in a particularly grievous case, the wronged applicant may be entitled to compensation for pain and suffering under section 847 of the Civil Code.⁹¹ Commentators accept these remedies as essential to fulfilling Article Nine's protection of associational rights.⁹²

Although constitutional guarantees of equal treatment, as well as statutory anti-discrimination, provisions appear to conform to the description of protective laws, these laws have not been so construed. A brief examination of these laws reveals the speciousness of the judicial arguments against providing a remedy for employment discrimination.

⁸⁸ LOEWISCH, *supra* note 21, at 100. Section 823, ¶ 2 of the Civil Code, reads in part, as follows: "Any person who violates a law whose purpose is the protection of other persons has the responsibility" to compensate the victim for the injury. *Bürgerliches Gesetzbuch* [BGB] § 823.

⁸⁹ BGB § 823; *see also* Josephine Shaw, *Recent Developments in the Field of Labour Market Equality: Sex Discrimination Law in the Federal Republic of Germany*, 13 *COMP. LAB. L.J.* 18, 30 (1991). The Termination Protection Law, which prevents wrongful discharge, has been interpreted as a "protective law," a breach of which may result in damages of one year's salary. *See infra* p. 26.

⁹⁰ Judgment of June 6, 1987, BAG, 45 *DER BETRIEB* 2312 (1987). The Supreme Labor Court ruled that an employer who refused to hire an applicant because she would not give up her union membership, could not rely on freedom of contract to protest the forced conclusion of an employment contract. The Court stated that "[t]hey were ready to enter a contract with the applicant. They had found her suited. They made the position dependent on an impermissible condition." *Id.*; *see also* BUCHNER, *supra* note 21, at 570.

⁹¹ LOEWISCH, *supra* note 21, at 101.

⁹² BUCHNER, *supra* note 21, at 570.

Under section 611(a) of the Civil Code,⁹³ employers are forbidden to discriminate on the grounds of sex in any matter relating to employment, unless sex is a necessary requirement for the job.⁹⁴ Section 611(a) is derived from Directive 76/207 of the European Economic Community,⁹⁵ which Germany translated into national law in 1980, two years after the deadline for its implementation.⁹⁶ Although the Directive required the member states to provide adequate compensation for victims of sex discrimination in the employment relationship, the German version restricts recovery essentially to the costs of making the job application—that is, the envelope and stamp used to mail a resume or bus fare to get to a job interview.⁹⁷ In two cases which came before the European Court, a pair of German women argued that they had not been adequately compensated by the German courts for discrimination in hiring, and that the practical bar on damages of section 611(a) violated European law.⁹⁸ Despite unequivocal evidence of discrimination, the women applicants had received only DM 2.31 and DM 7.20, respectively, in damages from the German courts.⁹⁹ The European Court determined that section 611(a)'s purely symbolic

⁹³ BGB § 611(a).

⁹⁴ For example, it is legal to refuse female applicants for male roles in a play. See BGB § 611(a)(1) (indicating that disparate treatment is permissible, when in view of the nature of the occupation, it is absolutely necessary to be a male or female); HALBACH ET AL., *supra* note 64, at 49.

⁹⁵ Council Directive 76/207 of Feb. 10, 1975 on Equal Treatment, 1975 O.J. (L 39) 40.

⁹⁶ Gesetz ueber die Gleichbehandlung von Maennern und Frauen im Arbeitsplatz (Gleichbehandlungsgesetz) [Equal Treatment Law], 1980 BGBI. I 1308; see also Klaus Bertelsmann & Heide M. Pfarr, *Diskriminierung von Frauen bei der Einstellung und Befoerderung*, in 24 DER BETRIEB 1297 (1984); Shaw, *supra* note 89, at 24.

⁹⁷ See WEISS, *supra* note 12, at 63.

⁹⁸ See Case 14/83, Van Colson v. Land Nordrhein-Westfalen, 1984 E.C.R. 1891; Case 79/83, Harz v. Deutsche Tradax, 1984 E.C.R. 1921; Bertelsmann & Pfarr, *supra* note 96, at 1297; Shaw, *supra* note 89, at 24.

⁹⁹ Bertelsmann & Pfarr, *supra* note 96, at 1297. In American currency, these amounts are roughly equal to \$1.40 and \$4.20 respectively.

reprimand did not effectuate the Community's dictate and Germany was instructed to rewrite the provision.¹⁰⁰

The legislature, however, has failed to agree on an adequate solution. To fill in the gap, judges on the Federal Labor Court have attempted to determine appropriate compensation, setting a maximum recovery of one month's salary.¹⁰¹ Not surprisingly, they argue that freedom of contract prevents the courts from ordering a perpetrator to compensate more generously or to hire the victim.¹⁰²

Despite the Federal Labor Court's reservations, a small group of commentators have contended that a job contract should be a possible remedy for discrimination in hiring under current German law.¹⁰³ Just as in cases of discrimination against union members, women applicants should be put in the position that they would have been in absent discrimination—that is, in the job.¹⁰⁴ These commentators find legal support for their contention in two provisions contained in the Civil Code. First, they argue that discrimination in hiring falls under the principle of *Verschulden bei Vertragsschluss* or *culpa in contrahendo* (fault in contracting) which enforces the duty to bargain in good faith.¹⁰⁵ As a remedy, the victim should be put in the same position that he or she would have been in had the other party not committed a punishable breach

¹⁰⁰ See Bertelsmann & Pfarr, *supra* note 96, at 1297; Shaw, *supra* note 89, at 24.

¹⁰¹ Judgment of Mar. 14, 1989, BAG, 45 DER BETRIEB 2279 (1989); see also Shaw, *supra* note 89, at 31-32.

¹⁰² Interview with judges of the Federal Labor Court in Kassel, Germany (Mar. 1-3, 1994).

¹⁰³ See WOLFGANG DAEUBLER, 2 DAS ARBEITSRECHT 690 (7th ed. 1990); Bertelsmann & Pfarr, *supra* note 96, at 1301. Because § 611(a) implicitly precludes the remedy of a job contract, these scholars argue that the supremacy of European Community Law requires interpreting the provision to limit contract but not tort claims; see also Shaw, *supra* note 89, at 29-30.

¹⁰⁴ DAEUBLER, *supra* note 103, at 690-91.

¹⁰⁵ Bertelsmann & Pfarr, *supra* note 96, at 1301. A violation of the duty to bargain in good faith entitles the victim to damages as set forth in § 249 of the Civil Code. That provision requires that one who is obligated to pay damages must put the victim in the position that he or she would have been in but for the injury. BGB § 249.

in negotiation. This remedy would entitle a job applicant who would have been hired but for sex discrimination, to be awarded the job as a remedy. Second, section 823, paragraph 2 of the Civil Code recognizes that compensation is due for violations of protective laws. This provision should apply to sex discrimination because section 611(a) fits the description of a protective law under the Civil Code.¹⁰⁶ Because section 611(a)'s purpose is specifically to protect women against discrimination in employment, it can be analogized to other laws that fall within 611(a)'s ambit, such as the protection of freedom of association¹⁰⁷ and the protection against wrongful discharge.¹⁰⁸

The application of section 823 to Article Three of the Basic Law should ensure equal rights to enter into employment contracts for minorities and women by treating the constitutional guarantee as a protective law, in the same manner that section 611(a) protects women. After all, Article Three, paragraph 3 of the Basic Law postulates that no one shall be disadvantaged or preferred based on race, speech, national origin, homeland, beliefs, religious or political opinions, or sex and has been described as a cardinal ordering principle of this area of the law.¹⁰⁹ Similarly, under the principle of *fault in contracting*, an employer's breach of the duty to bargain in good faith, by excluding the most qualified applicant solely because of race, should entitle that person to the job as a remedy. In practice, however, these fundamental principles have not been applied to discrimination directed at minorities. For example, the courts interpret the principle of equal treatment contained in Article Three as having no relevance in the hiring or in termination

¹⁰⁶ Bertelsmann & Pfarr, *supra* note 96, at 1300. Under § 823, ¶ 1, someone whose "general right of personality" has been violated must be compensated for pain and suffering. BGB § 823. This provision of the Civil Code protects an individual's right to respect and the right to develop one's personality. The right to enter a profession falls under this provision and, thus, victims of discrimination in hiring should receive these damages as well. Applicants who were not considered from the outset because of their sex would receive money damages under this paragraph of § 823 even when they might not have received an offer even without discrimination. Bertelsmann & Pfarr, *supra* note 96, at 1300.

¹⁰⁷ See discussion of freedom of association *supra* p. 3.

¹⁰⁸ See discussion of the Termination Protection Law *infra* part II.C.

¹⁰⁹ HALBACH ET AL., *supra* note 64, at 116.

of employment.¹¹⁰ Moreover, the employee can sign away this right to equal treatment in the workplace so long as the employer has not applied "impermissible pressure."¹¹¹ In contrast, an employer may not coerce an employee to bargain away protections embodied in a "general labor law norm or basic principle,"¹¹² classifications which apparently do not include anti-discrimination provisions.

The arguments against granting section 611(a), or Article Three, the status of a protective law range from weak to non-existent.¹¹³ One might argue, that in addition to relying on the oft-mentioned principle of freedom of contract, an anti-discrimination provision could be considered a protective law, only if compensation for the injury were feasible in practice. Compensation for discrimination is not possible, one could contend, because injuries suffered from discrimination, are basically unprovable and immeasurable. In the case of laws such as Article Nine's protection of freedom of association, or the Termination Protection Law, however, such qualms have not deterred their interpretation as protective laws.¹¹⁴ Such laws provide analogies which would give the courts a starting point for calculating appropriate damages when hiring the aggrieved applicant was not possible. For example, with the Termination Protection Law, when an employee is fired unjustly but cannot return to the labor relationship for personal reasons, the law foresees severance pay of up to twelve months salary.¹¹⁵ In any case, only the most overt examples of discrimination lead to

¹¹⁰ HALBACH ET AL., *supra* note 64, at 117.

¹¹¹ HALBACH ET AL., *supra* note 64, at 117.

¹¹² HALBACH ET AL., *supra* note 64, at 117.

¹¹³ Judges responding to questions at the Federal Labor Court gave no justification apart from the familiar intonation of freedom of contract. Interviews with judges of the Federal Labor Court, in Kassel, Germany (Mar. 1-3, 1994).

¹¹⁴ See *supra* note 10 and accompanying text; Bertelsmann & Pfarr, *supra* note 96, at 1299-300.

¹¹⁵ See KSchG §§ 9, 10; Bertelsmann & Pfarr, *supra* note 96, at 1299-300.

legal process due to the difficulty of proving a discrimination claim.¹¹⁶

2. *Collective Bargaining Agreements on a Grand Scale*

Apart from the example of forced contracting with union members, German law contains many provisions which may require the forcible conclusion of a contract as a possible remedy for employment discrimination. The generally binding collective bargaining agreement, *Allgemeinverbindlicherklärung* ("AVE"),¹¹⁷ represents the most pervasive example of forced contracting, and perhaps the greatest incursion on free contracting. Normal collective bargaining agreements function to order the relationship between the negotiating partners, usually establishing maximum hour rules, vacation days and wage classifications. The AVE, by contrast, extends the labor compact to companies that are not members of an employer association, who did not sign the agreement, or even wish to be parties to the collective agreement.¹¹⁸ The preconditions for an AVE include the application to the Minister of Labor by one of the bargaining partners, a legally effective collective bargaining agreement, the employment of at least fifty percent of the workers in that industrial sector by members of the negotiating employer association and benefit to the

¹¹⁶ For example, in most discrimination cases, victims often lack access to the applications of other job candidates. See Bertelsmann & Pfarr, *supra* note 96, at 1301.

¹¹⁷ Tarifvertragsgesetz [Collective Agreements Act] [TVG] § 5, 1969 BGBI. I 1323. Under § 5, the Federal Minister for Labor, in agreement with a committee consisting of three representatives each from umbrella organizations of employees and employers, can declare a collective bargaining agreement generally binding upon application of one of the parties to the agreement if: 1) the employers who are parties to the agreement employ not less than 50% of the employees within the scope of the agreement, and 2) the declaration of general binding appears to be in the public interest. TVG § 5.

¹¹⁸ Many German employers voluntarily join employers' associations which subject them to industry-wide collective bargaining agreements even if their employees are not unionized. These collective bargaining agreements serve as instruments of national economic policy by establishing minimum standards in many areas of the labor market. See Summers, *supra* note 69, at 261.

public from broader application of the collective bargaining agreement.¹¹⁹ In the name of public interest, the Minister of Labor can proclaim an agreement generally binding in order to prevent a worsening of labor conditions which might result from the actions of employers who are not members of a signatory association and therefore might undercut collective bargaining agreements.¹²⁰ Consequently, collective agreements have been extended to cover up to one-fifth of the work force.¹²¹

The AVE appears to be an imposition on the very aspect of freedom of contract that is allegedly sacrosanct in Germany. If it is permissible to extend the binding force of the collective agreement to noncontracting parties despite the doctrine of freedom of contract, then forced hiring should be a viable remedy for discrimination. Some might argue that there are great differences between the individualized contract and the collective one. The major distinction between the two, however, is that the terms of the former apply to more people and is a difference in scope and not in kind. Furthermore, the collective contract imposes a greater number of onerous contractual requirements on the employer than does an agreement with a single employee.

3. *Miners and Apprentices as Protected Classes*

Two further examples of the use of forced contracting in German labor law involve the forced hiring of handicapped miners and members of the works council who are only apprentices. In several of the German states,¹²² the possessor of a miner's maintenance certificate (*Bergmannsversorgungsschein*) must be given special consideration in the hiring process.¹²³ In the German state

¹¹⁹ TVG § 5; see also Summers, *supra* note 69, at 261; WEISS, *supra* note 12, at 141-42.

¹²⁰ See GUENTER SCHAUB, *ARBEITSRECHT HANDBUCH* 1067-68 (4th ed. 1979).

¹²¹ See Summers, *supra* note 69, at 261.

¹²² Such examples of forced contracting can be found in Niedersachsen and Nordrhein-Westfalen. See HALBACH ET AL., *supra* note 64, at 49.

¹²³ In these states, quotas are used, as they are used throughout Germany with respect to the employment of the disabled, that require a specific percentage

of the Saarland, this consideration permits local authorities to mandate the hiring of such a miner against the will of the employer.¹²⁴ In the case of a works council member who is only an apprentice (*Auszubildender*) and thus has no employment contract with the employer, section 78(a) of the Works Constitution Act requires the employer to enter into a regular labor agreement with the apprentice at the end of his or her apprenticeship.¹²⁵ According to commentators, apprentices would be discouraged from serving on the works council without a guarantee of obtaining a job at the end of the training period because they would fear that works council activity would diminish their chances of permanent employment.¹²⁶ Although admitting that this obligation verges on an infringement of freedom of contract, one commentator justifies its application on the basis of the infrequency with which such cases occur.¹²⁷ Similarly, civil cases in Germany alleging racial or sexual discrimination in hiring are virtually nonexistent.¹²⁸

B. Content of Labor Contracts

Germany has enacted a system of regulation of labor contracts which mandates a myriad of implied terms, most of which benefit the employee. From an American perspective, these rights are quite astonishing. The Works Constitution Act grants workers significant participation rights in the workplace by establishing an elected works council entitled to extensive information from management and with veto power over many traditional management decisions.¹²⁹ For example, the employer may not hire or transfer an employee without the approval of the works council.¹³⁰ The works council also possesses expansive rights to initiate

of jobs to be filled by former miners. HALBACH ET AL., *supra* note 64, at 49.

¹²⁴ HALBACH ET AL., *supra* note 64, at 49.

¹²⁵ Betriebsverfassungsgesetz [BetrVG] § 78(a), 1989 BGB1. I 902.

¹²⁶ BUCHNER, *supra* note 21, at 501-02; *see also*, WEISS, *supra* note 12, at 175.

¹²⁷ BUCHNER, *supra* note 21, at 502.

¹²⁸ NATIONAL STUDY, *supra* note 85, § 3.

¹²⁹ *See* Summers, *supra* note 69, *passim*.

¹³⁰ BetrVG § 99.

decisionmaking and to participate as coequals with management in areas such as setting work times and method of payment, introduction and use of technology for worker supervision and the administration of workplace benefits such as cafeterias and sports facilities.¹³¹ A “conciliation committee,” consisting of an equal number of works council and employer representatives, and a mutually acceptable chairperson, settles disagreements.¹³² Workers also have participation rights in their company’s supervisory board under the Codetermination Law.¹³³ Worker representatives elected to the board have the same rights and responsibilities as the shareholder representatives who generally outnumber them.¹³⁴ Through these laws, the German Parliament has sanctioned far-reaching incursions into an employer’s traditional control over contractual relationships with its employees.

A series of laws and regulations provide minimum standards in the German workplace, such as stringent health and safety standards, minimum vacation time, job security during parental leave or civil or military service and extremely generous sick pay.¹³⁵ This list, although far from exhaustive, relays the potency of these ordinances. For example, the Parental Leave Law requires an employer to hold a position for up to three years while a parent is raising a newborn child.¹³⁶ Those performing their military or

¹³¹ BetrVG § 87(1)1-12. *See generally* Summers, *supra* note 69.

¹³² BetrVG § 87(2); BetrVG § 76.

¹³³ Gesetz ueber die Mitbestimmung der Arbeitnehmer [Codetermination Law] [MitbestG], 1976 BGBI. I 1153. The supervisory board in a German corporation performs two primary functions: first, it selects the managing board which handles the day-to-day management of the company; and second, it supervises the managing board’s conduct of business. *See* Roland Koestler, *Codetermination in German Enterprises*, in *CODETERMINATION: INTRODUCTION INTO THE LEGAL SYSTEM OF WORKER PARTICIPATION IN THE FEDERAL REPUBLIC OF GERMANY* 5 (Hans-Boeckler-Foundation).

¹³⁴ Koestler, *supra* note 133, at 7.

¹³⁵ *See* Manfred Weiss, *Labor Law and Industrial Relations in Europe 1992: A German Perspective*, 11 *COMP. LAB. L.* 411, 416 (1990) (“It is quite possible that this body of protective law is the most comprehensive legislation of its kind in the world.”).

¹³⁶ Gesetz ueber die Gewaehrung von Erziehungsgeld und Erziehungsurlaub [Law Regarding the Provision of Parental Pay and Parental Leave] [BERzGG], 1992 BGBI. I 68.

civil service duty also retain the right to return to their job and receive all of the advantages that they would have gained had they been working for that time.¹³⁷ Thus, the years spent in service count towards salary and pension calculations. Furthermore, every company must provide at least eighteen days of paid vacation¹³⁸ and pay up to six weeks wages to a sick employee per illness.¹³⁹

These examples demonstrate that German legislators have no qualms about dictating contract components, and they leave individual employers and applicants little sovereignty to haggle over the specific details of their association. It appears that German legislators, therefore, fully endorse the idea that workers and employers are not in a relationship of equal bargaining power and that government intervention is required to ensure adequate working conditions.

C. Termination of the Contract

German employers must confront severe restrictions on their freedom of contract in the area of contract termination. Under the Termination Protection Law,¹⁴⁰ employers are required to provide reasons for the termination of an employment contract which must be clearly related to job performance or the needs of the company.¹⁴¹ In addition, if the works council expresses opposition to a dismissal, a subject that the employer must broach with the works council before taking action, the fired employee may continue to work until the case is concluded by the court.¹⁴² Moreover, it is practically impossible for management to dismiss any member of

¹³⁷ Gesetz ueber den Schutz des Arbeitsplatzes bei Einberufung zum Wehrdienst [Law Regarding the Protection of Jobs With Regard to the Draft], 1980 BGB1. I 425.

¹³⁸ Mindesturlaubsgesetz fuer Arbeitnehmer [Employee Minimum Vacation Law] § 3, 1963 BGB1. I 2.

¹³⁹ Gesetz ueber die Fortzahlung des Arbeitsentgelts im Krankheitsfalle [Law Regarding the Continued Payment of Wages in Cases of Illness] § 1, 1969 BGB1. I 946.

¹⁴⁰ KSchG, 1969 BGB1. I 1317.

¹⁴¹ KSchG § 1.

¹⁴² KSchG § 1(2); BetrVG § 102.

the works council.¹⁴³ Only in cases of serious behavioral disruption will a labor court sanction such an action.¹⁴⁴ Thus, the employer's freedom of contract in an employment relationship exists, if at all, only in a very restricted fashion.

CONCLUSION

One of the fundamental differences between civil and common law systems is that in the former

[h]uman dignity and personal freedom derive from the rights and duties laid down in law. Law therefore serves as a guide to freedom and right living. In the common law tradition, by contrast, freedom precedes law; freedom, after all, is the individual's natural state; judges therefore make law on a case-by-case basis as persons seek remedies for intrusions upon their freedom.¹⁴⁵

Generally, this statement is correct in its evaluation of the differences between the German social state and the more libertarian United States. But, as discussed above, the legal systems of the two countries trade positions when it comes to discrimination. In America, there are few controls on the labor relationship. An employer can fire someone for good cause, bad cause or no cause at all; except, however, when that cause is discrimination. In Germany, all aspects of the labor contract are influenced by laws, regulations and collective bargaining agreements except that an employer's right to discriminate based on race or sex remains largely immune from statutory limitations.

Manfred Gubelt, discussing Article Three's guarantee of equal treatment articulated the position of the German legal establishment:

Here the general tense relationship between freedom and equality becomes especially clear. The farther one allows Article Three to penetrate into the realm of private law, the more private autonomy is restricted. Because the freedom

¹⁴³ See WEISS, *supra* note 12, at 175.

¹⁴⁴ KSchG § 15; BetrVG § 103.

¹⁴⁵ Kommers, *supra* note 8, at 848.

to form relations in the private sphere is in any case ever more narrowed through a multiplicity of legislative rules, it has been expressly promoted that *here* the constitutional principle of freedom has priority.¹⁴⁶

German legal scholars thus admit that the decision to place freedom of contract above equal treatment in the hierarchy of constitutional values involves nothing more than arbitrary line-drawing. Much like the *Lochner* Supreme Court, German courts do little more than intone the principle of freedom of contract and fail to provide a persuasive defense of its substance or its application. Perhaps this hierarchical arrangement is simply a product of political inequity—women are a weak interest group and minorities, most of whom are not German citizens, are unable to vote. Unions and working people, however, have vigorous and powerful political organizations. The legislative and judicial line-drawing in Germany, therefore, may simply reflect this discrepancy in political strength. One thing is clear, however, the principle of freedom of contract cannot support the differential treatment.

¹⁴⁶ Manfred Gubelt, *Article 3*, in *GRUNDGESETZ-KOMMENTAR* 152, 153 (Ingo von Muench ed., 2d. ed. 1981) (emphasis added).